

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF DISH NETWORK  
DERIVATIVE LITIGATION.

JACKSONVILLE POLICE AND FIRE  
PENSION FUND,

Appellant,

vs.

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

Respondent.

Electronically Filed  
SUPREME COURT No. 69012  
May 27 2016 09:30 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

**JOINT APPENDIX  
VOLUME 39 of 44**

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

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<sup>1</sup> JA = Joint Appendix

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2016-01-27	Amended Judgment	Vol. 43	JA010725 – JA010726
2014-10-26	Appendix, Volume 1 of the Appendix to the Report of the Special Litigation Committee of DISH Network Corporation (No exhibits attached)	Vol. 20	JA004958 – JA004962
2014-10-27	Appendix, Volume 2 of the Appendix to the Report of the Special Litigation Committee of DISH Network Corporation (No exhibits attached)	Vol. 20	JA004963 – JA004971

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


**APPENDIX OF SLC REPORT EXHIBITS  
REFERENCED IN SUPPLEMENTAL  
REPLY IN SUPPORT OF THE MOTION  
TO DEFER TO THE SLC'S  
DETERMINATION THAT THE CLAIMS  
SHOULD BE DISMISSED**

///

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172	Transcript, <i>In re LightSquared Inc.</i> , No. 12-12080 (SCC), Adv. Proc. N. 13-01390 (SCC) (Bankr. S.D.N.Y. Dec. 10, 2013).	12 - 188
195	Post-Trial Findings of Fact and Conclusions of Law, <i>LightSquared LP v. SP Special Opportunities LLC (In re LightSquared Inc. )</i> , No. 12-12080 (SCC), Adv. Pro. No. 13-01390 (Bankr. S.D.N.Y. June 10, 2014)	189 - 364

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 2nd day of July 2015, a true and correct copy of the foregoing  
3 **APPENDIX OF SLC REPORT EXHIBITS REFERENCED IN SUPPLEMENTAL**  
4 **REPLY IN SUPPORT OF THE MOTION TO DEFER TO THE SLC'S**  
5 **DETERMINATION THAT THE CLAIMS SHOULD BE DISMISSED** was served by the  
6 following method(s):



8 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:

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**Young, Conway, Stargatt & Taylor, LLP**

Contact	Email
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SLC REPORT EX. 5

SLC REPORT EX. 5



ROSS MILLER  
Secretary of State  
204 North Carson Street, Ste 1  
Carson City, Nevada 89701-4283  
(775) 884-5708  
Website: secretaryofstate.biz

Filed in the office of  Ross Miller Secretary of State State of Nevada	Document Number <b>20080033774-24</b> Filing Date and Time <b>01/16/2008 3:40 PM</b> Entity Number <b>C6744-1995</b>
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## Certificate of Amendment

(PURSUANT TO NRS 78.385 AND 78.390)

USE BLACK INK ONLY - DO NOT HIGHLIGHT

ABOVE SPACE IS FOR OFFICE USE ONLY

### Certificate of Amendment to Articles of Incorporation

#### For Nevada Profit Corporations

(Pursuant to NRS 78.385 and 78.390 - After Issuance of Stock)

1. Name of corporation:

EchoStar Communications Corporation

2. The articles have been amended as follows (provide article numbers, if available):

Article I of the Articles of Incorporation is hereby amended to provide as follows:

Name

The name of the corporation shall be DISH NETWORK CORPORATION (the "Corporation").

Article V of the Articles of Incorporation is hereby amended to provide as follows:

Voting and Conversion Rights

1. Voting Rights:

(a) Except as otherwise required by law or, in any Preferred Stock Statement and Certificate of Designations, Preferences and Rights ("Certificate of Designations"), with respect to all matters upon which stockholders are entitled to vote or to which stockholders are entitled to give consent, the holders of any outstanding shares of Class A Common Stock, Class B Common Stock, Class C Common Stock and Preferred Stock shall vote together without regard to class, and every holder of any outstanding shares of the Class A Common Stock and Class C Common Stock shall be entitled to cast one vote. . . . (See attachment for additional amendments)

3. The vote by which the stockholders holding shares in the corporation entitling them to exercise at least a majority of the voting power, or such greater proportion of the voting power as may be required in the case of a vote by classes or series, or as may be required by the provisions of the articles of incorporation have voted in favor of the amendment is: 208,059,134 Class B Shares

4. Effective date of filing (optional):

1/20/08  
(must not be later than 90 days after the certificate is filed)

5. Officer Signature (Required):

X

\*If any proposed amendment would alter or change any preference or any relative or other right given to any class or series of outstanding shares, then the amendment must be approved by the vote, in addition to the affirmative vote otherwise required, of the holders of shares representing a majority of the voting power of each class or series affected by the amendment regardless of limitations or restrictions on the voting power thereof.

**IMPORTANT:** Failure to include any of the above information and submit the proper fees may cause this filing to be rejected.

This form must be accompanied by appropriate fees.

Nevada Secretary of State AM 78.385 April 2007  
Revised Oct. 01/01/07



CERTIFICATE OF AMENDMENT OF

ARTICLES OF INCORPORATION

OF

ECHOSTAR COMMUNICATIONS CORPORATION

(Pursuant to Sections 78.385 and 78.390 of the Nevada Revised Statutes)

The undersigned, being a duly authorized officer of EchoStar Communications Corporation, a Nevada corporation (the "Corporation"), pursuant to Sections 78.385 and 78.390 of the Nevada Revised Statutes (the "NRS") DOES HEREBY CERTIFY:

FIRST: The original Articles of Incorporation of the Corporation (the "Articles of Incorporation") was filed with the Secretary of State of the State of Nevada on the 26th day of April, 1995; a Restated Articles of Incorporation of the Corporation was filed with the Secretary of State of the State of Nevada on the 20th day of June, 1995; a Certificate of Amendment of Articles of Incorporation of the Corporation was filed with the Secretary of State of the State of Nevada on the 20th day of June, 1995; a Certificate of Amendment of Articles of Incorporation of the Corporation was filed with the Secretary of State of the State of Nevada on the 30th day of June, 1999; a Certificate of Amendment of Articles of Incorporation of the Corporation was filed with the Secretary of State of the State of Nevada on the 21st day of October, 1999; a Certificate of Amendment of Articles of Incorporation of the Corporation was filed with the Secretary of State of the State of Nevada on the 7th day of February, 2000; a Certificate of Amendment of Articles of Incorporation of the Corporation was filed with the Secretary of State of the State of Nevada on the 29th day of March, 2000; and a Certificate of Amendment of Articles of Incorporation of the Corporation was filed with the Secretary of State of the State of Nevada on the 19th day of May, 2003.

SECOND: Pursuant to Section 78.390 of the NRS, the Board of Directors of the Corporation duly adopted resolutions (i) setting forth a proposed amendment (the "Amendment") to the Articles of Incorporation of the Corporation, (ii) recommending the Amendment to the stockholders of the Corporation, and (iii) seeking the required consent and approval, under the NRS, of the holders of a majority of the outstanding shares of the Corporation entitled to vote thereon.

THIRD: Thereafter, pursuant to resolutions of the Board of Directors of the Corporation, the Amendment was submitted to a majority of the holders of the shares of outstanding capital stock of the Corporation entitled to vote thereon, and pursuant to Section 78.320 of the NRS a majority of such holders voted to authorize the amendment to the Articles of Incorporation of the Corporation.

FOURTH: Article I of the Articles of Incorporation is hereby amended to provide as follows:



Name

The name of the corporation shall be DISH NETWORK CORPORATION (the "Corporation").

FIFTH: Article V of the Articles of Incorporation is hereby amended to provide as follows:

Voting and Conversion Rights

I. Voting Rights.

(a) Except as otherwise required by law or, in any Preferred Stock Statement and Certificate of Designations, Preferences and Rights ("Certificate of Designations"), with respect to all matters upon which stockholders are entitled to vote or to which stockholders are entitled to give consent, the holders of any outstanding shares of Class A Common Stock, Class B Common Stock, Class C Common Stock and Preferred Stock shall vote together without regard to class, and every holder of any outstanding shares of the Class A Common Stock and Class C Common Stock shall be entitled to cast one vote in person or by proxy for each share of the Class A Common Stock and Class C Common Stock held by such holder; every holder of any outstanding shares of Class B Common Stock shall be entitled to cast ten votes in person or by proxy for each share of Class B Common Stock held by such holder; and every holder of any outstanding shares of Preferred Stock shall be entitled to cast, in person or by proxy for each share of Preferred Stock held by such holder, the number of votes specified in the applicable Certificate of Designations; provided however, in the event of a "Change in Control" of the Corporation, the holders of any outstanding shares of Class C Common Stock shall be entitled to cast ten votes in person or by proxy for each share of Class C Common Stock held by such holder. As used herein, a "Change of Control" of the Corporation means: (i) any transaction or series of transactions, the result of which is that the Principals and their Related Parties (as such terms are hereinafter defined), or an entity controlled by the Principals and their Related Parties, cease to be the "beneficial owners" (as defined in Rule 13(d) (3) under the Securities Exchange Act of 1934) of at least 30% of the total equity interests of the Corporation and to have the voting power to elect at least a majority of the Board of Directors of the Corporation; or (ii) the first day on which a majority of the members of the Board of Directors of the Corporation are not continuing directors. "Principals" means Charles W. Ergen, James DeFranco, and David K. Moskowitz. "Related Parties" means, with respect to any Principal: (y) the spouse and each immediate family member of such Principal; and (z) each trust, corporation, partnership or other entity of which such Principal beneficially holds an 80% or more controlling interest.

(b) A quorum for the purpose of shareholder meeting shall consist of a majority of the voting power of the Corporation. If a quorum is present, the effective vote of a majority of the voting power represented at the meeting and entitled to vote on the subject matter shall be the act of the shareholders, unless the vote of a greater proportion or number is required by any provisions contained in the NRS. Notwithstanding any provisions contained in the NRS requiring the vote of shares possessing two-thirds of the voting power of the Corporation to take action, absent a provision herein to the contrary, in the case of such provisions the affirmative vote of a majority of the voting power shall be the act of the shareholders.

(c) Holders of Common Stock shall not be entitled to cumulate their votes in the election of directors and shall not be entitled to any preemptive rights to acquire shares of any class or series of capital stock of the Corporation. Subject to any preferential rights of holders of Preferred Stock, holders of Common Stock shall be entitled to receive their pro rata shares, based upon the number of shares of Common Stock held by them, of such dividends or other distributions as may be declared by the Board of Directors from time to time and of any distribution of the assets of the Corporation upon its liquidation, dissolution or winding up, whether voluntary or involuntary.

## 2. Conversion Rights.

(a) Each share of Class B Common Stock and Class C Common Stock shall be convertible at the option of the holder thereof into Class A Common Stock of the Corporation in accordance with this Article V. In order to exercise the conversion privilege, a holder of Class B Common Stock or Class C Common Stock shall surrender the certificate evidencing such Class B Common Stock or Class C Common Stock to the Corporation at its principal office, duly endorsed to the Corporation or, in the case of uncertificated shares, instruct the Corporation's transfer agent to surrender such shares to the Corporation and, in either case, accompanied by written notice to the Corporation that the holder thereof elects to convert a specified portion or all of such shares. Class B Common Stock or Class C Common Stock converted at the option of the holder shall be deemed to have been converted on the day of surrender of the certificate representing such shares for conversion in accordance with the foregoing provisions or, in the case of uncertificated shares, on the day in which the Corporation's transfer agent receives instruction to effect a book entry transfer to the Corporation, and at such time the rights of the holder of such Class B Common Stock or Class C Common Stock, as such holder, shall cease and such holder shall be treated for all purposes as the record holder of Class A Common Stock issuable upon conversion. As promptly as practicable on or after the conversion date, the Corporation shall issue and mail or deliver to such holder a certificate or certificates for the number of Class A Common Stock issuable upon conversion or shall instruct the Corporation's transfer agent to effect a book entry transfer to reflect such Class A Common Stock issuable upon conversion, computed to the nearest one hundredth of a full share, and a certificate or certificates or book entry transfer for the balance of Class B Common Stock or Class C Common Stock surrendered, if any, not so converted into Class A Common Stock.

(b) The Class B Common Stock and Class C Common Stock shall be convertible into one share of Class A Common Stock for each share of Class B Common Stock or Class C Common Stock so converted (the "Conversion Rate"). In the event the Corporation shall at any time subdivide or split its outstanding Class A Common Stock, into a greater number of shares or declare any dividend payable in Class A Common Stock, the Conversion Rate in effect immediately prior to such subdivision, split or dividend shall be proportionately increased, and conversely, in case the outstanding Class A Common Stock of the Corporation shall be combined into a smaller number of shares, the Conversion Rate in effect immediately prior to such combination shall be proportionately decreased.

(c) Upon any adjustment of the Conversion Rate then and in each such case the Corporation shall give written notice thereof, by first-class mail, postage prepaid, addressed to the registered holders of Class B Common Stock and Class C Common Stock at the addresses



of such holders as shown on the books of the Corporation, which notice shall state the Conversion Rate resulting from such adjustment and the increase or decrease, if any, in the number of shares receivable at such price upon the conversion of Class B Common Stock or Class C Common Stock, setting forth in reasonable detail the method of calculation and the facts upon which such calculation is based.

(d) The holders of Class B Common Stock and Class C Common Stock shall have the following rights to certain properties received by the holders of Class A Common Stock:

(i) In case the Corporation shall declare a dividend or distribution upon Class A Common Stock payable other than in cash out of earnings or surplus or other than in Class A Common Stock, then thereafter each holder of Class B Common Stock or Class C Common Stock upon the conversion thereof will be entitled to receive the number of shares of Class A Common Stock into which such Class B Common Stock or Class C Common Stock shall be converted, and, in addition and without payment therefor, the property which such holder would have received as a dividend if continuously since the record date for any such dividend or distribution such holder: (A) had been the record holder of the number of Class A Common Stock then received; and (B) had retained all dividends or distributions originating directly or indirectly from such Class A Common Stock.

(ii) If any capital reorganization or reclassification of the capital stock of the Corporation, or consolidation or merger of the Corporation with another corporation, or the sale of all or substantially all of its assets to another corporation shall be effected in such a way that holders of Class A Common Stock shall be entitled to receive stock, securities or assets with respect to or in exchange for a Class A Common, then, as a condition of such reorganization, reclassification, consolidation, merger or sale, lawful and adequate provision shall be made whereby the holders of Class B Common Stock and Class C Common Stock shall thereafter have the right to receive, in lieu of Class A Common Stock of the Corporation immediately theretofore receivable upon the conversion of such Class B Common Stock and Class C Common Stock, such shares of stock, securities or assets as may be issued or payable with respect to or in exchange for a number of outstanding Class A Common Stock equal to the number of Class A Common Stock immediately theretofore receivable upon the conversion of such Class B Common Stock and Class C Common Stock had such reorganization, reclassification, consolidation, merger or sale not taken place, and in any such case appropriate provision shall be made with respect to the rights and interests of the holders of the Class B Common Stock and Class C Common Stock to the end that the provisions hereof (including without limitation provisions for adjustments of the Conversion Rate and of the number of shares receivable upon the conversion of such Class B Common Stock and Class C Common Stock) shall thereafter be applicable, as nearly as may be, in relation to any shares of stock, securities or assets thereafter receivable upon the conversion of such Class B Common Stock and Class C Common Stock. The Corporation shall not effect

any such reorganization, reclassification, consolidation, merger or sale, unless prior to the consummation thereof the surviving corporation (if other than the Corporation), the corporation resulting from such consolidation or the corporation purchasing such assets shall assume by written instrument executed and mailed to the registered holders of the Class B Common Stock and Class C Common Stock at the last address of such holders appearing on the books of the Corporation, the obligation to deliver to such holders such shares of stock, securities or assets as, in accordance with the foregoing provisions, such holders may be entitled to receive.

(e) In case at any time:

(iii) the Corporation shall pay any dividend payable in stock upon Class A Common Stock or make any distribution (other than regular cash dividends to the holders of Class A Common Stock); or

(iv) the Corporation shall offer for subscription pro rata to the holders of Class A Common Stock any additional shares of stock of any class or other rights; or

(v) there shall be any capital reorganization, reclassification of the capital stock of the Corporation, or consolidation or merger of the Corporation with, or sale of all or substantially all of its assets, to another corporation (provided however, that this provision shall not be applicable to the merger or consolidation of the Corporation with or into another corporation if, following such merger or consolidation, the shareholders of the Corporation immediately prior to such merger or consolidation own at least 80% of the equity of the combined entity); or

(vi) there shall be a voluntary or involuntary dissolution, liquidation or winding up of the Corporation;

then, in any one or more of the aforesaid cases, the Corporation shall give written notice, by first-class mail, postage prepaid, addressed to the holders of Class B Common Stock and Class C Common Stock at the addresses of such holders as shown on the books of the Corporation, of the date on which: (A) the books of the Corporation shall close or a record shall be taken for such dividend, distribution or subscription rights; or (B) such reorganization, reclassification, consolidation, merger, sale, dissolution, liquidation or winding up shall take place, as the case may be. Such notice shall also specify the date as of which the holders of Class A Common Stock of record shall participate in such dividend, distribution, or subscription rights, or shall be entitled to exchange their Class A Common Stock for securities or other property deliverable upon such reorganization, reclassification, consolidation, merger, sale, dissolution, liquidation or winding up, as the case may be. Such written notice shall be given at least 20 days prior to the action in question and not less than 20 days prior to the record date or the date on which the Corporation's transfer books are closed in respect thereto.

SIXTH: Article VIII of the Articles of Incorporation is hereby amended to provide as follows:



### Corporate Opportunity

1. Certain Acknowledgements; Definitions. The provisions of this Article VIII shall, to the fullest extent permitted by law, delineate the doctrine of "corporate opportunities," as it applies to the Corporation, define the conduct of certain affairs of the Corporation and its Subsidiaries and the Corporation's and its Subsidiaries' directors and officers as they may involve EchoStar Holding Corporation ("EchoStar") and its Subsidiaries, and the powers, rights, duties and liabilities of the Corporation and its Subsidiaries and the Corporation's and its Subsidiaries' directors, officers and employees in connection therewith. In recognition and anticipation that (a) directors and officers of the Corporation and its Subsidiaries may serve as directors, officers and employees of EchoStar and its Subsidiaries, (b) the Corporation and its Subsidiaries, directly or indirectly, may engage and are expected to continue to engage in the same, similar or related lines of business as those engaged in by EchoStar and its Subsidiaries and other business activities that overlap with or compete with those in which EchoStar and its Subsidiaries may engage, (c) the Corporation and its Subsidiaries may have an interest in the same areas of business opportunity as EchoStar and its Subsidiaries, (d) the Corporation and its Subsidiaries may engage in material business transactions with EchoStar and its Subsidiaries, including, without limitation, receiving services from, providing services to or being a significant customer or supplier to EchoStar and its Subsidiaries, and that the Corporation, EchoStar and/or one or more of their respective Subsidiaries may benefit from such transactions, and (e) as a consequence of the foregoing, it is in the best interests of the Corporation that the rights of the Corporation and its Subsidiaries, and the duties of any directors or officers of the Corporation or any of its Subsidiaries, be determined and delineated in respect of (x) any transactions between the Corporation and its Subsidiaries, on the one hand, and EchoStar and its Subsidiaries, on the other hand, and (y) any potential transactions or matters that may be presented to officers and directors of the Corporation and its Subsidiaries, or of which such officers or directors may otherwise become aware, which potential transactions or matters may constitute business opportunities of the Corporation or any of its Subsidiaries, and in recognition of the benefits to be derived by the Corporation and its Subsidiaries through its continued contractual, corporate and business relations with EchoStar and its Subsidiaries and of the benefits to be derived by the Corporation and its Subsidiaries by the possible service as directors or officers of the Corporation and its Subsidiaries of persons who may also serve from time to time as directors, officers and employees of EchoStar or any of its Subsidiaries, the provisions of this Article VIII shall, to the fullest extent permitted by law, regulate and define the conduct of the business and affairs of the Corporation and its Subsidiaries in relation to EchoStar and its Subsidiaries, and as such conduct and affairs may involve EchoStar's and its Subsidiaries directors, officers and employees, and the powers, rights, duties and liabilities of the Corporation and its Subsidiaries and their respective officers and directors in connection therewith and in connection with any potential business opportunities of the Corporation and its Subsidiaries. Any person purchasing or otherwise acquiring any shares of capital stock of the Corporation, or any interest therein, shall be deemed to have notice of and to have consented to the provisions of this Article VIII. For purposes of this Article VIII, "Control" and derivative terms means the possession of the power to direct or cause the direction of the management and policies of a person, whether through the possession of voting securities, by contract or otherwise; and "Subsidiary" means, with respect to any person, any other person that such first person directly or indirectly Controls. References in this Article VIII to "directors," "officers" or "employees" of any person shall be deemed to include those persons who hold similar positions or exercise similar powers and

authority with respect to any such person that is a limited liability company, partnership, joint venture or other non-corporate entity or any close corporation governed directly by its stockholders.

2. Certain Agreements and Transactions Permitted. No contract, agreement, arrangement or transaction (or any amendment, modification or termination thereof) entered into between the Corporation and/or any of its Subsidiaries, on the one hand, and EchoStar and/or any of its Subsidiaries, on the other hand, before EchoStar ceased to be a wholly-owned subsidiary of the Corporation shall be void or voidable or be considered unfair to the Corporation or any of its Subsidiaries for the reason that EchoStar or any of its Subsidiaries is a party thereto, or because any directors, officers or employees of EchoStar or a Subsidiary of EchoStar are a party thereto, or because any directors, officers or employees of EchoStar or a Subsidiary of EchoStar were present at or participated in any meeting of the board of directors, or committee thereof, of the Corporation, or the board of directors, or committee thereof, of any Subsidiary of the Corporation, that authorized the contract, agreement, arrangement or transaction (or any amendment, modification or termination thereof), or because his, her or their votes were counted for such purpose. The Corporation may from time to time enter into and perform, and cause or permit any of its Subsidiaries to enter into and perform, one or more contracts, agreements, arrangements or transactions (or amendments, modifications or supplements thereto) with EchoStar or any Subsidiary thereof pursuant to which the Corporation or a Subsidiary thereof, on the one hand, and EchoStar or a Subsidiary thereof, on the other hand, agree to engage in contracts, agreements, arrangements or transactions of any kind or nature with each other, or agree to compete, or to refrain from competing or to limit or restrict their competition, with each other, including to allocate and cause their respective directors, officers and employees (including any such persons who are directors, officers or employees of both) to allocate opportunities between, or to refer opportunities to, each other. To the fullest extent permitted by law, no such contract, agreement, arrangement or transaction (nor any such amendments, modifications or supplements), nor the performance thereof by the Corporation, EchoStar or any Subsidiary of the Corporation or EchoStar, shall be considered contrary to any fiduciary duty owed to the Corporation (or to any Subsidiary of the Corporation, or to any stockholder of the Corporation or any of its Subsidiaries) by any director or officer of the Corporation (or by any director or officer of any Subsidiary of the Corporation) who is also a director, officer or employee of EchoStar or any Subsidiary thereof. To the fullest extent permitted by law, no director or officer of the Corporation or any Subsidiary of the Corporation who is also a director, officer or employee of EchoStar or any Subsidiary thereof shall have or be under any fiduciary duty to the Corporation (or to any Subsidiary of the Corporation, or to any stockholder of the Corporation or any of its Subsidiaries) to refrain from acting on behalf of the Corporation or EchoStar, or any of their respective Subsidiaries, in respect of any such contract, agreement, arrangement or transaction or performing any such contract, agreement, arrangement or transaction in accordance with its terms and each such director or officer of the Corporation or any Subsidiary of the Corporation who is also a director, officer or employee of EchoStar or any Subsidiary thereof shall be deemed to have acted in good faith and in a manner such person reasonably believed to be in or not opposed to the best interests of the Corporation, and shall be deemed not to have breached his or her duties of loyalty to the Corporation and their respective stockholders, and not to have derived an improper personal benefit therefrom.



3. Duties of Directors and Officers Regarding Potential Business Opportunities: No Liability for Certain Acts or Omissions. If a director or officer of the Corporation or any Subsidiary of the Corporation is offered, or otherwise acquires knowledge of, a potential transaction or matter that may constitute or present a business opportunity for the Corporation or any of its Subsidiaries (any such transaction or matter, and any such actual or potential business opportunity, a "Potential Business Opportunity"), such director or officer shall, to the fullest extent permitted by law, have no duty or obligation to refer such Potential Business Opportunity to the Corporation or any of its Subsidiaries, or to refrain from referring such Potential Business Opportunity to any other person, or to give any notice to the Corporation or any of its Subsidiaries regarding such Potential Business Opportunity (or any matter relating thereto), and such director or officer will not be liable to the Corporation or any of its Subsidiaries, as a director, officer, stockholder or otherwise, for any failure to refer such Potential Business Opportunity to the Corporation or any of its Subsidiaries, or for referring such Potential Business Opportunity to any other person, or for any failure to give any notice to the Corporation or any of its Subsidiaries regarding such Potential Business Opportunity or any matter relating thereto, unless all of the following conditions are satisfied: (A) the Corporation has expressed an interest in such business opportunity as determined from time to time by the Corporation's Board of Directors as evidenced by resolutions appearing in the Corporation's minutes; (B) such Potential Business Opportunity was expressly offered to such director or officer solely in his or her capacity as a director or officer of the Corporation or as a director or officer of any Subsidiary of the Corporation; and (C) such opportunity relates to a line of business in which the Corporation or any Subsidiary of the Corporation is then directly engaged. In the event the preceding conditions are satisfied with respect to a particular Potential Business Opportunity, then such Potential Business Opportunity shall be offered first to the Corporation. In the event the preceding conditions are satisfied and the Corporation declines to pursue such Potential Business Opportunity, the directors, officers and other members of management of the Corporation shall be free to engage in such Potential Business Opportunity on their own and this paragraph shall not limit the right of any director, officer or other member of management of the Corporation to continue a business existing prior to the time that such area of interest is designated by the Corporation. This paragraph shall not be construed to release any employee of this Corporation (other than a director, officer or member of management) from any duties which may be owed to this Corporation.

4. Amendment of Article VIII. No alteration, amendment or repeal, or adoption of any provision inconsistent with, any provision of this Article VIII shall have any effect upon (a) any agreement between the Corporation or a Subsidiary thereof and EchoStar or a Subsidiary thereof that was entered into before such time or any transaction entered into in connection with the performance of any such agreement, whether such transaction is entered into before or after such time, (b) any transaction entered into between the Corporation or a Subsidiary thereof and EchoStar or a Subsidiary thereof before such time, (c) the allocation of any business opportunity between the Corporation or a Subsidiary thereof and EchoStar or a Subsidiary thereof before such time, or (d) any duty or obligation owed by any director or officer of the Corporation or any Subsidiary of the Corporation (or the absence of any such duty or obligation) with respect to any potential business opportunities of the Corporation or any Subsidiary of the Corporation which such director or officer was offered, or of which such director or officer otherwise became aware, before such time.

5. Renunciation. In addition to, and notwithstanding the foregoing provisions of this Article VIII, a potential transaction or business opportunity (1) that the Corporation or its Subsidiaries is not financially able, contractually permitted or legally able to undertake, or (2) that is, from its nature, not in the line of the Corporation's or its Subsidiaries' business, is of no practical advantage to the Corporation or its Subsidiaries or that is one in which the Corporation or its Subsidiaries has no interest or reasonable expectancy, shall not, in any such case, be deemed to constitute a corporate opportunity belonging to the Corporation, or any of its Subsidiaries, and the Corporation, on behalf of itself and each Subsidiary, to the fullest extent permitted by law, hereby renounces any interest therein.

6. Termination. Notwithstanding anything in these Articles of Incorporation to the contrary, the provisions of Sections 2 and 4(a)-(c) of this Article VIII shall automatically terminate, expire and have no further force and effect from and after the date on which no the Corporation director or officer is also an EchoStar director, officer or employee.

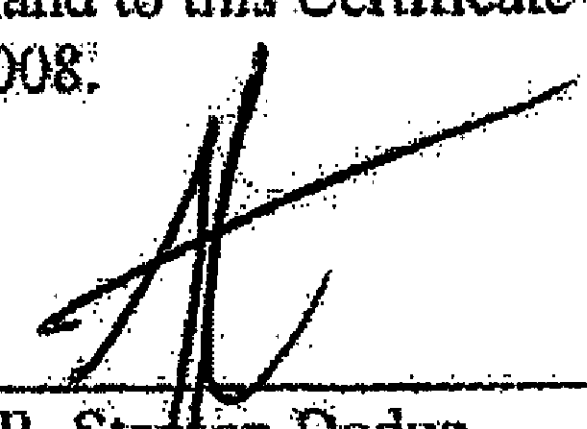
7. Deemed Notice. Any person or entity purchasing or otherwise acquiring or obtaining any interest in any capital stock of the Corporation shall be deemed to have notice and to have consented to the provisions of this Article VIII.

8. Severability. The invalidity or unenforceability of any particular provision, or part of any provision, of this Article VIII shall not affect the other provisions or parts hereof, and this Article VIII shall be enforced to the maximum extent permissible, and the remaining provisions of this Article VIII shall be unaffected thereby and will remain in full force and effect.

SEVENTH: The Amendment was duly adopted in accordance with the provisions of Sections 78.320, 78.385 and 78.390 of the NRS.

The Amendment shall become effective on January 20, 2008.

IN WITNESS WHEREOF, I have hereunto set my hand to this Certificate of Amendment of Articles of Incorporation on this 16<sup>th</sup> day of January, 2008.

  
\_\_\_\_\_  
Name: R. Stanton Dodge  
Title: Executive Vice President, General Counsel and Secretary



SLC REPORT EX. 172

SLC REPORT EX. 172

**In Re:**  
*LIGHTSQUARED INC., et al.*  
*Case No. 12-12080-scc*

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*December 10, 2013*

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UNITED STATES BANKRUPTCY COURT

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SOUTHERN DISTRICT OF NEW YORK

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

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In the Matter of:

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LIGHTSQUARED, INC., et al.,

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Debtors.

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HARBINGER CAPITAL PARTNERS LLC, et al.,

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Plaintiffs,

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- against -

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ERGEN, et al.,

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Defendants.

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- - - - -x

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United States Bankruptcy Court

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One Bowling Green

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New York, New York

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December 10, 2013

22

1:19 PM

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B E F O R E:

24

HON. SHELLEY C. CHAPMAN

25

U.S. BANKRUPTCY JUDGE

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Doc# 69 Motion to Dismiss the Complaint-In-Intervention

(related document(s)66) filed by James C. Dugan on behalf of  
Charles W. Ergen, SP Special Opportunities, LLC.

Doc# 72 Motion to Dismiss Adversary Proceeding Notice of Motion  
to Dismiss the Complaint-In-Intervention.

Doc# 83 Notice of Motion to Dismiss Second Amended Complaint  
(related document(s)74) filed by James C. Dugan on behalf of SP  
Special Opportunities, LLC.

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

THE COURT: Good afternoon. How is everybody? Who'd like to start?

MR. DUGAN: Your Honor, that would be me. Thank you.

THE COURT: First order of business, Mr. Dugan, is to apologize to everybody for being twenty minutes late.

MR. DUGAN: Exactly. We are very sorry for that, Your Honor. We were stuck on the train and we do apologize, we very much do.

THE COURT: Second order of business is I'm going to identify who's on the phone. I have Ms. Iacob from DebtWire; Mr. Kronsberg from Cyrus Capital Partners; Mr. Pagels from Willkie Farr; Mr. Sanjana from Reorganization Research; Mr. Smalley from The Seaport Group; Mr. Wilson from Skadden Arps; and Mr. Brown from White & Case. Is there anyone else on the phone who wishes to note their appearance?

Okay, Mr. Dugan, we're ready for you.

MR. DUGAN: Thank you, Your Honor. Your Honor, thank you and good afternoon. Jim Dugan for Charles Ergen and SPSO. Your Honor, I do want to apologize again for how late we were in arriving to court this morning.

THE COURT: Okay.

MR. DUGAN: It is inexcusable. We felt very bad about it. We were stuck on a train, and that's no excuse.

THE COURT: Things happen.



1 MR. DUGAN: We're sorry. Yeah, sorry.

2 So, Your Honor, I just wanted to focus, because we've  
3 now been through several rounds of briefing, really in a death  
4 march of briefing, if you will, for the last several weeks --

5 THE COURT: Oh, let's not get that -- let's not be  
6 that dramatic.

7 MR. DUGAN: But it was quite intense. It was quite  
8 intense. And we've been through quite a lot of briefing and  
9 there's been a lot of pages submitted to the Court, and a lot  
10 of arguments --

11 THE COURT: Can I just -- I just want to make sure I'm  
12 going to do this for each of you. I just want to make sure  
13 that I have everything --

14 MR. DUGAN: Sure.

15 THE COURT: -- that you think I have.

16 MR. DUGAN: Right.

17 THE COURT: So I have the original memorandum of law  
18 in support of the motion to dismiss the LightSquared complaint,  
19 and then I have a memorandum of a law in support of the motion  
20 to dismiss the Harbinger complaint.

21 MR. DUGAN: Yes.

22 THE COURT: And then I have a reply for each of them.  
23 And I have a declaration that you submitted. Right?

24 MR. DUGAN: Yes, Your Honor --

25 THE COURT: Okay.

1 MR. DUGAN: -- that's right. There might have been a  
2 declaration in connection with both LightSquared --

3 THE COURT: Exact -- right.

4 MR. DUGAN: -- and Harbinger. Yeah. Okay.

5 THE COURT: Okay.

6 MR. DUGAN: So, Your Honor, let me just get right into  
7 it, and I'm going to focus first on the LightSquared claims and  
8 then on the Harbinger claims.

9 THE COURT: Okay.

10 MR. DUGAN: In essence, Your Honor, LightSquared  
11 asserts three claims for relief, although it's styled as four:  
12 breach of contract and declaratory relief I will treat as  
13 one --

14 THE COURT: Okay.

15 MR. DUGAN: -- because I think essentially, as a  
16 substantive matter, they are the same; tortious interference of  
17 contract --

18 THE COURT: Right.

19 MR. DUGAN: -- and equitable subordination. They do  
20 assert an equitable-disallowance claim, but I think Your Honor  
21 has noted that's been dismissed with prejudice.

22 THE COURT: Right.

23 MR. DUGAN: So --

24 THE COURT: Although they -- and I'll ask LightSquared  
25 about this when they stand; although there is an oddity that

1 there's a prayer for relief for equitable subordination but  
2 there's no count for equitable subordination.

3 MR. DUGAN: Your Honor, you're right. I'm going to  
4 assume that they intend to submit a claim for equitable  
5 subordination and that's what they meant to do or that's what  
6 in effect they have done, and address it in that way.

7 THE COURT: Okay.

8 MR. DUGAN: And we'll get to that in a moment.

9 But I did want to start off with the breach-of-  
10 contract allegations, and I think that those really are the  
11 most critical allegations that we're dealing with here,  
12 because, in essence, almost all of the allegations that  
13 LightSquared makes and all the claims that they assert come  
14 back down to the notion that SPSO and Mr. Ergen breached the  
15 contract -- or I should say SPSO is the one against whom the  
16 claim is made -- but that they breached the contract when they  
17 bought the loan debt.

18 And in essence, LightSquared looks at two, basically,  
19 prongs to get there. I mean, the question really is, was SPSO  
20 a subsidiary of a disqualified company? We obviously  
21 concede --

22 THE COURT: Well, that's one formulation of how they  
23 get there. I don't think that it's the only formulation of how  
24 they get there.

25 MR. DUGAN: Exactly, Your Honor. I think that the

1 contract itself, under its terms, would preclude SPSO from  
2 buying the debt or being an eligible assignee if it is a  
3 disqualified company. And the way they get to that is by  
4 saying that it was a subsidiary of a disqualified company,  
5 which is DISH.

6 The other allegation they make -- and this may be what  
7 you're suggesting, Your Honor; the other allegation they make  
8 is that Mr. Ergen and Mr. Kiser were agents of DISH and that  
9 when they were trading for SPSO and acting for SPSO, they were  
10 acting as agents of DISH. And that's what I wanted to start  
11 with, Your Honor; I wanted to --

12 THE COURT: Okay.

13 MR. DUGAN: -- start with that allegation, because I  
14 think, when we look at the facts that are alleged and the  
15 inferences that can be reasonably drawn from those facts, we  
16 have to look not just at the allegations in the complaint. We  
17 certainly have to start with the allegations of the complaint  
18 but, Your Honor, as this litigation has progressed, and as the  
19 briefing has progressed, more and more, Harbinger and  
20 LightSquared have submitted into the court -- into the record  
21 before Your Honor, documents from other proceedings, in  
22 particular a Nevada proceeding.

23 THE COURT: But I'm not going to pay attention to  
24 them.

25 MR. DUGAN: Well, Your Honor, I think the law is, on

1 this, that to the extent that the allegations of that  
2 proceeding and the facts that are established in that  
3 proceeding are put before Your Honor by the debtors to shore up  
4 the claims in their complaint -- and that is what they've  
5 done -- Your Honor, I think the law is clear that it is fair  
6 for you to consider those documents as being part of the record  
7 before you on this motion. I think the law is clear that when  
8 a plaintiff attempts to attach documents from other  
9 litigations, and attempts to augment their allegations by  
10 inviting the Court's attention to allegations in other cases,  
11 that those allegations in other cases that the plaintiff  
12 themselves asked the Court to consider and entertain --

13 THE COURT: But then you're talking about --

14 MR. DUGAN: -- become part of their allegations.

15 THE COURT: Then you're talking about something that  
16 feels more like a motion for summary judgment, because if I do  
17 that, then I get into things that everybody has pointed to me  
18 outside of a complaint, and then I don't know what I'm doing on  
19 a 12(b)(6) motion anymore. So what I've been doing these past  
20 couple weeks is reading a complaint and looking at what  
21 inferences can be drawn from the face of the complaint and,  
22 frankly, ignoring everything that all of you have to say about  
23 Nevada, because, except to the extent that underlying facts are  
24 alleged in the complaint, I'm not really interested.

25 MR. DUGAN: Well, Your Honor, I understand your

1 position on that, but I'd like to be heard at least --

2 THE COURT: Okay.

3 MR. DUGAN: -- on what we think we now have before us,  
4 because we now have on this motion a pretty full record that  
5 includes their allegations, the documents that they have  
6 submitted -- and by "they" I mean both LightSquared and  
7 Harbinger -- for the Court's consideration. And we also have  
8 the findings that are in those documents, the allegations that  
9 are in those documents, that they themselves are saying, Your  
10 Honor, please consider this.

11 Now, the reason why I think it's relevant, the reason  
12 why we should look at it, is because the point of a motion to  
13 dismiss really is a gatekeeping function. The point is, has a  
14 question of fact been raised that requires a trial? The  
15 question really is, has a question of fact been raised with  
16 respect to whether Mr. Ergen and Mr. Kiser were agents for DISH  
17 when SPSO bought the debt? Has a fact been raised that would  
18 require a trial on that point?

19 And we can look at, Your Honor -- in addition to the  
20 allegations that LightSquared has made, they quote e-mails. We  
21 can look at those e-mails. The law is clear that when a  
22 plaintiff quotes an e-mail in their complaint -- quotes a  
23 document --

24 THE COURT: Right, I --

25 MR. DUGAN: -- in their complaint --

1 THE COURT: I --

2 MR. DUGAN: -- you can look at that document.

3 THE COURT: Right.

4 MR. DUGAN: You can look in those e-mails.

5 THE COURT: I agree with that. That's in the  
6 complaint, though.

7 MR. DUGAN: Right.

8 THE COURT: Right?

9 MR. DUGAN: Right, that is. But -- and also, let's  
10 for a moment consider Harbinger. Harbinger has itself filed a  
11 complaint in this matter, which they say they've done to  
12 enhance -- to further the allegations of LightSquared. In that  
13 complaint, Harbinger quotes from deposition testimony in the  
14 Nevada proceeding; they quote from a report that the special  
15 litigation committee filed in that proceeding; they quote from  
16 court orders proceedings in that case that make certain  
17 representations.

18 And I think, when you look at the overwhelming weight  
19 of those matters, which the plaintiffs themselves -- and by  
20 that I mean LightSquared and Harbinger --

21 THE COURT: Right.

22 MR. DUGAN: -- when you look at those documents that  
23 the plaintiffs themselves have said, please rely on this, it is  
24 part of our complaint, it is part of our theory, when you look  
25 at those things, they completely undermine the claim that Kiser

1 and Ergen were agents for DISH, because the entire Nevada  
2 proceeding is predicated on the fact -- and it's all over the  
3 documents that they quote; it's all over the report that they  
4 quote; it's all over the testimony that they quote -- it's  
5 predicated on the fact that the board of DISH did not know that  
6 Mr. Ergen was buying debt.

7 THE COURT: But that doesn't answer the question at  
8 all, Mr. Dugan, because -- and I really was hoping to avoid  
9 having to delve into the matters having to do with the Nevada  
10 litigation, because I believe that, as between Mr. Ergen and  
11 the DISH shareholders, that's the business of the Nevada court  
12 and not here.

13 But I could articulate a theory under which that fact  
14 doesn't matter one way or the other to the question that I  
15 might have to decide, which is the identity of interest,  
16 agency -- I can come up with any number of legal  
17 formulations -- the relationship between Mr. Ergen -- again,  
18 acting through SPSO here -- on the one hand, and DISH and  
19 EchoStar on the other hand.

20 So if you're citing to me the fact that Mr. Ergen did  
21 not inform the board until some date in whenever it was, as  
22 evidence of the fact that there was no agency, that's not  
23 persuasive.

24 MR. DUGAN: Well, Your Honor --

25 THE COURT: So that doesn't get you over the finish



1 line.

2 MR. DUGAN: Well, let me just put it this way, then,  
3 Your Honor: I mean, if it were the case that Mr. Ergen was  
4 acting as the agent for DISH, he would have had to -- and the  
5 case law says this: the allegations have to show he would have  
6 had to be authorized by DISH to do something for DISH. DISH  
7 would have had to authorize him to buy this billion dollars'  
8 worth of debt.

9 THE COURT: And perhaps by a course of conduct in the  
10 past, he knew that he had the authority to do that, that he  
11 knew that he had the authority ultimately to have whatever  
12 series of transactions that he felt were in the best interests  
13 of DISH, to occur.

14 MR. DUGAN: Well, Your Honor, I don't understand  
15 exactly what conduct that necessarily was. I don't think that  
16 LightSquared has pled a course of conduct involving Mr. Ergen  
17 purchasing distressed-debt investments using --

18 THE COURT: You're defining it that way --

19 MR. DUGAN: -- his money.

20 THE COURT: -- I'm not, Mr. Dugan.

21 MR. DUGAN: But that is the conduct that we're looking  
22 at now, Your Honor. That is the conduct where he's alleged to  
23 have engaged in.

24 Frankly, I think the law is clear on this that the  
25 titles of Mr. Ergen and the title of Mr. Kiser is not

1 dispositive of whether they were acting as agents for DISH. In  
2 fact, it's what is referred to as a conclusory allegation. It  
3 doesn't establish that they did anything at DISH's direction  
4 with respect to these particular investments.

5 Now, there are e-mails that LightSquared has -- had in  
6 its possession before they drafted this complaint, before they  
7 put these e-mails in the complaint and quoted them. There are  
8 e-mails -- and we can show them to Your Honor -- where  
9 Mr. Ketchum of Sound Point says to his boss, about Mr. Ergen,  
10 he is opening up a family account, family money to trade, his  
11 money to trade; it's a family office, he's going to be buying  
12 LightSquared -- he has bought LightSquared with this managed  
13 family account, he's got someone helping him with this family  
14 account. This is Ketchum.

15 In Harbinger's original pleading, they said he was in  
16 on it; they said he was part of the conspiracy. LightSquared  
17 doesn't use the term "conspiracy", but they're seeking  
18 equitable subordination, Your Honor. They're not just saying  
19 this was something that happened and it was a breach. They're  
20 saying this was a conspiracy, it was something that happened,  
21 it was bad, it was fraud. It has to be near that level; it has  
22 to be akin to fraud.

23 And when you look at the participants in that fraud,  
24 what they're saying -- they're not saying, this is for DISH and  
25 we need to be careful, it's for DISH, don't say it, but that's

1 true, don't say it. What they're saying is, this is for Ergen,  
2 there's a guy that's helping him, it's for his personal  
3 account. These are e-mails that LightSquared had; they quote  
4 from them. Do they quote from that part? No. But that's what  
5 those e-mails say.

6 So, Your Honor, I think it's only fair to consider  
7 that. When we're -- we're looking at the inferences --

8 THE COURT: Then I'm in --

9 MR. DUGAN: -- we ask them to make.

10 THE COURT: -- I'm in a summary judgment motion; I'm  
11 not on a motion to dismiss. I just don't -- I don't know how  
12 you -- I don't know how I go where you're inviting me to go,  
13 and draw a reasonable line. This is quintessentially a  
14 situation, then, where we move beyond a motion to dismiss and  
15 we just have a factual record. And there's going to be a  
16 winner and there's going to be a loser.

17 MR. DUGAN: I understand that that's your position,  
18 Your Honor. And I just -- since I'm here, to be heard out on  
19 the point --

20 THE COURT: Of course.

21 MR. DUGAN: -- yeah, I mean, that certainly there is  
22 law, and we've cited it to Your Honor -- it's obviously Your  
23 Honor's call. There is law, and we've cited it to Your Honor,  
24 that when a plaintiff refers to a document, quotes a document  
25 like they quote these e-mails, you can look at those e-mails

1 that the plaintiffs quote.

2 THE COURT: Well --

3 MR. DUGAN: It doesn't transform --

4 THE COURT: -- even --

5 MR. DUGAN: -- the motion into a motion for summary  
6 judgment; it does not.

7 THE COURT: For the purposes of argument and moving  
8 along, I'll accept your premise. But even if I accept your  
9 premise, I don't believe that that compels the granting of the  
10 motion to dismiss on that basis. So --

11 MR. DUGAN: Understood, Your Honor. Now, when we were  
12 looking at Twombly and Iqbal, just to --

13 THE COURT: Right.

14 MR. DUGAN: -- bring those cases back into focus, I  
15 mean, essentially what those cases say is that, yes, we'll give  
16 you the benefit of inferences, but the inferences have to be  
17 reasonable, they can't be conclusory and they can't be  
18 contradicted by other documents in the record or that you  
19 invite into the record by quoting them and referencing them.

20 There can be no question, Your Honor -- putting aside  
21 how you feel about what we should do in terms of fact-finding,  
22 which I totally understand and appreciate, there can be no  
23 question that what these plaintiffs have done here is quote and  
24 refer to -- but by the way, not point out -- the parts that  
25 contradict their allegations in their complaints. There is no

1 question that the documents that they keep asking you to look  
2 at -- which I understand you don't want to, but they keep  
3 asking you to -- completely contradict the allegations that  
4 they're making.

5           These documents and these findings say, without  
6 question, not only that the board didn't know; they say, when  
7 the board found out, they had an investigation done,  
8 independent counsel, independent financial advisors. They had  
9 a special committee, too, that they created to look into the  
10 issue of corporate opportunity. What did this guy do? But --

11           THE COURT: But, Mr. Dugan, are you really inviting me  
12 to take a look at how that all played out in Nevada? Because  
13 last time you didn't want me to look at that.

14           MR. DUGAN: Your Honor, they're inviting you.

15           THE COURT: So if you -- do you want -- but are you  
16 telling me right now that I should accept their invitation to  
17 look at what happened in Nevada? Because --

18           MR. DUGAN: Yes, Your Honor, you should --

19           THE COURT: You are?

20           MR. DUGAN: -- accept their invitation, and here's  
21 why: because they want to have a whole trial on something that  
22 their own documents show is completely made up. And here's  
23 what I'm saying is made up, Your Honor. What is made-up is the  
24 notion that Mr. Ergen and Mr. Kiser got together and had a  
25 conspiracy where Mr. Ergen and Mr. Kiser were going to buy debt

1 for DISH.

2 THE COURT: That --

3 MR. DUGAN: That's what's made up.

4 THE COURT: That's not what they're saying. That's  
5 not what they're saying.

6 MR. DUGAN: They can't support an equitable-  
7 subordination claim without fraud, Your Honor. Their  
8 equitable-subordination claim can't be based on an innocent  
9 breach of contract; it doesn't work that way.

10 THE COURT: That -- I agree with that.

11 MR. DUGAN: But --

12 THE COURT: But that's a completely different point  
13 from the --

14 MR. DUGAN: Well, we'll get to that point.

15 THE COURT: -- from the three or four that you just  
16 made.

17 MR. DUGAN: We'll get --

18 THE COURT: But that much I agree with you.

19 MR. DUGAN: We'll get to that point. But let me ask  
20 you -- let me make this --

21 THE COURT: Although Mr. Friedman might disagree with  
22 me --

23 MR. DUGAN: I'm sure he'll disagree with me.

24 THE COURT: -- but I can't tell.

25 MR. DUGAN: I have no doubt.

1 THE COURT: I'm going to start to pick on him early  
2 today.

3 MR. DUGAN: I have no doubt he'll disagree with me.

4 UNIDENTIFIED SPEAKER: Take your time.

5 MR. DUGAN: I have no doubt he'll disagree with me,  
6 Your Honor, and he should.

7 But the point is that -- I mean, when we talk about  
8 agency -- I want to be clear about this -- I really think the  
9 agency allegations are more relevant to the equitable-  
10 subordination piece than to the breach-of-contract piece.  
11 Here's how I get there: you have to have words in a contract  
12 that you don't comply with, to have a breach. Words in a  
13 contract have to be breached, to have a breach.

14 So what are the words in the contract that say DISH  
15 and EchoStar and their agents can't buy this debt? The words  
16 don't say that. Hear me on this. The words do say  
17 "subsidiary". I know we've been up and down --

18 THE COURT: No, the word says that, subsequent to the  
19 amendment, that DISH cannot buy the debt.

20 MR. DUGAN: That's true.

21 THE COURT: Right?

22 MR. DUGAN: Or any subsidiary of it.

23 THE COURT: Or any subsidiary. Put the subsidiary to  
24 one side. It says DISH can't buy the debt, right?

25 MR. DUGAN: Right.

1 THE COURT: So in one of the first rounds of this, we  
2 had some diagrams in a complaint that showed basically  
3 Mr. Ergen controls SPSO, Mr. Ergen controls DISH, therefore,  
4 DISH controls SPSO. It was triangular, if I'm remembering it.

5 MR. DUGAN: Right.

6 THE COURT: Okay. So put that to one side. So now at  
7 least what I'm reading in the complaint is that they do argue  
8 they're a subsidiary, that SPSO is a subsidiary, with a lower-  
9 case S. I don't think they've entirely abandoned the upper-  
10 case S definition, so --

11 MR. DUGAN: I agree, Your Honor.

12 THE COURT: -- there's those arguments. But I think  
13 what they're saying now is Mr. Ergen/SPSO -- because clearly --  
14 and I think there was some argument that, because he can't hold  
15 the debt as a natural person, therefore, you should disregard  
16 SPSO; but people form those vehicles all the time, so I'm not  
17 interested in that -- but that Mr. Ergen is DISH; he's DISH.  
18 This is Pepper v. Litton, ironically, and there's an identity  
19 of interest and he is DISH and, therefore -- therefore, there  
20 was a breach. Not that there's an equitable basis to disallow  
21 it, but he's (sic) a breach, because he says he's SPSO but he's  
22 really DISH. That's what they're saying. That's what they're  
23 saying.

24 So whether he's an agent or there's an identity of  
25 interest or they really are the same or it's a sham, that's



1 what they're trying to say. And in response to that in the  
2 last couple of rounds -- and you'll forgive me, I can't  
3 remember each time who exactly was here; I'm not sure if it was  
4 you or Ms. Strickland or one of the folks from Sullivan &  
5 Cromwell -- that, look, it's a public company, it's a public  
6 company. They have filings, they would have to have disclosed  
7 this, you can't say that a controlling shareholder is  
8 necessarily same as the corporation. I agree with all of that.  
9 But what they're saying in their complaint that they're asking  
10 me to give the favorable inferences to is that, under the  
11 circumstances here, Ergen is DISH, DISH can't buy, therefore,  
12 he couldn't buy. And maybe I'm giving them too much credit,  
13 but that's the way I'm reading what they're saying.

14 MR. DUGAN: And, Your Honor, let's read it that way,  
15 then, and let's --

16 THE COURT: Okay.

17 MR. DUGAN: -- and let's unpack that, because there  
18 are a number of elements to "DISH is Ergen, and Ergen is DISH".  
19 I mean, there are a number of elements to that; the first is,  
20 there's a piercing-the-corporate-veil argument, or an element  
21 to that. I mean, it is not easy to allege a pierce-the-  
22 corporate-veil claim. It's not easy to prove a pierce-the-  
23 corporate-veil claim.

24 For DISH to be Ergen in the sense that Your Honor is  
25 referring to and in the sense that you are positing that they

1 have alleged, they have to allege a pierce-the-corporate-veil  
2 claim. And how do you allege a pierce-the-corporate-veil  
3 claim? You have to allege a unity of interest not just on an  
4 abstract metaphysical level but concretely: same bank  
5 accounts, not really respecting the corporate separateness.

6 Here we have no allegation of same bank accounts. We  
7 have no allegation that Ergen treated DISH like it was himself.  
8 We don't have an allegation that anything Ergen wanted to do,  
9 DISH had to do. We don't have an allegation that DISH always  
10 did what Ergen wanted. In fact, it's quite the opposite;  
11 that's why, Your Honor, I keep sort of referring to Nevada,  
12 because they've put in their -- and also because, far from  
13 Ergen being DISH, when Ergen told the board of DISH what he had  
14 done, they said, hold on a second, you did what? And they  
15 formed a special committee, not because they thought it was  
16 great that he had done this thing to help them; it was because  
17 they didn't know what he had done, and they needed to figure it  
18 out. That's not an identity of interest.

19 Now, they hired independent legal advisors; they hired  
20 independent financial advisors. They investigated it. They  
21 did a report -- this is what the plaintiffs put in their papers  
22 before you -- a report that was based on interviews, that was  
23 based on an interview of documents with fact-finding and all  
24 this other stuff.

25 Now, I know Your Honor is leery to go there but, on

1 the point of "DISH is Ergen, and Ergen is DISH", I don't see  
2 how you can get there on that record, the record that they have  
3 put before you. It just doesn't add up. Not only have they  
4 not put in their allegations the "DISH is Ergen, Ergen is DISH"  
5 predicate; they've put stuff in that undermines it completely.  
6 And that is the problem with that claim. It's a claim that  
7 they can't support, with their inferences that are plausible  
8 and reasonable to make, on the record that they have created on  
9 this motion. And that is our ultimate endpoint on that point.  
10 I mean --

11 THE COURT: And it shouldn't give me any pause that  
12 the treasurer of DISH was doing this for Mr. Ergen?

13 MR. DUGAN: Well, I think, Your Honor, what they  
14 allege is that Mr. Kiser was acting on Mr. Ergen's behest.  
15 Should it give you pause? You know, Your Honor, obviously it's  
16 a fact; it's a fact that they point to. But it's one fact in a  
17 sea of facts. It's one inference in a sea of inferences. If  
18 you're going to single out that one inference, you have to do  
19 it in the --

20 THE COURT: I'm trying not to --

21 MR. DUGAN: -- context of what else is there.

22 THE COURT: -- single out that one inference, but  
23 that's why you have trials, because --

24 MR. DUGAN: Understood, Your Honor.

25 THE COURT: -- you have no dispute that the fellow who

1 was the treasurer of DISH was executing these trades. In  
2 addition, you have allegations made repeatedly that there was  
3 something going on with respect to the timing of the closing of  
4 the trades at a critical time in this Chapter 11 proceeding.  
5 You've got allegations that reasons were being given for the  
6 fact that trades weren't closing, despite entreaties from the  
7 counterparties on the trades. And those strike me as  
8 allegations that call out for the development of a factual  
9 record.

10 MR. DUGAN: Understood, Your Honor. Now, because  
11 we've talked a lot about agency, I do want to address the  
12 manipulation of trades for a moment. Clearly the manipulation-  
13 of-trade allegation is not going to whether the contract was  
14 breached, because there's nothing in the contract, even if  
15 we're talking about whether it was DISH or it was Ergen.

16 THE COURT: No, we can assume for that purpose that  
17 he's an eligible assignee.

18 MR. DUGAN: So then let's ask ourselves where are they  
19 going with that and what exactly do those allegations show. I  
20 mean, where they appear to be going -- where they have to be  
21 going with it is equitable subordination, because what else  
22 would it really be relevant to? It's not relevant to the  
23 tort --

24 THE COURT: It'd be relevant to a damage claim.

25 MR. DUGAN: But only if those allegations attach

1 themselves to a claim -- to a cause of action. In other words,  
2 those allegations, to give rise to a damages claim, have to  
3 attach themselves to a cause of action. They don't attach  
4 themselves to breach of contract, because they don't have to do  
5 with the contract and, as you say, we can assume he was an  
6 eligible assignee, before we get to those.

7           So what exactly are those allegations attached to?  
8 They're not attached to tortious interference, because that  
9 claim is limited to the very first trade Ergen did, for five  
10 million dollars in April of 2002. Weeks before -- maybe over a  
11 month before -- LightSquared was even in bankruptcy, he did a  
12 trade for five million dollars. That's their tortious-  
13 interference claim; it's based on that trade and only that  
14 trade.

15           The only claim that's left that the manipulation of  
16 trades can possibly be relevant to is equitable subordination.  
17 And what we have to ask ourselves is this: do these  
18 allegations of manipulation of trades -- do they really equate  
19 to -- do they support to an equitable-subordination claim? Are  
20 they anything like the kinds of allegations that we've seen  
21 support an equitable-subordination claim? They don't use the  
22 term "fraud". They don't say that there was fraud here, that  
23 somehow there was an attempt to commit a fraud when Ergen or  
24 SPSO didn't close the trades on time. Harbinger did allege  
25 that, by the way, but that was thrown out. That claim couldn't

1 be supported. It couldn't support a fraud claim. They don't  
2 allege fraud.

3           They don't allege tortious interference of creditors.  
4 That was a claim Harbinger made. That was a claim Harbinger  
5 made that got thrown out. The debtors didn't come in and say,  
6 by the way, this manipulation of trades has caused us to lose  
7 an expectancy of closing a contract that was firm enough to  
8 give rise to a tortious-interference claim. They don't make  
9 that allegation. They don't connect it that way. They just  
10 put it out there that they think the trades took a long time to  
11 close, that there's e-mail traffic that shows that the other  
12 side of that trade asked to close and it couldn't get it closed  
13 for weeks, sometimes, yes, for a month, sometimes for two  
14 months. Yes, there are allegations, there are complaints,  
15 there are e-mails about that.

16           Do the e-mails say the reason why these trades aren't  
17 closing is because we want to screw up the debtors' ability to  
18 negotiate with its creditors? No, the e-mails don't say that.  
19 They have all the e-mails, but they would have quoted those  
20 parts if they had those. They don't say that. All they say is  
21 that these trades took a long time to close. And I don't see  
22 that, Your Honor, under the law, as giving rise to the type of  
23 fraud, to the type of breach-of-fiduciary-duty-like --

24           THE COURT: There's --

25           MR. DUGAN: -- allegations --

1 THE COURT: There's --

2 MR. DUGAN: -- that they need.

3 THE COURT: There's no way of knowing that. If we  
4 take as a given that there was a delay in the closing of the  
5 trades for a strategic purpose, I think that's something I'm  
6 entitled to know.

7 MR. DUGAN: But they don't allege that, Your Honor.  
8 They say it had the effect. They say it had the effect of  
9 interfering with their creditor negotiations. They don't  
10 say -- I looked hard for a part where it says they had the  
11 purpose, the reason why these trades took so long to close is  
12 because Ergen had the purpose, SPSO had the purpose, of  
13 interfering with our negotiation with trades. No, they said it  
14 had the effect. Effect and purpose --

15 THE COURT: Mr. Dugan --

16 MR. DUGAN: -- are very different things.

17 THE COURT: -- you have to remember that I was  
18 actually here during this period of time, so I independently  
19 have a recollection of what was occurring as those weeks  
20 unfolded.

21 MR. DUGAN: Well, Your Honor, now you exactly know why  
22 it is that we keep asking for matters that are not just in  
23 their pleading to be considered, because there's a big mosaic  
24 of facts that we're all dealing with here. It's a big mosaic.  
25 I mean, now, Your Honor can't look at all of it, because the



1 law doesn't let you look at all of it. But Your Honor can look  
2 at more than just what they say in their complaint, because  
3 that's the record that they've invited and created. Your Honor  
4 could also consider the record in the bankruptcy proceeding,  
5 because, after all, you were here for that, as you say, Your  
6 Honor. So yes, all that --

7 THE COURT: Well --

8 MR. DUGAN: -- you can consider.

9 THE COURT: -- it'd be a neat trick for me not to  
10 consider what happens here, so --

11 MR. DUGAN: Yeah. I would agree.

12 THE COURT: But that's a different -- that's different  
13 from importing everything that happens --

14 MR. DUGAN: Right, and --

15 THE COURT: -- in Nevada.

16 MR. DUGAN: -- I understand that but, if we're going  
17 to look at what's happened in the bankruptcy proceeding on the  
18 issue of manipulation of trades itself, we should consider what  
19 happened in May of 2013 -- I'm sure Your Honor will recall --  
20 when the debtor had a seemingly very different perspective on  
21 SPSO and was actually actively monitoring the closing of trades  
22 and was making arguments to try to get the benefit of  
23 provisions in the exclusivity stipulation that were based on  
24 SPSO's trading, and arguments based on SPSO's position.

25 THE COURT: That sounds like a defense. That doesn't

1 have a bearing on whether or not SPSO was intentionally  
2 declining to close trades that were otherwise ready to close,  
3 because there was a strategic advantage --

4 MR. DUGAN: But --

5 THE COURT: -- in doing so.

6 MR. DUGAN: But, Your Honor, if the relevance of  
7 manipulation of trades is the equitable-subordination claim,  
8 which is my supposition but I don't know what else it's  
9 relevant to, then the debtors' conduct with respect to those  
10 trades and the timing of those trades and the positions they  
11 took certainly is relevant to whether or not it would be  
12 equitable to subordinate --

13 THE COURT: Right, but --

14 MR. DUGAN: -- SPSO's claim.

15 THE COURT: -- I'm not having a trial on the merits of  
16 equitable subordination right now.

17 MR. DUGAN: Well, I understand, Your Honor. We're  
18 talking about inferences from facts. But in the world of  
19 inferences from facts, we can discuss these things.

20 I'm sorry, Your Honor.

21 Okay, so, Your Honor, just one other thing about the  
22 trade timing that I think is relevant to consider, which is,  
23 the way that the debtors have set up their cause of action,  
24 they make it appear that there is some right, during the  
25 exclusivity period, to have creditors not trade, that they have

1 some right, during their exclusivity period, to --

2 THE COURT: No, that's --

3 MR. DUGAN: -- lock everything into place.

4 THE COURT: -- that's absolutely incorrect as a matter  
5 of law.

6 MR. DUGAN: It is absolutely incorrect as a matter of  
7 law. But if Your Honor were to find in their favor on this  
8 claim of manipulation of trades, in effect, what would you be  
9 saying -- what would the Court be saying to the participants in  
10 the distressed-debt market, with respect to trading during an  
11 exclusivity period? Are they always going to be open to the  
12 claim that, by trading, they somehow made the identity of  
13 creditors less knowable, more uncertain, to the extent where a  
14 debtor can come in and say, you interfere with my ability to  
15 negotiate with my creditors; I didn't know who they were; you  
16 kept trading?

17 THE COURT: All right, well, that -- you're inviting  
18 me down the slippery slope and I'm not going to follow you,  
19 so --

20 MR. DUGAN: Your Honor, it's relevant to consider for  
21 the claim that they're asserting. That's why we're making --

22 THE COURT: Okay.

23 MR. DUGAN: -- that argument.

24 THE COURT: Does it make any difference, Mr. Dugan, on  
25 the issue of Nevada, if -- and I have no idea what the current

1 posture is, other than what you folks have told me in terms of  
2 the limited injunctive relief that was entered, I think, the  
3 day before Thanksgiving. But if that were to proceed and  
4 ultimately the Nevada court were to rule that the profit that  
5 Mr. Ergen gains on the debt holdings goes to the DISH  
6 shareholders, is that any relevance to the issues that are  
7 before me?

8 MR. DUGAN: I don't think so, Your Honor, because the  
9 question then would be -- I think the question would be --  
10 since we're talking about a present act affecting past conduct,  
11 I think the question would be whether the Court's order in some  
12 sense would be the equivalent of a ratification, if you will,  
13 that the trades were for DISH in some way or for the DISH  
14 shareholders in some way. And I think that theory is self-  
15 defeating, Your Honor, because for there to be a ratification,  
16 you have to start with the premise that when the trades first  
17 happened, they were not for DISH. Ratification is backward-  
18 looking.

19 So for some court to say, after the fact, you know,  
20 looking back at these things that happened now a while ago, I'm  
21 going to grant relief that would have the effect now of making  
22 the economic benefit of those trades the benefit for DISH, that  
23 almost has as its predicate that when the trades happened, they  
24 didn't happen for DISH. It's a backward-looking -- in fact, it  
25 changes things. It changes things.

1 THE COURT: But it also --

2 MR. DUGAN: So we don't --

3 THE COURT: -- it also highlights the fact that,  
4 again, looking back in the beginning of the trading, way before  
5 the bankruptcy, right?

6 MR. DUGAN: Right.

7 THE COURT: Because of Mr. Ergen's economic interest  
8 in DISH, it kind of wasn't going to matter whether or not  
9 ultimately he got to keep the spread or not. He either was  
10 going to get to keep the spread for his own account, or the  
11 spread was going to go to DISH shareholders, and maybe he got a  
12 share of it that way.

13 MR. DUGAN: Well, what Your Honor is saying is  
14 logical. I mean, I would think that as someone who spent a  
15 billion dollars of his own money, he would have preferred to  
16 get the benefit of it, but what Your Honor is saying is  
17 logical.

18 THE COURT: Okay.

19 MR. DUGAN: Your Honor, I wanted to touch on a few  
20 other claims that LightSquared makes. I mean, I do want to  
21 note, Your Honor -- I mean, I know we've talked about a lot  
22 about subsidiary. I think it's worth saying, because it just  
23 seems like it is, that the position that LightSquared lays out  
24 in their brief with respect to subsidiary kind of proves what  
25 we're saying on that piece, just in the following sense.

1           What they're saying is, subsidiary in almost every  
2 instance -- they certainly say it with respect to the  
3 definition in the credit agreement, which is broader than  
4 Merriam's, which is broader than Black's. They say -- looking  
5 at the broadest definition of subsidiary in the credit  
6 agreement, it's downstream looking. Downstream looking:  
7 that's what makes it a subsidiary. You're always looking  
8 downstream, as opposed to affiliate, which they say is  
9 different, because it's upstream and downstream. It's both  
10 ways. It's all directions.

11           Well, Your Honor, we think that proves our point on  
12 the subsidiary piece of it, putting aside whether DISH is Ergen  
13 and Ergen is DISH, and we think there are serious problems with  
14 that, as I've said. But putting aside that one, we think that  
15 proves our point, because unless DISH is Ergen and Ergen is  
16 DISH, you have to go up before you go down. So you can't be in  
17 the control situation that they're setting forth, unless Ergen  
18 is DISH and DISH is Ergen. You have to go from DISH --

19           THE COURT: Go up, right.

20           MR. DUGAN: -- to Ergen and then back down. So it  
21 can't be a subsidiary under their own argument. So I just  
22 wanted to point that out on that piece, before I move to  
23 tortious interference, unless you have other questions about  
24 the breach of contract.

25           THE COURT: So you folks concede that an affiliate of

1 DISH could have bought the debt, correct?

2 MR. DUGAN: That an affiliate of DISH could buy the  
3 debt.

4 THE COURT: Could buy the debt?

5 MR. DUGAN: Yes. As long as that affiliate is not a  
6 subsidiary, because subsidiaries --

7 THE COURT: Okay, so 51 --

8 MR. DUGAN: -- are a form of affiliate.

9 THE COURT: Fifty-one, forty-nine, right? So an  
10 Entity, capitalized, owned forty-nine percent by DISH, and  
11 fifty-one percent by Mr. Ergen or SPSO could have bought the  
12 debt, right?

13 MR. DUGAN: You know, I don't know that I would go  
14 that far, because --

15 THE COURT: Why not?

16 MR. DUGAN: -- because I think if you're talking about  
17 one entity being under another, you're kind of in a zone.  
18 You're kind of in a zone. We're not talking here about one  
19 entity being under another. We're talking about one entity  
20 being under another who you have to go up to, to get down from.

21 THE COURT: The --

22 MR. DUGAN: There's a reason why we define terms the  
23 way we do. I mean, affiliate is no -- by, without question,  
24 broader than subsidiary. And frankly, Your Honor, I don't  
25 think that -- I mean, it would be interesting how it would turn



1 out if it happened the way you're suggesting. But I don't  
2 think that anyone on the Ergen side is necessarily interested  
3 in playing with those kinds of ownership structures. I mean --

4 THE COURT: I'm just trying to --

5 MR. DUGAN: Yeah.

6 THE COURT: I'm just trying to understand --

7 MR. DUGAN: Right.

8 THE COURT: -- what the appropriate vehicles would  
9 have -- are for having purchased the debt. So SPSO is an  
10 affiliate of DISH?

11 MR. DUGAN: Well, by definition it has to be, because  
12 Mr. Ergen controls it. I mean, so -- I think not just by the  
13 definition in the credit agreement, but by the definition in  
14 Webster's.

15 THE COURT: Okay.

16 MR. DUGAN: So, Your Honor, if I can move on to  
17 tortious interference.

18 THE COURT: Sure.

19 MR. DUGAN: Now, there are a lot of problems with this  
20 claim. Let's start out with the fact that I don't -- it's not  
21 quite clear what relevance it has. I mean, it is addressing --  
22 unless I'm missing something -- a very small piece of this debt  
23 puzzle. It's addressing a five million dollar trade. So even  
24 if the debtors were to prevail on it, it's far from clear what  
25 their damages might be or what consequence it can have, given

1 that a five-million-dollar piece of debt in this big picture  
2 doesn't have any leverage, doesn't have any real meaningful  
3 impact on anything. But that is their claim.

4 THE COURT: Can you help me out, and show me where it  
5 is that's it's limited to that?

6 MR. DUGAN: Okay, Your Honor.

7 THE COURT: I may have missed that.

8 MR. DUGAN: And maybe I'm misreading it, but it's also  
9 in their motion --

10 THE COURT: Okay.

11 MR. DUGAN: -- to dismiss. But what I am looking  
12 at -- I have to get there. I'm sorry, Your Honor. Give me one  
13 moment.

14 Okay, so what I'm looking at is the cause of action  
15 for tortious interference, which is the --

16 THE COURT: It's paragraph 10 --

17 MR. DUGAN: -- fifth claim for relief.

18 THE COURT: Paragraph 109?

19 MR. DUGAN: It's paragraph 109, I think. Maybe it's  
20 not that one. Let's see. Oh, here it is. I think it's --  
21 yeah, okay, it is paragraph 109. "SPSO, DISH, EchoStar, and  
22 Mr. Ergen" --

23 THE COURT: Right.

24 MR. DUGAN: -- "intentionally caused GPS to breach the  
25 credit agreement before SPSO itself became a party to that

1 agreement." That's what it says. That's the sentence that I'm  
2 focusing on.

3 THE COURT: Okay, and then -- I'm sorry; I was reading  
4 the subsequent paragraphs as additional acts.

5 MR. DUGAN: I thought that the subsequent paragraph  
6 was referring to the misrepresentation and the assignment and  
7 assumption that referred back to that first purchase, because  
8 the documentation tends to come months later. So he's -- I  
9 think what it's saying is on September 6th, 2012, Ergen  
10 represented in the assignment and assumption about that trade  
11 on April 13th, 2012. It's going back to April, which is when  
12 the first purchases occurred. I mean, to the extent, Your  
13 Honor, that --

14 THE COURT: But there's a -- I'm sorry; I just  
15 completely -- I missed that. I read this as being relating to  
16 the entire suite of trades because it refers to the LP debt  
17 trades.

18 MR. DUGAN: And Your Honor, I'm sure LightSquared can  
19 clarify what they meant, but they said it here, and they also  
20 said in their brief, that this related to when -- before SPSO  
21 became -- arguably became a party to the credit agreement. And  
22 the reason why they would say it that way, Your Honor, at least  
23 to my way of thinking, is pretty obvious, once you get into the  
24 law, which is --

25 THE COURT: Right.

1 MR. DUGAN: -- you can't be a party to a contract,  
2 breach it, and tortious interfere with it all at the same time.

3 THE COURT: At the same time, right.

4 MR. DUGAN: Right. Which I think the law is pretty  
5 clear about.

6 THE COURT: Okay. All right. Mr. Stone, you can  
7 clarify this at some point.

8 MR. STONE: Okay.

9 THE COURT: Okay.

10 MR. DUGAN: Okay. So, but Your Honor, that was one  
11 reason why we thought the tortious interference claim didn't  
12 work.

13 THE COURT: Okay, I got you; thank you.

14 MR. DUGAN: The other reason why we thought it didn't  
15 work is that when you talk about the UBS breach, the  
16 hypothetical UBS breach -- it's far from clear that there was  
17 any obligation by UBS under this credit agreement to have a  
18 gatekeeping function. They say they breached the gatekeeping  
19 function.

20 THE COURT: Well, to that extent, also it's a --  
21 there's not a claim against UBS.

22 MR. DUGAN: Well, there's no claim against UBS.

23 THE COURT: Right.

24 MR. DUGAN: And there's also no obligation that UBS  
25 has to be a gatekeeper, under the credit agreement, because UBS

1 is entitled to rely on the representations of those two --  
2 submit documents to it. And the agreement expressly exculpates  
3 them from doing so. So I think that they're high and dry on  
4 the breach by UBS argument which I just wanted to underscore  
5 for Your Honor.

6 The 502(b) claim, if I can touch on that. I mean, we  
7 have cited law that I think is very clear. That if, as they're  
8 alleging, their position is this breach -- the acquisition of  
9 debt by SPSO -- the result of it should be that their claim is  
10 disallowed. That they get nothing.

11 New York law is clear, I think, that for you to argue  
12 that transfer has that effect, if a transfer in violation of an  
13 agreement -- a transfer restriction and agreement -- to have  
14 that effect, it has to be clearly set forth in the agreement  
15 itself, in language that is very clear.

16 The clearest language you can have is, this transfer  
17 is null and void. In fact, that language is in the credit  
18 agreement. But it's not talking about a transfer to a  
19 noneligible assignee. It's talking about a transfer involving  
20 a borrower, not a transfer involving a noneligible assignee.  
21 There's nowhere in this credit agreement that says a transfer  
22 to a noneligible assignee is null and void. In fact, it says  
23 it should be treated as participation, which is a whole  
24 different thing, but --

25 THE COURT: Right, but then that takes us down another

1 rabbit warren, because the participation section pulls in the  
2 eligible assignee language. So that doesn't help. There is  
3 nothing that says that a transfer in violation of 10.04 -- I  
4 don't know if I have the section right -- is void or voidable.  
5 Nothing. It doesn't say that.

6 MR. DUGAN: It doesn't, Your Honor.

7 THE COURT: Right.

8 MR. DUGAN: That's the point we're making there.

9 THE COURT: Right. But the fact that it says that the  
10 transfer in violation of that prohibition doesn't effect the  
11 obligations of the borrower, that doesn't get you there. That  
12 just says that the money lent is still --

13 MR. DUGAN: Right.

14 THE COURT: -- owed.

15 MR. DUGAN: Right. But --

16 THE COURT: The company has to pay it back.

17 MR. DUGAN: But if under New York law, the credit  
18 agreement is not clear enough to avoid the transfer, then in  
19 some sense it must remain a transfer.

20 THE COURT: Well, I think that they -- and I think  
21 that there is case law to the effect that you're citing,  
22 clearly says that you have a claim for breach against the  
23 transferor, original assignor. But the question then is, well,  
24 maybe there's a claim for damages for the breach, right? In  
25 other words, it's --

1 MR. DUGAN: Right. Well, Your Honor --

2 THE COURT: So if the claim is allowed, perhaps  
3 there's a damage claim -- there's a damage claim for the  
4 breach. Maybe that damage claim is for the same amount as the  
5 transferred debt.

6 MR. DUGAN: Well, Your Honor, that's entirely  
7 possible. I mean, the claim we're specifically addressing is  
8 the equitable disallowance claim -- I'm sorry --

9 THE COURT: Right.

10 MR. DUGAN: -- the 502(b) disallowance claim as pled.

11 THE COURT: Right.

12 MR. DUGAN: I didn't see that damages theory pled in  
13 the complaint. It's an interesting one. I guess one could ask  
14 in a situation where the debtor is under any circumstance being  
15 either recapitalized or the assets being sold, I guess it's  
16 unclear to me how you can mount an argument that they've been  
17 damaged to the extent of a billion dollars by a billion dollars  
18 of debt in the hands of a competitor. I know that they hate  
19 competitors in their capital structure, because they say it so  
20 many times.

21 But it's unclear in the context of where we are in  
22 this reorganization/sale setting that a competitor in the  
23 capital structure is a serious concrete harm to them.

24 THE COURT: Right. But then again, that's another  
25 defense fact to be developed at trial, not something that it's



1 appropriate for me to rely on in granting a motion to dismiss.

2 MR. DUGAN: Right. Well, Your Honor, I hear you on  
3 that, but I think again, we're in the -- where you and I have a  
4 disconnect, and I understand we have it, is the issue of what  
5 are the inferences that can be drawn and how reasonable they  
6 are. And I think part of the issue really is, when I say, what  
7 are the inferences that can be drawn, I'm looking at A plus B  
8 plus C. And the only reason why I'm looking at A plus B plus C  
9 is because they put B and C in, not because I'm saying go look  
10 at B and C.

11 So we're starting off with that issue, but I totally  
12 get where you're coming from, Your Honor.

13 THE COURT: I mean, they do make a claim -- the second  
14 count in the LightSquared complaint is for damages. And it's  
15 been said before when I've pointed out that, as you said, I  
16 have an auction process now; we have a bidding process now, and  
17 the best and the highest bid will win. The suggestion was  
18 made, well, maybe all of this conduct made it more expensive  
19 for an alternative bidder plan proponent to prevail. That was  
20 suggested as a measure of damages, as opposed to the complete  
21 disallowance of the claim.

22 And again, so when you go there, that suggests  
23 something that would be a matter for trial, not something I  
24 could determine now.

25 MR. DUGAN: And Your Honor, just so I'm clear on what

1 you're suggesting. Are we referring back now to the  
2 manipulation of trade issue? In other words, the lack of --  
3 their alleged lack of knowing who their creditors were?

4 THE COURT: And the fact -- that and the fact that an  
5 ineligible assignee got into the capital structure, and  
6 therefore, rendered it harder to put a deal together at an  
7 earlier part. I'm not saying I'm saying that any of this is  
8 meritorious. I'm repeating to you what's been said to me --

9 MR. DUGAN: Right.

10 THE COURT: -- about a theory of recovery when I've  
11 questioned before causation and damages, right? If you --

12 MR. DUGAN: Well, Your Honor, once you accept the fact  
13 that I guess that there was some attempt to do something for  
14 the purpose of interfering with creditors, which we think is a  
15 hard stretch to make. I guess you can theorize things that  
16 could hypothetically come from that. But we're not disagreeing  
17 about that, Your Honor. I think what we're disagreeing about  
18 is whether, in fact, the allegations that we have before us get  
19 us over the hurdle on DISH being Ergen and Ergen being DISH on  
20 the one hand --

21 THE COURT: Well, what about the --

22 MR. DUGAN: -- or a subsidiary.

23 THE COURT: -- what about the existence of the release  
24 in the LBAC bid. So LBAC began life being fully owned by Mr.  
25 Ergen and then was transferred to DISH for a dollar. And as

1 far as I know, there are certain provisions -- I don't want to  
2 wander into anything that I shouldn't be, since we have an  
3 ongoing auction, but there are certain provisions in the bid  
4 that suggest a link.

5 MR. DUGAN: Well, Your Honor, I -- and I'm not sure  
6 that I know what those provisions are other than the only one  
7 that we've discussed in this room has been the release, which  
8 frankly is a little, I guess -- we can understand why there's a  
9 discussion, but it's not unusual in an asset purchase  
10 agreement --

11 THE COURT: I'm not interested --

12 MR. DUGAN: -- to have that kind of release.

13 THE COURT: I know fully well what's usual and not  
14 unusual. In this context, it's been made clear that a  
15 condition is that there be a claim allowance and a release of  
16 affirmative claims. So everybody knows the drill that  
17 purchasers don't want to be sued after the fact. But given the  
18 backdrop of the allegations as far as connection, identity of  
19 interest, et cetera, that's in particular why I'm interested in  
20 that provision in this case.

21 MR. DUGAN: Right. Well, Your Honor, I guess what I  
22 could suggest to Your Honor, I mean there is a claim that's  
23 been put out there, and I think that's an element of it, that  
24 SPSO, LBAC and DISH are inextricably linked. You know, again,  
25 it seems like that might be wandering into the equitable

1 subordination zone, maybe that's why that's out there. I don't  
2 believe that's relevant to the breach of contract claim, but  
3 let's just look at it.

4           You know, essentially, when they say inextricably  
5 linked the conflict that we have here is SPSO in buying debt.  
6 I know you don't want to look at Nevada, Your Honor, I  
7 understand you don't. But if we have a trial in this case, and  
8 it may be inevitable, but if we do, you're going to hear the  
9 story. But be that as it may, the timing and how things  
10 evolved, and it's a matter of public record as well, is that  
11 when Ergen was buying this trade, when he was buying this  
12 LightSquared debt, DISH was not considering LightSquared; it  
13 was considering Clearwire and Sprint as acquisition vehicles.  
14 Those were twenty billion dollars investments.

15           THE COURT: Okay. I'm going to stop you, because I  
16 started this question being a question about the release.  
17 And --

18           MR. DUGAN: Well, and the linkage, Your Honor. The  
19 linkage --

20           THE COURT: Okay.

21           MR. DUGAN: -- between SPSO, LBAC and DISH. Whether  
22 that linkage is adequately alleged on this record.

23           And the release, just to be clear about that, you  
24 know, although we don't think there is linkage, to focus on the  
25 release, that was included in this APA before there was any

1 cause of action that was made. It was publicly filed in this  
2 case in July, before any claim by Harbinger. In other words,  
3 it was part of this deal before there was anything to be  
4 released from. It's been part of this deal from way before  
5 there was any claims.

6 THE COURT: No, it -- well, that's fine, but the  
7 release, as it's been explained to me, it's not just a release  
8 of affirmative claims, it requires the full allowance of the  
9 SPSO debt.

10 MR. DUGAN: Well, I think it would require a release  
11 of claims for disallowance, right, yes.

12 THE COURT: Yes, claims for disallowance. So even  
13 before there were allegations there was a clear link between  
14 the desire of the bidder to proceed with the assurance that the  
15 debt owner was going to be paid back in full.

16 Ms. Strickland --

17 MR. DUGAN: Ms. Strickland is refreshing my  
18 recollection on something.

19 THE COURT: Okay.

20 MR. DUGAN: Because just in fairness, I was  
21 misstating something to Your Honor.

22 The release -- I mean, just to get to your point,  
23 there's nothing specific in the release, she refreshed my  
24 recollection, about disallowance specifically; it's a broad  
25 general release.

1 THE COURT: Yes. But, Mr. Dugan, I asked the question  
2 repeatedly and pointedly one or two hearings ago, and it was  
3 clarified to me that, in fact, what the release means is not  
4 just a release of affirmative claims, which I agree with you  
5 had not been alleged, but it requires that the debt claim be  
6 allowed in full.

7 MR. DUGAN: I think that's a conclusion that was  
8 reached because it is a broad release. It's a release of all  
9 claims. It doesn't specifically require what Your Honor just  
10 said. But I think because it is a broad release of all claims,  
11 it arguably covers it, I mean, but it doesn't carve that out  
12 and specifically recover it.

13 THE COURT: Mr. Dugan, now I'm going to start to a  
14 little bit lose my patience.

15 MR. DUGAN: Okay.

16 THE COURT: It's in the document that LBAC put forward  
17 as a bid. So somebody wrote it. And if somebody didn't  
18 understand what they meant at the time, subsequent events have  
19 forced them to clarify it. And it's been clarified to me  
20 before that, in fact, it includes a full allowance, such that I  
21 cannot just say you know what, we'll proceed on the bid, we'll  
22 deal with the claims allowance later, that would not satisfy  
23 the condition of the release.

24 MR. DUGAN: I -- I --

25 THE COURT: So if that's wrong you can tell me, but

1 that's what my understanding is of how that works.

2 MR. DUGAN: I understand, Your Honor.

3 THE COURT: And that fact, whether or not that changes  
4 now, that fact is a fact that's out there, and that may or may  
5 not have a bearing on the identity of interest inextricably  
6 linked argument.

7 MR. DUGAN: I understand what you're saying, Your  
8 Honor. And forgive me for the disconnect.

9 THE COURT: That's okay.

10 MR. DUGAN: I don't think I'm --

11 THE COURT: You all are working very hard and sharing  
12 the responsibility; I understand. But it's not -- I have to  
13 hold you to prior statements that were made when, perhaps, you  
14 weren't standing at the podium.

15 MR. DUGAN: I understand perfectly, Your Honor. Let's  
16 just move on if we may.

17 THE COURT: Sure.

18 MR. DUGAN: I don't know if you have any other  
19 questions about the LightSquared complaint and what our  
20 arguments are with respect to them.

21 THE COURT: Let me look at my notes if you don't mind.

22 MR. DUGAN: Sure.

23 THE COURT: I think most of my notes relate to  
24 questions I want to ask the other folks.

25 MR. DUGAN: Okay.



1 THE COURT: So you can finish up what you have and  
2 reserve for rebuttal.

3 MR. DUGAN: You don't know how happy I am to hear  
4 that, Your Honor. I'm very happy to hear that, Your Honor.

5 Let me just, if I can, briefly touch on Harbinger --

6 THE COURT: Okay.

7 MR. DUGAN: -- if that's okay.

8 THE COURT: Sure.

9 MR. DUGAN: Just as long as I'm up here.

10 THE COURT: Sure.

11 MR. DUGAN: This will be brief.

12 Your Honor, our motion to dismiss Harbinger's claims  
13 is to some extent procedural. We kind of think that when we  
14 got their pleading we didn't understand exactly where it was  
15 coming from given what we thought your order had --

16 THE COURT: Me too.

17 MR. DUGAN: -- Your Honor had ordered. It seemed like  
18 a little bit --

19 THE COURT: Right.

20 MR. DUGAN: -- of left field lob, and maybe Hail Mary  
21 pass and a combo of those. And so we would just posit before  
22 you, first, that it doesn't appear to comply with what Your  
23 Honor ordered.

24 THE COURT: I'm going to sort it out with them.

25 MR. DUGAN: Okay. We also believe that there's

1 some -- I mean, to the extent their complaint -- and it's  
2 confusing -- alleges that they're not really seeking to  
3 vindicate any rights for relief that they have themselves, it  
4 appears to be pled derivatively which raises another host of  
5 issues that I don't think they adequately explain in their  
6 briefing, so I don't want to belabor that point.

7 And the only other thing I would say on that is to the  
8 extent they've got the 502(b) claim which Your Honor I think  
9 did say they could re-plead, our position on that claim is the  
10 same as the one that we've asserted for LightSquared.

11 THE COURT: Okay. Okay. All right, thank you, Mr.  
12 Dugan.

13 MR. DUGAN: Okay, thank you.

14 MR. GIUFFRA: Good afternoon, Your Honor.

15 THE COURT: Good afternoon.

16 MR. GIUFFRA: Robert Giuffra, Sullivan & Cromwell, for  
17 DISH and EchoStar.

18 THE COURT: All right, Mr. Giuffra, let me just follow  
19 along here and make sure I have everything that you filed.

20 I have a memorandum of law in support of the motion to  
21 dismiss the LightSquared complaint and a reply.

22 MR. GIUFFRA: That's correct, Your Honor.

23 THE COURT: And you filed nothing with respect to the  
24 Harbinger, correct?

25 MR. GIUFFRA: No, Your Honor.

1 THE COURT: Okay.

2 MR. GIUFFRA: We're not a party to that complaint.

3 THE COURT: Okay.

4 MR. GIUFFRA: Your Honor, this is a motion pursuant to  
5 Rule 8 of the Federal Rules of Civil Procedure, and it focuses  
6 on the plausibility of the complaint as pled. In our view,  
7 they have not pled the single claim that they brought against  
8 DISH and EchoStar, and that's a tortious interference with  
9 contract claim.

10 Now, a tortious interference with contract claim  
11 requires certain elements. You have to have a --

12 THE COURT: Can I just stop you for a minute?

13 MR. GIUFFRA: Yes, Your Honor.

14 THE COURT: Now I'm confused. So DISH and EchoStar  
15 are defendants in the Harbinger complaint.

16 MR. GIUFFRA: Not in the Harbinger complaint; we're  
17 defendants --

18 THE COURT: No.

19 MR. GIUFFRA: -- in the LightSquared complaint.

20 MR. FRIEDMAN: Your Honor, we only objected to the  
21 plan and we joined in the subordination of the SPSO, but we're  
22 not suing anybody.

23 THE COURT: Okay. So we're --

24 MR. GIUFFRA: One less thing for us to do today, Your  
25 Honor. So we're only a defendant in the LightSquared

1 complaint --

2 THE COURT: Okay.

3 MR. GIUFFRA: -- Count V, which is the tortious  
4 interference claim --

5 THE COURT: Hold on.

6 MR. GIUFFRA: -- which is a very specific claim that  
7 has to be pled, and they've got to allege a breach of a  
8 contract.

9 THE COURT: I got it, you're right.

10 MR. GIUFFRA: They've got to allege that DISH and  
11 EchoStar intentionally --

12 THE COURT: Right.

13 MR. GIUFFRA: -- caused in the complaint, and this is  
14 important, Your Honor, in paragraph 109 --

15 THE COURT: Right.

16 MR. GIUFFRA: -- that they say DISH -- "SPSO, DISH,  
17 EchoStar and Mr. Ergen intentionally caused UBS to breach  
18 Section 10.04 of the credit agreement." So that's what they've  
19 got to plead. And then they've also go to plead some sort of  
20 an injury and some sort of damages.

21 THE COURT: Right.

22 MR. GIUFFRA: Now, we believe, Your Honor, that  
23 there's no basis to infer from this complaint that Ergen or Mr.  
24 Kiser were acting as agents for DISH and EchoStar. And I  
25 talked about this the last time I stood before Your Honor --

1 THE COURT: Right.

2 MR. GIUFFRA: -- about the fact that DISH is a public  
3 company with 35,000 employees, more than 10,000 shareholders,  
4 same for EchoStar, and there's virtually nothing in this  
5 complaint about EchoStar at all.

6 And I think if Your Honor looks at paragraph 86 of the  
7 complaint, because I think that paragraph may be -- we could  
8 sort of speed up some of the points that Mr. Dugan was making,  
9 and maybe look at them in a slightly different way.

10 Paragraph 86, which is in the breach of contract  
11 claim, and I think the reason that they pled this in sort of an  
12 odd way against DISH and EchoStar was because they wanted --  
13 LightSquared wanted to bring a breach of contract claim against  
14 Mr. Ergen and against SPSO, and they couldn't allege they were  
15 tortiously interfering with the same contract, because you only  
16 get one bite at the apple.

17 THE COURT: Right.

18 MR. GIUFFRA: You can only do a breach of contract  
19 claim, or you can bring a tortious interference claim, which is  
20 why they've come up with this sort of oddball claim involving  
21 UBS, so they can basically drag everybody into a tortious  
22 interference claim, and get their cake and eat it too.

23 But if you look at paragraph 86, and, again, it's a  
24 Rule 8 motion, Twombly, Iqbal, you've got to plead it in a  
25 plausible way.

1 Now, they plead in the complaint it's a public  
2 company; there's no question about that. And they say -- they  
3 just -- they have one sentence: "SPSO is a subsidiary of DISH  
4 and EchoStar." That's a conclusory allegation in our view.

5 Then they go on to say "DISH and EchoStar controlled  
6 SPSO, among other reasons because their executive chairman, Mr.  
7 Ergen, acting within the scope" -- "and the treasurer, Mr.  
8 Kiser, acting within the scope of their agency for the benefit  
9 of DISH and EchoStar, directed the management in investment  
10 policies of SPSO, specifically it's purchase of interest in LP  
11 debt." That's the only allegation that I see in this entire  
12 complaint supporting the notion that SPSO is a subsidiary of  
13 DISH and EchoStar.

14 Now, what are we talking about here? We're talking  
15 about a billion dollars of debt. And Your Honor hit on the  
16 point before that public companies can't go buy a billion  
17 dollars in debt in secret. They have boards of directors; they  
18 have auditors; they've got obligations with the SEC. And in  
19 particular, if they're using their own money, purchases of the  
20 debt -- and here we're talking about purchases that went back  
21 in time -- would be reflected in the financial statements of a  
22 company that would have to be disclosed.

23 They obviously can't cite anything like that, and  
24 maybe to put a different spin on what Mr. Dugan was saying,  
25 there are no allegations in the complaint of board approval of

1 this conduct; there's no allegations in this complaint of a  
2 board authorization of the conduct.

3 THE COURT: That's true, but I think their theory is  
4 that because of the extent of the control that Mr. Ergen  
5 exercises over DISH; fifty-three percent economic control,  
6 ninety percent, almost, voting control, it didn't matter.

7 MR. GIUFFRA: Okay, but --

8 THE COURT: Just as it -- might I finish?

9 MR. GIUFFRA: Yeah, I'm sorry, Your Honor.

10 THE COURT: Okay. It just doesn't matter, so that --

11 MR. GIUFFRA: But that --

12 THE COURT: -- therefore, when the debt's purchased,  
13 it doesn't matter because at the end of the day the chairman  
14 knows that the company will just do what he wants them to do.  
15 I'm not saying I'm finding that as a fact. I'm saying that  
16 that's what their theory is, that that's what their theory is:  
17 that at that point when the debt was purchased there was an  
18 optionality about it. He could use it for his own account, or  
19 if he subsequently decided that DISH would become involved,  
20 then DISH would become involved. I mean, I think that's what  
21 their theory is.

22 MR. GIUFFRA: That is their theory, Your Honor, but  
23 it's not a plausible theory as a matter of law. And the reason  
24 why it's not a plausible theory is if you accept that theory  
25 and take it to its logical extreme, and let's look again at the

1 allegations of the compliant. If Mr. Ergen goes out with the  
2 assistance of Mr. Kiser and buys a million acres of land in the  
3 west, okay, and just uses his own money and buys that land, is  
4 that suddenly that whatever that vehicle --

5 THE COURT: But it's context. It's context.

6 MR. GIUFFRA: Con --

7 THE COURT: I mean, if Mr. Ergen goes out and buys a  
8 large flat screen TV, I mean, it's context, right? So he's  
9 buying the debt of a -- distressed debt of a telecommunications  
10 company, it's in the neighborhood of what DISH and EchoStar do.

11 MR. GIUFFRA: But, again, if he buys a billion dollars  
12 of distressed debt he can't do it in secret. And if you read  
13 the allegations of the complaint they go back to the same  
14 arguments that Harbinger made that Mr. Ergen is DISH or Mr.  
15 Ergen is EchoStar, and it's all sort of one and the same  
16 without any specific pleadings, how in this particular case  
17 there was some authorization by some principal to someone other  
18 than the fact that Mr. Ergen is the executive chairman.

19 MR. GIUFFRA: That's the only --

20 THE COURT: Well, you have the treasurer --

21 MR. GIUFFRA: -- allegation they have.

22 THE COURT: The treasurer of DISH is executing the  
23 trades.

24 MR. GIUFFRA: But there's no allegation that -- people  
25 have multiple hats in this world, particularly corporate



1 executives and people who are involved in companies -- in  
2 multiple companies, because the allegation is oh, he works for  
3 EchoStar, too, and they just sort of plead it in a conclusory  
4 way. They don't plead any specifics. I'm not disputing that  
5 he is the treasurer; I'm not disputing the e-mails that they  
6 attach in the complaint. But the point is there's no  
7 allegation that they were authorized to engage in the conduct  
8 that they are alleged to have engaged in here and specifically  
9 buying the debt. Okay? There's got to be some authorization  
10 to do something that big. Okay?

11 I could be the CEO of a major company; even if I  
12 control it, I can't just go out and buy a billion dollars worth  
13 of debt and have it be ascribed to the company that I'm a CEO  
14 of. People have multiple hats. They don't allege in this  
15 complaint, for example, that that debt is owned by DISH or  
16 EchoStar. Those are public companies. That's an asset of a  
17 public company. You would have to use -- if Mr. -- they don't  
18 allege that money from DISH or EchoStar was used to buy the  
19 debt. One could talk about optionality as much as one wants  
20 but that still doesn't mean that in connection with these  
21 purchases that DISH or EchoStar had authorized them. They're  
22 not small purchases.

23 Now, let me focus, Your Honor, just on the elements.  
24 Again, in Count V they focus on UBS, and I believe that was a  
25 tactical decision because they could not allege that DISH or

1 EchoStar had tortiously interfered with LightSquared's debt  
2 agreement because they wanted to be able to bring the claim  
3 against Ergen for an act -- the Count II claim for breach of  
4 the credit agreement. So they come up with this theory that  
5 there is a breach by UBS in some way because that's what they  
6 allege in paragraph 109 that "intentionally caused UBS to  
7 breach 10.04." And again, tortious interference is an  
8 intentional tort. It's not just a negligence based and they've  
9 got to intentionally cause UBS to breach Section 10.04.

10 Now, they've got to allege some facts that support the  
11 notion that UBS breached the credit agreement Section 10.04.  
12 But UBS under the credit agreement itself, Section 9.03,  
13 Section 9.04, Mr. Dugan talked about it, was under no  
14 obligation to ascertain the accuracy of representations that  
15 were made to UBS. And then in paragraph 9.04 it says, "No  
16 liability for relying upon representations that are made."

17 So you need as a precursor to going back to basic  
18 building-block pleading rules, you need to establish a breach  
19 by UBS. That's what they pled in paragraph 109. If you can't  
20 establish a breach by UBS, they've got no claim against DISH or  
21 EchoStar for tortiously and intentionally causing UBS to breach  
22 an agreement.

23 Now, number one, UBS could not have breached the  
24 credit agreement because it had no obligation to ascertain the  
25 bona fides of people who claim to be eligible assignees, and

1 that's straight out of the credit agreement.

2 Second, in our opinion Your Honor, in our view, SPSO  
3 was an eligible assignee in any event and Your Honor, not to  
4 beat an argument that's been made, just look to footnote 39 --  
5 37, excuse me, of Your Honor's initial opinion on the last go  
6 round we had. Your Honor made the point that -- and we think  
7 it's correct -- that the Court did not find the argument that  
8 subsidiary, small "s," and subsidiary, big "S," made the same  
9 thing in a contract that was negotiated by separate folks.

10 So number one, I don't think that DISH and EchoStar  
11 are an ineligible assignee. Even if they were, they haven't  
12 pled that UBS breached any agreement and they haven't pled --  
13 again it's very conclusory and they've got a Twombly-Iqbal  
14 obligation -- they don't allege, Your Honor, that in some way  
15 DISH or EchoStar, as they must, were the but-for cause for any  
16 breach by UBS and that there was some intentional conduct by  
17 DISH or EchoStar to cause that. And that goes back in part to  
18 the agency argument that I've made before which is that you're  
19 dealing with a public company. It's not plausible to say that  
20 just because someone is the executive chairman -- and that's  
21 really what they do; they take the titles and they say the  
22 titles mean for all purposes, actions they take and I guess  
23 Your Honor's point would be in the neighborhood, are actions of  
24 the public companies.

25 And we don't believe, Your Honor, that's plausible

1 pleading when you're dealing with public companies that have  
2 independent --

3 THE COURT: Well, what if I were to dismiss out DISH  
4 and EchoStar and the rest of the complaints, in some fashion,  
5 went forward or enough of the core allegations went forward and  
6 at the end of the day, at the end of the trial, hypothetically,  
7 I were to find that there is an identity of interest -- putting  
8 aside the subsidiary upper case/lower case issue -- I were to  
9 find for the plaintiffs on their theory that Mr. Ergen and DISH  
10 have an identity of interest and, therefore, SPSO couldn't buy  
11 the debt, just hypothetically, but I've let DISH and EchoStar  
12 out. Isn't that problematic?

13 MR. GIUFFRA: No, they would still have a claim under  
14 their breach of contract claim against Mr. Ergen. The only  
15 claim they pled against DISH and EchoStar is this tortious  
16 interference claim which is clearly just a convoluted theory  
17 that's being put together --

18 THE COURT: But I guess the question that I am asking  
19 you in terms of the efficiency, then, if there were to be a  
20 finding that Ergen and DISH are one and the same, right, but we  
21 don't have DISH as a party in the proceeding anymore, wouldn't  
22 that require yet another trial of some kind? That's what I am  
23 trying --

24 MR. GIUFFRA: Well, theoretically --

25 THE COURT: -- I'm just appealing to your

1 sophistication as a litigator to help me out.

2 MR. GIUFFRA: A couple of points; obviously they can  
3 only have us participate in this party if they've pled a claim  
4 against us.

5 THE COURT: Sure.

6 MR. GIUFFRA: We don't think they have. If the claim  
7 is, okay, we bring a claim against Mr. Ergen for breach of  
8 contract, they get a claim against Mr. Ergen for damages,  
9 okay -- and I don't think they can for all the reasons that are  
10 in all the papers, but let's just as a theoretical matter, they  
11 would try to enforce a judgment against Mr. Ergen if you found  
12 that Ergen and DISH were the same. Presumably they could try  
13 to enforce that judgment against DISH or EchoStar. We would  
14 make all the arguments about how we maintained separate  
15 corporate ownership.

16 THE COURT: Right.

17 MR. GIUFFRA: There's no piercing of the corporate  
18 veil, which they haven't pled in this complaint. So you're  
19 talking about a theoretical issue and I think it's -- Mr.  
20 Ergen, you would have to get past Mr. -- you would have to be  
21 able to establish breach by Mr. Ergen, Mr. Ergen not paying on  
22 the judgment and then you would have to be able to establish  
23 that there was a basis for piercing the corporate veil between  
24 Ergen and DISH and EchoStar: public companies with  
25 shareholders, directors, accountants. And presumably if you're

1 a noncontrolling, he owns about fifty-two percent of the  
2 company, you've got another forty plus percent of those  
3 companies --

4 THE COURT: All right, but that's economic. That's  
5 not -- voting is much higher; he's much higher.

6 MR. GIUFFRA: But you're focused on, well, they've got  
7 a claim against Mr. Ergen. It's a money damages claim, right?  
8 So the question is who pays the money if there's a judgment and  
9 does DISH or EchoStar and its noncontrolling shareholders have  
10 a -- are they on the hook for this, which is part of the  
11 problem with what we're dealing with and that's why we're  
12 fighting this battle with Your Honor which is the mere fact  
13 that someone is the executive chairman of a public company  
14 doesn't make the noncontrolling shareholders, the passive  
15 shareholders and their investment part of a litigation.  
16 There's got to be some control that's been -- or some  
17 authorization by the principal, the board of directors,  
18 particularly given -- and again going back to plausibility -- a  
19 transaction that involves a billion dollars.

20 So I don't see a problem if you went down that road.  
21 I don't think you'll ever get there, but just as an academic  
22 exercise, you would still -- you would go first to Mr. Ergen.  
23 Then you would have to establish some sort of piercing of the  
24 corporate veil and then you would try to go to the shareholders  
25 of -- and the assets of DISH and EchoStar, I guess as a

1 theoretical matter.

2 So one, we don't think there's a breach by UBS. Two,  
3 we don't think that DISH and EchoStar are the but-for cause of  
4 that breach and they've got nothing other than this basically  
5 agency theory by title.

6 And then the other point, Your Honor, which I just  
7 want to talk about for a second, is they haven't alleged any  
8 damages as a matter of law, any injury. And they come back and  
9 they make the point, well, LightSquared alleges that they were  
10 harmed by the fact that SPSO was in the capital structure and  
11 had a blocking position. And there's no specific allegations  
12 in this complaint. And they speculate in their brief about  
13 impacts during the exclusivity period but there's no allegation  
14 and as I -- going through the records, Your Honor, there was a  
15 number of extensions on that exclusivity period; there's no  
16 allegation that whatever plan was going to be put forward by  
17 LightSquared or by Harbinger was going to succeed. There was  
18 obviously a lot of contingencies like exit financing, creditor  
19 votes, board approval. And there's a lot of reasons why  
20 LightSquared was unable to negotiate a plan during the  
21 exclusivity period. Your Honor's more aware of them even than  
22 I am.

23 And in fact, Your Honor, at page 41 of the last  
24 decision you issued in this case, you made the point that  
25 there's no allegation in Harbinger's complaint that

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

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

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



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

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

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

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

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

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

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

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

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

5           THE COURT: No.

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

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

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

24           THE COURT: Okay.

25           MR. GIUFFRA: Okay.

1 THE COURT: Thank you.

2 MR. GIUFFRA: Thank you, Your Honor.

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

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

6 THE COURT: Ms. Strickland?

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

13 THE COURT: Okay. Mr. Sussberg?

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

16 THE COURT: All right.

17 MR. SUSSBERG: If --

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

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

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

3 THE COURT: Mr. Sussberg?

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

7 THE COURT: I don't.

8 MR. SUSSBERG: -- things happening.

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

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

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

15 MR. SUSSBERG: That is our plan.

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

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

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

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

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

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

8 MR. STONE: Okay.

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

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

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

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

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

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

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

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

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

20           THE COURT: Okay.

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

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

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

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

5 MR. STONE: The reply, Your Honor.

6 THE COURT: Okay.

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

13 THE COURT: Okay.

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

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

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

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

4 THE COURT: I skipped them.

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

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

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

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

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

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

7 MR. STONE: Yes.

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

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

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

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

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

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

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

13 THE COURT: Just at the LP.

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

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

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

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

21 MR. STONE: In the complaint?

22 THE COURT: In the plan.

23 MR. STONE: Oh, in the plan.

24 THE COURT: Mr. Barr?

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

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

5 THE COURT: Okay, thank you.

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

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

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

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

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

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

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

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



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

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

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

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

17 MR. STONE: Well --

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

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

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

8 MR. STONE: Right.

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

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

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

20 MR. STONE: No.

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

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

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

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

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

1 THE COURT: Okay.

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

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

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

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

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

9 MR. BARR: So I should hand it?

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

11 MR. BARR: Okay.

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

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

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

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

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

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

7 MR. STONE: Certainly, Your Honor.

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

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

16 MR. STONE: Yes.

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

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

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

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

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

10 MR. STONE: Correct.

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

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

16 THE COURT: From May, 2012.

17 MR. STONE: Yes.

18 THE COURT: Okay. Anything else?

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

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

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

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

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

2 UNIDENTIFIED SPEAKER: Thanks.

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

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

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

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

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

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

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

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

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

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

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

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

6 MR. FRIEDMAN: Claim disallowance.

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

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

14 THE COURT: Right.

15 MR. FRIEDMAN: -- because I --

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

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



1 THE COURT: Right.

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

9 THE COURT: Right.

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

12 THE COURT: Right.

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

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

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

24 MR. FRIEDMAN: Exactly. Exactly.

25 THE COURT: Right?

1 MR. FRIEDMAN: Yes.

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

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

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

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

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

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

1 THE COURT: Right.

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

4 THE COURT: Right.

5 MR. FRIEDMAN: So --

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

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

17 THE COURT: Sure.

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

23 THE COURT: Right.

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

1 THE COURT: Right.

2 MR. FRIEDMAN: So --

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

4 MR. FRIEDMAN: Yes.

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

7 MR. FRIEDMAN: Yes.

8 THE COURT: Right?

9 MR. FRIEDMAN: Yes.

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

13 MR. FRIEDMAN: Yes. Yes.

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

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

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

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

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

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

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

19 MR. FRIEDMAN: No.

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

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

25 THE COURT: That one is --

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

2 THE COURT: Right.

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

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

7 MR. FRIEDMAN: Yes.

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

10 MR. FRIEDMAN: Right.

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

14 MR. FRIEDMAN: Right.

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

17 MR. FRIEDMAN: Right. Right.

18 THE COURT: So isn't that --

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

25 THE COURT: Right.

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

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

4 MR. FRIEDMAN: Right. Right.

5 THE COURT: Right?

6 MR. FRIEDMAN: But we'll --

7 THE COURT: So --

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

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

14 MR. FRIEDMAN: Yes.

15 THE COURT: -- on January 9th.

16 MR. FRIEDMAN: Yes. Yes.

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

19 MR. FRIEDMAN: Tomorrow.

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

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

24 THE COURT: -- which -- subordination. Thank you.

25 You have to put in a plan tomorrow --

1 MR. FRIEDMAN: No question.

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

4 MR. FRIEDMAN: Yes.

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

6 MR. FRIEDMAN: Right.

7 THE COURT: I mean, this all --

8 MR. FRIEDMAN: There --

9 THE COURT: The same set of transactions --

10 MR. FRIEDMAN: Right.

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

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

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

20 MR. FRIEDMAN: Right.

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

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



1 THE COURT: Right.

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

5 THE COURT: Okay.

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

7 THE COURT: Right.

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

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

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

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

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

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

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

4 MR. FRIEDMAN: Um-hum.

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

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

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

14 MR. FRIEDMAN: Right.

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

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

22 THE COURT: Okay.

23 MR. FRIEDMAN: But --

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

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

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

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

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