

EXHIBIT E

EXHIBIT E

REGISTER OF ACTIONS

CASE No. A-13-686775-B

Jacksonville Police and Fire Pension Fund, Plaintiff(s) vs. Charles Ergen, Defendant(s)

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Case Type: **Business Court**
Date Filed: **08/09/2013**
Location: **Department 11**
Cross-Reference Case Number: **A686775**
Supreme Court No.: **69012**
69729

RELATED CASE INFORMATION

Related Cases

- A-13-688862-B (Consolidated)
- A-14-693887-B (Consolidated)

PARTY INFORMATION

Lead Attorneys

Defendant **Ergen, Charles W.**

Joshua H. Reisman
Retained
702-727-6258(W)

Plaintiff **Jacksonville Police and Fire Pension Fund**

Brian W. Boschee
Retained
702-791-0308(W)

EVENTS & ORDERS OF THE COURT

08/21/2015 | **All Pending Motions** (3:00 AM) (Judicial Officer Gonzalez, Elizabeth)

Minutes

08/21/2015 3:00 AM

- THE SPECIAL LITIGATION COMMITTEE'S MOTION TO SEAL SUPPLEMENTAL REPLY IN SUPPORT OF ITS MOTION TO DEFER AND CERTAIN EXHIBITS THERETO PLAINTIFF'S MOTION TO REDACT ITS SUPPLEMENTAL OPPOSITION TO THE SLC'S MOTION TO DEFER TO THE SLC'S DETERMINATION THAT THE CLAIMS SHOULD BE DISMISSED PLAINTIFF'S MOTION TO SEAL SUPPLEMENTAL OPPOSITION TO THE SLC'S MOTION TO DEFER TO THE SLC'S DETERMINATION THAT THE CLAIMS SHOULD BE DISMISSED AND APPENDIX OF EXHIBITS TO SUPPLEMENTAL OPPOSITION TO THE SLC'S MOTION TO DEFER TO THE SLC'S DETERMINATION THAT THE CLAIMS SHOULD BE DISMISSED The Court has reviewed the supplements to the motion to seal and redact filed by Plaintiff and the SLC, exhibits 1 and 2 to the motion to compel relate to sensitive business and litigation information and includes attorney work product accordingly the request to seal those exhibits is granted. The motion to seal the

supplemental opposition to the motion to defer is GRANTED IN PART. The following exhibits are permitted to be sealed or redacted as noted below: 1 Redacted version due to atty client privilege and atty work product as submitted in supplement 2 Redacted version due to atty client privilege and atty work product as submitted in supplement 3 Redacted version due to atty client privilege and atty work product as submitted in supplement 5 Redact third party email address and resubmit 6 Sealed due to atty work product and sensitive business information 9 Sealed due to atty work product and sensitive business information 10 Sealed due to atty work product and sensitive business information 12 Sealed due to BK order and sensitive business information 14 Redact third party email address and resubmit 16 Redact third party email address and resubmit 17 Redact third party email address and resubmit 18 Redact third party email address and resubmit 20 Redact third party email address and phone numbers and resubmit 22 Redact third party email address and resubmit 23 Redact third party email address and resubmit 24 Redact third party email address and resubmit 25 Redact third party email address and resubmit 26 Redact third party email address and resubmit 27 Redact third party email address and resubmit 28 Redact third party email address and resubmit 30 Redact third party email address and resubmit 31 Redact third party email address and resubmit 32 Redact phone number and resubmit 33 Redact third party email address and resubmit 34 Redact third party email address and resubmit 35 Redact third party email address and resubmit 36 Redact third party email address and resubmit 37 Redact third party email address and resubmit 38 Redact third party email address and resubmit 42 Redact third party email address and resubmit 48 Sealed due to atty work product and sensitive business information 49 Sealed due to atty work product and sensitive business information 51 Sealed due to atty work product and sensitive business information 52 Sealed due to atty work product and sensitive business information 53 Sealed due to atty work product and sensitive business information 55 Sealed due to atty work product and sensitive business information 60 Sealed due to atty work product and sensitive business information 70 Sealed due to atty work product and sensitive business information 72 Sealed due to atty work product and sensitive business information 73 Sealed due to atty work product and sensitive business information 77 Sealed due to atty work product and sensitive business information 78 Sealed due to atty work product and sensitive business information 79 Sealed due to atty work product and sensitive business information 80 Sealed due to atty work product and sensitive business information 81 Sealed due to atty work product and sensitive business information 82 Sealed due to atty work product and sensitive business information 83 Sealed due to atty work product and sensitive business information 84 Sealed due to atty work product and sensitive business information 87 Sealed due to atty work product and sensitive business information 97 Sealed due to atty work product and sensitive business information 98 Sealed due to atty work product and sensitive business information The motion to seal the supplemental reply to the motion to defer is GRANTED IN PART. The following exhibits are permitted to be sealed or redacted as noted below: D Sealed due to atty work product and sensitive business information E Sealed due to atty work product and sensitive business information J Sealed due to atty work product and sensitive business information K Sealed due to atty work product and sensitive business information CLERK'S NOTE: The above minute order has been distributed to Brian Boschee, Esq. (702-791-1912), Kirk Lenhard, Esq. (702-382-8135), James Pisanelli, Esq. (702-214-2101), and Joshua Reisman, Esq. (702-446-6756)

[Return to Register of Actions](#)

EXHIBIT D

EXHIBIT D

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF DISH NETWORK
DERIVATIVE LITIGATION.

No. 69012

JACKSONVILLE POLICE AND FIRE
PENSION FUND,

Appellant,

vs.

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

Respondents.

FILED

AUG 17 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

IN THE MATTER OF DISH NETWORK
DERIVATIVE LITIGATION.

No. 69729

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,

Respondents.

ORDER

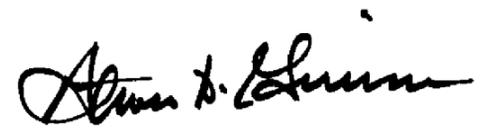
Appellant has filed a motion to redact portions of its opening brief and to file documents in its appendix under seal. The Special Litigation Committee of DISH Network Corporation (SLC) has filed a limited opposition and countermotion for leave to make additional

redactions.¹ The parties agree that the documents and portions of the opening brief identified by appellant should remain sealed pursuant to Protective Orders entered by the district court. The SLC, however, contends that additional information on page 74 of the opening brief is also subject to the protective order and should be redacted. SLC also agrees to appellant's motion that referenced documents at pages JA007346-47, JA007356-57 and JA007468 of Volume 30; pages JA007502 and JA7535-43 of Volume 31, pages JA007769-72 of Volume 32 and page JA008245 of Volume 34 of the sealed portions of the Joint Appendix may be unsealed and disclosed publicly. Accordingly, the clerk of this court shall unseal the identified portions of the joint appendix, filed as "Appendix to Opening Brief." However, with respect to the referenced documents at pages JA007348-55 of Volume 30 of the sealed portions of the Joint Appendix, we agree with SLC that the personal contact information of third parties contained therein (including personal email addresses) shall remain redacted pursuant to the District Court's October 21, 2013, Stipulated Confidentiality Agreement and Protective Order and August 21, 2015, Minute Order. Cause appearing, we grant the motions. The clerk of this court shall file the redacted opening brief provisionally received on May 31, 2016, and shall file under seal the unredacted opening brief and sealed portions of the appendix to the opening brief, provisionally received in this court on May 27, 2016.

¹We direct the clerk of this court to file SCL's "limited Opposition to Appellant's Motion for Leave to Redact Portions of Appellant's Opening Brief and to Seal Portions of the Appendix and Countermotion for Leave to Make Additional Redactions" with "Sealed Exhibit C," provisionally received on June 10, 2016.

EXHIBIT C

EXHIBIT C



CLERK OF THE COURT

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15 *Attorneys for the Special Litigation Committee
of Dish Network Corporation*
16

17 **DISTRICT COURT
CLARK COUNTY, NEVADA**

18 IN RE DISH NETWORK CORPORATION
19 DERIVATIVE LITIGATION

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

20
21 **STIPULATION AND
22 PROTECTIVE ORDER**

23
24 WHEREAS, on July 25, 2014, plaintiff Jacksonville Police and Fire Pension Fund
25 (“Jacksonville”) filed the Verified Second Amended Shareholder Derivative Complaint of
26 Jacksonville Police and Fire Pension Fund Pursuant to Rule 23.1 of the Nevada Rules of Civil
27 Procedure (“Second Amended Complaint”) purporting to assert claims on behalf of DISH
28 Network Corporation (“DISH”) against certain DISH directors and officers;

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

1 WHEREAS, on October 24, 2014, the Special Litigation Committee (the “SLC”) of
2 DISH, after conducting an investigation, filed with the Court a report (the “SLC Report”), in
3 which it presented its determination that pursuing the claims asserted in the Second Amended
4 Complaint was not in DISH’s best interests;

5 WHEREAS, on November 17, 2014, the SLC filed a Motion to Defer to the SLC’s
6 Determination that the Claims Should Be Dismissed (the “Motion to Defer”), by which the SLC
7 requested that the claims of the Second Amended Complaint be dismissed with prejudice on the
8 ground that they were not in DISH’s best interest;

9 WHEREAS, on December 10, 2014, Jacksonville filed its opposition to the Motion to
10 Defer, and on January 5, 2015, the SLC filed its Reply in Support of the Motion to Defer;

11 WHEREAS, at the hearing on January 12, 2015, and in further response and opposition
12 to the Motion to Defer, Jacksonville served an affidavit (the “Rule 56(f) Affidavit”) seeking
13 discovery pursuant to Rule 56(f), by which Jacksonville requested, among other discovery,
14 certain documents (the “Rule56(f) Requests”);

15 WHEREAS, by order dated January 12, 2015, the Court granted the Rule 56(f) Motion to
16 the extent that it requested discovery concerning the “independence and thoroughness of the
17 investigation by the Special Litigation Committee;”

18 WHEREAS, on January 26, 2015, in response to the Rule 56(f) Requests, the SLC
19 objected to producing, among other documents, (1) summaries of interviews conducted by the
20 SLC and/or its counsel; (2) documents provided to the SLC by its counsel; and (3) any drafts of
21 the SLC Report provided to persons other than the SLC or its counsel before the SLC Report was
22 filed with the Court (collectively the “Disputed Documents”), on the asserted grounds, among
23 other grounds, that they constitute attorney work product, may be subject to a common-interest
24 privilege with respect to third parties outside DISH, are highly confidential, and exceed the scope
25 of permissible discovery from a special litigation committee on the issues of independence of the
26 SLC and thoroughness of the SLC’s investigation;

1 WHEREAS, the SLC has expressed to Jacksonville its concern that the Disputed
2 Documents should not be produced in a manner that might permit their use against DISH in
3 cases pending or that may be asserted against DISH, including cases pending in the United States
4 Bankruptcy Court for the Southern District of New York and the United States District Court for
5 the District of Colorado, which address or may address issues related to the factual and legal
6 issues raised and discussed in the Second Amended Complaint and the SLC Report;

7 WHEREAS, the SLC and Jacksonville have met and conferred in an effort to resolve the
8 disputes between the SLC and Jacksonville concerning the SLC's objections to the production of
9 the Disputed Documents and other documents;

10 WHEREAS, to resolve aspects of the disputes described above, the SLC has indicated
11 that it will agree to produce, and will produce, the Disputed Documents specified below,
12 provided that a stipulated protective order is entered by the Court setting forth the terms set forth
13 herein; and

14 WHEREAS, Jacksonville has agreed to accept such terms in exchange for the SLC's
15 agreement to produce such documents;

16 NOW, THEREFORE, IT IS STIPULATED AND ORDERED AS FOLLOWS:

17 1. Following approval and entry by the Court of this Stipulated Protective Order, the
18 SLC shall produce the following Disputed Documents:

19 A. the final versions of all memoranda prepared by counsel for the SLC
20 summarizing interviews conducted by the SLC in the investigation leading to the SLC
21 Report (the "Interview Summaries"), whether or not such memoranda were provided to
22 the members of the SLC, except to the extent such memoranda contain information that is
23 subject to the attorney-client privilege of DISH (although the redaction of any such
24 information shall be disclosed on an appropriate privilege log);

25 B. any documents collected by counsel for the SLC during the investigation
26 leading to the SLC Report from persons other than counsel for the SLC that were
27 provided, before the SLC Report was filed, to the members of the SLC by counsel for the

1 SLC (the “Selected Documents”), except to the extent such documents have already been
2 provided to Jacksonville as exhibits to the SLC Report or constitute or contain
3 information that is subject to the attorney-client privilege of DISH (although the
4 withholding or redaction of any such information shall be disclosed on an appropriate
5 privilege log); and

6 C. any drafts of the SLC Report or excerpts of such drafts that were disclosed
7 to persons, other than the members of the SLC or counsel for the SLC (the “Subject Draft
8 Reports”), including or constituting any such drafts or excerpts that were disclosed to
9 DISH’s FCC counsel and/or other counsel for DISH, except to the extent such drafts or
10 excerpts contain information that is subject to the attorney-client privilege of DISH
11 (although the redaction of any such information shall be disclosed on an appropriate
12 privilege log);

13 2. The SLC asserts that the Interview Summaries, the collection of the Selected
14 Documents, and the Subject Draft Reports (the “Protected Documents”) constitute attorney work
15 product of counsel for the SLC that is protected from disclosure under the common law, the
16 common-interest privilege, and Nevada Rule of Civil Procedure 26. Without admitting or
17 denying the SLC’s work product assertions, the parties hereby agree, and the Court orders, that
18 the SLC and/or its counsel shall mark all Protected Documents produced to Jacksonville as
19 “Protected Documents,” and the Protected Documents shall continue to be afforded attorney
20 work product protection and/or common-interest privilege protection while in the possession of
21 derivative plaintiff Jacksonville and its counsel and the other parties to this litigation and their
22 counsel, and the production of the Protected Documents shall not waive the work product
23 protection for such documents, nor waive the work product protection for any other documents
24 possessed by the members of the SLC or counsel for the SLC;

25 3. The SLC, its members and counsel shall not be required to produce for the
26 Motion to Defer any documents that are properly protected from disclosure as attorney work
27 product of counsel for the SLC, other than the Protected Documents, including, without

1 limitation, (a) any draft or final memoranda, analyses or email prepared by counsel for the SLC
2 or at their request, whether or not disclosed to members of the SLC, (b) any drafts of the SLC
3 Report other than the Subject Draft Reports, whether or not disclosed to the members of the
4 SLC, or (c) any drafts of or documents prepared by the SLC's counsel concerning any reports,
5 briefs or other documents filed by the SLC with the Court, whether or not disclosed to members
6 of the SLC;

7 4. The Protected Documents may not be disclosed by Jacksonville, the other parties
8 to this litigation or their counsel to any person other than (a) the parties to this litigation;
9 (b) Bernstein Litowitz Berger & Grossmann LLP, Holley Driggs Walch Puzey Thompson, Block
10 & Leviton, LLP, Gardy & Notis, LLP, Robbins Arroyo LLP, and Kessler Topaz Meltzer &
11 Check, LLP in their capacity as counsel for Jacksonville in this litigation; and (c) provided that
12 appropriate procedures are undertaken to preserve their confidentiality, the Court;

13 5. Jacksonville and its counsel shall not use the Protected Documents for any
14 purpose other than to respond to the Motion to Defer in this litigation. For the avoidance of
15 doubt, Jacksonville's and/or its counsel's use of the Protected Documents to respond to the
16 Motion to Defer in this litigation may include use of the Protected Documents in depositions of
17 any DISH employee or director taken in connection with Jacksonville's response to the Motion
18 to Defer.

19 A. If the Motion to Defer is denied, within 20 days after entry of the order
20 denying the Motion to Defer, the Protected Documents and all hard and electronic copies
21 thereof shall either be destroyed or returned to the SLC, as shall be certified by
22 Jacksonville, upon written request from the SLC or the SLC's counsel, within the 20
23 days.

24 B. If the Motion to defer is granted, within 20 days after the order granting
25 the Motion to Defer becomes final and no longer subject to any appeal the Protected
26 Documents and all hard and electronic copies thereof shall either be destroyed or returned
27 to the SLC within the 20 days.

1 C. All parties to this litigation reserve any rights or arguments they may have
2 as to whether Jacksonville may discover or use the Protected Documents in this litigation
3 for some other purpose.
4

5 DATED this 27 day of March, 2015
6
7 By: 
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16 *Attorneys for Director Defendants*

5 DATED this ___ day of March, 2015
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18 *Attorneys for Director Defendants*

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18 *Attorneys for Director Defendants*

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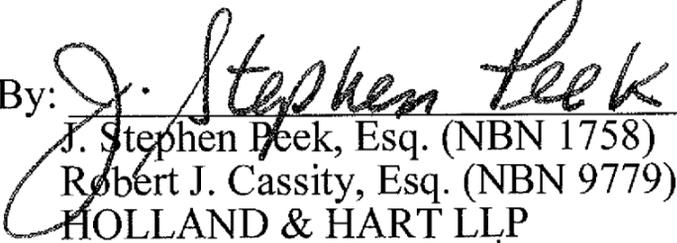
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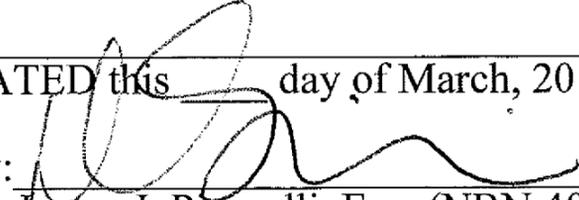
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Wilmington, DE 19801
*Attorneys for the Special Litigation
Committee of Dish Network Corporation*

DATED this _____ day of March, 2015

By: 
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Debra J. Spinelli, Esq. (NBN 9695)
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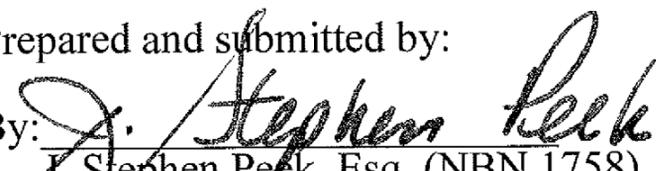
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PROTECTIVE ORDER

Having considered the foregoing and finding good cause appearing,
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the foregoing
Stipulation and Protective Order is GRANTED.

Dated this ____ day of March, 2015

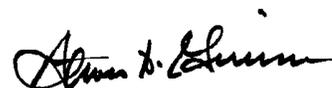

DISTRICT COURT JUDGE

Prepared and submitted by:
By: 
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EXHIBIT B

EXHIBIT B



CLERK OF THE COURT

1 **SAO**
 2 JEFFREY S. RUGG, ESQ.
 3 Nevada Bar No. 10978
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 14 Brian T. Frawley, Esq. (admitted pro hac vice)
 15 SULLIVAN & CROMWELL LLP
 16 125 Broad Street
 17 New York, NY 10004

18 Attorneys for NOMINAL DEFENDANT DISH
 19 NETWORK CORPORATION and DEFENDANTS
 20 JOSEPH P. CLAYTON, JAMES DEFRANCO,
 21 CANTEY M. ERGEN, DAVID K. MOSKOWOTZ, and
 22 CARL E. VOGEL

23 **DISTRICT COURT**
 24 **CLARK COUNTY, NEVADA**

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

27 IN RE DISH NETWORK CORPORATION
 28 DERIVATIVE LITIGATION

**STIPULATED CONFIDENTIALITY
 AGREEMENT AND PROTECTIVE
 ORDER**

29 Plaintiff JACKSONVILLE POLICE AND FIRE PENSION FUND ("Plaintiff"), by and
 30 through its undersigned attorneys of record, Nominal Defendant DISH NETWORK
 31 CORPORATION ("DISH"), by and through its undersigned attorneys of record, and Defendants
 32 CHARLES W. ERGEN, JOSEPH P. CLAYTON, JAMES DEFRANCO, CANTEY M. ERGEN,
 33 DAVID K. MOSKOWITZ, TOM A. ORTOLF and CARL E. VOGEL (together with DISH,
 34 "Defendants"), by and through their undersigned attorneys of record, hereby stipulate and agree,
 35

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1 pursuant to N.R.C.P. 29 and EDCR 7.50, that the use and handling of Confidential Information (as
2 defined herein) and Discovery Material (as defined herein) in these proceedings shall be governed
3 by and subject to the provisions below:

4 Plaintiff and Defendants, separately and each of them, are each a "party" and are
5 collectively referred to as the "parties." Any reference to a party or a person or non-party means,
6 unless otherwise indicated, a natural person, firm, entity, corporation, partnership, proprietorship,
7 association, joint venture, subsidiary, division, affiliate, parent company, and any other form of
8 business organization or arrangement, and includes the party or person or non-party's officers,
9 directors, managers, members, employees, agents, representatives, shareholders, independent
10 contractors, attorneys, accountants, and all other person(s) over which the party or person or non-
11 party has control or which act or purport to act on their behalf. Any party or any person or non-
12 party producing or disclosing Confidential Information or Discovery Material pursuant to the terms
13 set forth below is referred to as the "Producing Party," and the party or any person or non-party
14 receiving or being given access to confidential information or material is referred to as the
15 "Receiving Party."

16 **1. Confidential Information.** "Confidential Information" means any and all
17 information, documents, materials, items and things produced, disclosed or otherwise revealed in
18 discovery in this case, regardless of the medium or manner generated, stored or maintained,
19 including but not limited to testimony adduced at depositions upon oral examination or upon
20 written questions, answers to interrogatories or requests for admission, or other forms of discovery
21 responses (collectively, "Discovery Material") that the Producing Party designates as
22 "CONFIDENTIAL—Authorized Eyes Only" pursuant to Section 2. The Producing Party shall, in
23 good faith, designate as "CONFIDENTIAL—Authorized Eyes Only" only such Discovery
24 Materials that consists of (i) previously non-disclosed financial information (including but not
25 limited to profitability reports or estimates, percentage fees, commercial rates, sales report and
26 sales margins), (ii) previously non-disclosed trade secrets, business plans or prospects, product
27 development information, or marketing information, (iii) any information of a personal or intimate
28 nature regarding any individual, (iv) attorney-client privileged information and work product, and

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1 (v) any other category of information hereinafter giving confidential status by the Court. In
2 designating information as "CONFIDENTIAL—Authorized Eyes Only," the Producing Party
3 represents that he, she or it maintains the information in confidence and in good faith believes in
4 fact that it is confidential and that its unprotected disclosure might result in economic or
5 competitive injury.

6 **2. Designation of Confidential Information by Receiving Party.** All Discovery
7 Material in this case that has not been designated as Confidential Information by the Producing
8 Party shall be deemed Confidential Information for the first five (5) business days after production.
9 During those five days, any Receiving Party may designate any Discovery Material received as
10 Confidential Information under the same designation procedure and according to the same rules
11 applicable to the Producing Party as set forth herein. If, at the expiration of the five-day period, no
12 Party notifies the Producing Party of its intent to designate Discovery Material as Confidential
13 Information, any non-designated Discovery Material shall be treated as not Confidential
14 Information unless otherwise designated as Confidential Information as set forth herein.

15 When the Producing Party produces, discloses or otherwise reveals Confidential
16 Information, it shall be clearly designated at the expense of the Producing Party as
17 "CONFIDENTIAL—Authorized Eyes Only" and treated as Confidential Information by the
18 Receiving Party. The legend "CONFIDENTIAL—Authorized Eyes Only" shall be stamped or
19 affixed to the Discovery Material(s) in such a way as to not obliterate or obscure any written
20 matter. With respect to a multi-page document that contains Confidential Information, the
21 designation should be made, to the extent possible, on each page of the document. If designation
22 in the manner set forth herein is impossible or impractical, the Producing Party may use such other
23 method of designation as is reasonable under the circumstances. The Producing Party shall, in
24 good faith, designate as "CONFIDENTIAL—Authorized Eyes Only" only such Discovery
25 Materials, pursuant to and consistent with Section 1, that it reasonably believes constitutes
26 Confidential Information, and the Producing Party shall use best efforts to designate Discovery
27 Materials as containing Confidential Information prior to production or disclosure by the
28 Producing Party. In the event any Discovery Materials that contain Confidential Information are

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1 made available for inspection by a party, there will be no waiver of confidentiality by virtue of
2 such inspection before the material is copied and produced with a confidentiality designation by
3 the Producing Party.

4 If the Producing Party determines that any of its Discovery Material produced in the course
5 of discovery in this action should have been designated as provided herein, it shall advise the
6 Receiving Party of this fact in writing as soon as practicable, and all copies of such Discovery
7 Material deemed to be Confidential Information shall be marked "CONFIDENTIAL—Authorized
8 Eyes Only" at the expense of the Producing Party and treated as Confidential Information by all
9 parties. The Receiving Party shall promptly destroy or return the previously undesignated copies
10 of Confidential Information upon receiving substitute copies of the Discovery Materials properly
11 designated as "CONFIDENTIAL—Authorized Eyes Only." Nothing herein shall preclude a party
12 from disputing any designation of Discovery Materials by a party as Confidential Information
13 under Section 11. By designating Discovery Materials as containing Confidential Information, the
14 Producing Party is certifying to the Court that there is a good faith basis in law and in fact for the
15 designation within the meaning of N.R.C.P. 26(g).

16 **3. Use of Confidential Information Generally.** All Confidential Information
17 designated as provided herein in Section 2 shall be used by the Receiving Party solely for the
18 purposes of this lawsuit, shall not be disclosed to anyone other than those persons identified herein
19 in Section 5, and shall be handled in the manner set forth herein until such designation is removed
20 by the Producing Party or by order of the Court. Such Confidential Information shall not be used
21 by any Receiving Party or other person granted access thereto under this Stipulated Confidentiality
22 Agreement and Protective Order ("Stipulation and Order" or "Protective Order") for any purpose
23 outside of this lawsuit, including, but not limited to, a business or competitive purpose, publicity,
24 or in another legal dispute or proceeding, without prior written consent of the Producing Party or
25 approval from the Court. Nothing herein shall preclude the Producing Party from using its own
26 Confidential Information.

27 The Receiving Party, or any person or non-party receiving or being given access to
28 Confidential Information, must proceed as follows:

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- a. Store and maintain such Confidential Information in a secure manner, within their exclusive possession and control;
- b. Take all measures reasonably necessary to maintain the confidentiality of such Confidential Information; and
- c. Not permit or participate in, directly or indirectly, the unauthorized production, disclosure, or use of such Confidential Information.

All Parties and persons or non-parties obtaining, receiving or being given access to Confidential Information in accordance with this Stipulation and Order consent to the continuing jurisdiction of the Court for the purpose of enforcing the terms of this Stipulation and Order and remedying any violation(s) thereof.

4. **Use of Confidential Information in Depositions.** Any party shall have the right to use Confidential Information during depositions taken in connection with this case unless otherwise agreed to by the Parties in writing or on the record at the deposition. However, to the extent a third party deponent (or a person or non-party not otherwise authorized to receive Confidential Information under Section 5 herein) is present, that third party deponent or person or non-party shall be required to confirm, in writing or orally on the record, that it accepts the words and substance of the form Attachment A affixed to this Stipulation and Order prior to dissemination or disclosure of Confidential Information. Counsel for the affected Party may also request that all individual(s) not qualified to obtain, receive or be given access to Confidential Information under this Stipulation and Order (other than the third-party deponent's legal counsel) leave the deposition session during any portion where Confidential Information is used, disclosed or referred to. At any deposition session, upon inquiry with regard to the content of a document, material, item or thing marked "CONFIDENTIAL—Authorized Eyes Only," or whenever counsel for a party deems that the answer to a question may result in the disclosure of Confidential Information, or whenever counsel for a party deems that the answer to any question has resulted in the disclosure of Confidential Information, the deposition (or portions thereof) may be designated by the affected party as containing Confidential Information subject to the provisions of this Stipulation and Order. When such designation has been made, the testimony or the transcript of

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1 such testimony shall be disclosed only to those parties or persons or non-parties described herein in
2 Section 5 and to the testifying third party deponent (including the third party deponent's legal
3 counsel), and the Confidential Information contained therein shall be used only as specified in this
4 Stipulation and Order. Moreover, all originals and copies of deposition transcripts that contain
5 Confidential Information and/or exhibits containing Confidential Information shall be prominently
6 marked "CONFIDENTIAL—Authorized Eyes Only" on the cover thereof and, if and when filed
7 with the Court, the portions of such transcript so designated shall be filed under seal as required
8 under Section 6 herein.

9 Counsel must designate portions of a deposition transcript, by page and line number(s),
10 including any confidential exhibit(s), as "CONFIDENTIAL—Authorized Eyes Only" on the
11 record at the deposition, or within ten (10) business days of receiving the transcript and
12 corresponding exhibit(s). Designations may be made by letter to counsel of record or on the record
13 during the deposition. Portions of deposition transcripts so designated shall be treated as
14 Confidential Information by the parties as set forth herein. If all or a portion of a videotaped
15 deposition is intended to be designated as Confidential Information, the videocassette, videotape,
16 DVD, CD-ROM or other electronic medium storing or maintaining the deposition testimony shall
17 be stamped or affixed "CONFIDENTIAL—Authorized Eyes Only." During the ten (10) business
18 day period, the entire transcript, or other recording of deposition testimony, shall be treated as
19 Confidential Information. If no confidential designations are made within the ten (10) business
20 day period, the entire transcript shall be considered not Confidential Information.

21 **5. Disclosure of Confidential Information.** Confidential Information produced
22 pursuant to this Stipulation and Order may be disclosed or made available only to the persons
23 designated below:

- 24 (a) Retained counsel and in-house counsel for a party (including attorneys associated
25 with retained counsel's law firm and the paralegal, clerical, and secretarial staff
26 employed by retained counsel, and attorneys working under the leadership of
27 retained counsel for a party, to the extent such persons are deemed reasonably
28 necessary by the party's counsel to aid in the prosecution, defense or settlement of

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- this action);
- (b) A Defendant, or officers, directors, and employees of a Defendant deemed reasonably necessary by counsel for the Defendant to aid in the defense, or settlement of this action;
- (c) Outside experts or consultants (together with their clerical and secretarial staff) retained by counsel for a party to assist in the prosecution, defense, or settlement of this action, to the extent reasonably necessary to perform their work in connection with this action, provided, however, that no such expert or consultant shall be employed or retained by, or otherwise working for, any party (other than the Defendants and their affiliates) in connection with the proceedings captioned *In re: LightSquared Inc., et al.*, Case No. 12-12080 (SCC), pending in the United States Bankruptcy Court for the Southern District of New York;
- (d) Clerical and data processing personnel, including third party vendors, involved in the production, reproduction, organizing, filing, coding, cataloging, converting, storing, retrieving, and review of Discovery Material, to the extent reasonably necessary to assist a party or its counsel in these proceedings;
- (e) This Court and its staff and any other court, tribunal or dispute resolution officer duly appointed, chosen or assigned in connection with this action;
- (f) Court reporter(s) and videographers(s) employed in this action;
- (g) A witness or person or non-party appearing at a deposition in this action (including his or her counsel), subject to the terms of Section 4;
- (h) The original source of the Confidential Information (its author), and any addressee(s) or recipient(s) of communications or material that is designated as Confidential Information, including but not limited to addressee(s) or recipient(s) of confidential e-mail communications and/or confidential correspondence;
- (i) Any other person as to whom the parties in writing agree or that the Court in this action designates; and

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1 (j) Any governmental agency or regulating authority to the extent disclosure is required
2 by applicable law.

3 To facilitate the expedited production of Confidential Information and Discovery Material
4 in connection with Count I of the Verified Amended Derivative Complaint, dated September 12,
5 2013, Plaintiff agrees that Confidential Information and Discovery Material will be made only
6 available to its retained counsel, its in-house counsel, and counsel working under Plaintiff's
7 retained counsel's leadership until the bankruptcy court presiding over *In re: LightSquared Inc., et*
8 *al.*, Case No. 12-12080 (SCC), pending in the United States Bankruptcy Court for the Southern
9 District of New York, conducts the bankruptcy plan confirmation hearing currently scheduled for
10 December 6, 2013 and issues a final order confirming a plan of reorganization in that case.
11 Following the bankruptcy plan confirmation hearing and a final order confirming a bankruptcy
12 plan, any Confidential Information produced pursuant to this Stipulation and Order may also be
13 disclosed or made available to up to three (3) officers, directors or employees of Plaintiff,
14 designated by counsel for Plaintiff as reasonably necessary to aid in the defense or settlement of
15 this action. Prior to receiving Confidential Information, the three (3) designated representatives of
16 Plaintiff must execute the Confidentiality Agreement set forth in Attachment A to this Stipulation
17 and Order.

18 Any person or non-party to whom Confidential Information is disclosed or revealed
19 pursuant to subparts (b), (c), (d), (f), (g) or (i) of this Section shall be given a copy of this
20 Stipulation and Order advised (1) that the Confidential Information is being disclosed pursuant to
21 an Order of the Court and agreement of the Parties; (2) that the Confidential Information may not
22 be disclosed by such person or non-party to any other person or non-party not permitted to have
23 access to the Confidential Information pursuant to this Stipulation and Order; and (3) that any
24 violation of this Protective Order may result in the imposition of such sanctions as the Court deems
25 proper. Prior to delivering or disseminating any Confidential Information to any person or non-
26 party designated in subparts (c), (d), (f), (g) or (i) of this Section, above, such person or non-party
27 shall be required to execute a copy of the form Attachment A affixed to this Stipulation and Order.
28 No party (or its counsel) shall discourage any persons or non-parties from signing a copy of the

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1 form Attachment A affixed to this Stipulation and Order.

2 6. Filing of Confidential Information With the Court. Any Confidential
3 Information that any party or non-party files with the Court, including transcripts of depositions or
4 portions thereof, documents produced in discovery, information obtained from inspection of
5 premises or things, and answers to interrogatories or requests for admissions, exhibits and all other
6 documents that have previous thereto been designated as containing Confidential Information, or
7 any pleading, motion, brief or memorandum reproducing, paraphrasing, or containing such
8 Confidential Information, shall be filed and maintained under seal in compliance with Part VII of
9 the Nevada Supreme Court Rules Governing Sealing and Redacting Court Records. The filing
10 must be placed in a sealed envelope bearing the title of the case and the notation:

11 **“CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER**
12 **To Be Opened Only Upon Further Order Of This Court**
13 **Or For the Sole Use of The Court And Its Employees”**

14 All such sealed envelopes shall not be opened except for the sole use of the Court or its
15 employees or as otherwise ordered by the Court. Further, all such sealed envelopes shall be
16 maintained by the Clerk of the Court separate from public records in this action and shall be
17 released only upon further order of the Court; however, the same shall remain available to the
18 parties and all persons or non-parties entitled to receive Confidential Information pursuant to
19 Section 5.

20 7. Knowledge of Unauthorized Use or Possession of Confidential Information.

21 The Receiving Party or its counsel shall immediately notify counsel for the Producing Party
22 in writing if it learns of any unauthorized possession, knowledge, use or disclosure of any
23 Confidential Information in any manner inconsistent with the terms of this Stipulation and Order.
24 The Receiving Party shall promptly furnish the Producing Party in writing with the full details of
25 such unauthorized possession, knowledge, use or disclosure. With respect to such unauthorized
26 possession, knowledge, use or disclosure, the Receiving Party shall assist the Producing Party in
27 preventing its recurrence of and shall cooperate fully with the Producing Party in any litigation to
28 prevent unauthorized use or further dissemination of Confidential Information. The Receiving

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1 Party shall further use its best efforts to retrieve all copies of Confidential Information obtained by
2 persons or non-parties not authorized to possess, know or otherwise receive Confidential
3 Information under this Stipulation and Order, and provide such person or non-party with a copy of
4 this Stipulation and Order.

5 **8. Copies, Summaries or Abstracts.** Any and all copies, summaries, abstracts,
6 compilations or exact duplications of Confidential Information shall be marked
7 "CONFIDENTIAL—Authorized Eyes Only" and shall be considered Confidential Information
8 subject to the terms and conditions of this Protective Order. Attorney-client communications and
9 attorney work product regarding Confidential Information shall not be subject to this Section,
10 regardless of whether they summarize, abstract, paraphrase, or otherwise reflect Confidential
11 Information, provided that the holders of such communications and work product maintain its
12 confidentiality.

13 **9. Information Not Confidential.** The restrictions set forth in this Protective Order
14 shall not be construed:

- 15 (a) To apply to information lawfully obtained by a party from any non-party to this
- 16 litigation, if that non-party had the right to disclose such information subsequent to
- 17 the production of information by the Producing Party, subject to and in accordance
- 18 with Section 10 herein; or
- 19 (b) To apply to information or other materials that have been or become part of the
- 20 public domain by publication or otherwise and not due to any unauthorized act or
- 21 omission on the part of a Receiving Party; or
- 22 (c) To apply to information or other materials that, under law, have been declared to be
- 23 in the public domain.

24 For purposes of this Stipulation and Order, "tax returns" shall not be declared as
25 information or other Discovery Material that is or has become part of the public domain, unless
26 such tax returns have been made publicly available pursuant to state or federal law or otherwise
27 have been voluntarily made publicly available by the taxpayer.

28 **10. Production of Confidential Information by Non-Parties.** Promptly and in no

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1 event later than five (5) business days of receipt of any information, documents, materials, items or
2 things produced by a non-party voluntarily or in response to a subpoena or court order, the party
3 receiving such information, documents, materials, items or things shall provide all parties in this
4 case with copies thereof. Any party who reasonably believes in good faith that any materials
5 produced by a non-party contain Confidential Information may, within ten (10) business days of
6 receipt thereof, designate the materials as "CONFIDENTIAL—Authorized Eyes Only" pursuant to
7 and consistent with Section 2. Until this ten (10) business day period expires, the parties shall treat
8 all such materials produced by a non-party as Confidential Information. If no objections or
9 confidential designations are made within the ten (10) day period, the materials shall be considered
10 not Confidential Information.

11 Nothing herein shall be construed as authorizing or encouraging a party to disobey a lawful
12 directive from this or another court or tribunal.

13 **11. Challenges to Confidentiality Designations.** If at any time counsel for the
14 Receiving Party believes in good faith that counsel for the Producing Party has unreasonably
15 designated certain Discovery Materials as containing Confidential Information, or believes in good
16 faith that it is necessary to disclose Confidential Information to persons or non-parties other than
17 those permitted by this Protective Order, the Receiving Party may make an appropriate application
18 to this Court requesting that the specific Discovery Materials be excluded from the provisions of
19 this Protective Order or be made available to specified other persons or non-parties; however, prior
20 to seeking relief from the Court, the Parties must comply with the requirements of EDCR 2.34 to
21 attempt to resolve informally any and all dispute(s) relating to confidentiality designations or the
22 disclosure of Confidential Information to persons or non-parties not identified in Section 5. A
23 party may seek an Order Shortening Time to object to the disclosure or designation of Confidential
24 Information. The party claiming confidentiality shall have the burden of establishing
25 confidentiality. Until the Court issues a ruling, all parties shall continue to afford the Discovery
26 Material(s) in dispute the protection to which it is entitled under this Protective Order, and will not
27 disclose or reveal the disputed Discovery Material(s) to the person or non-party at issue.

28 **12. Use of Confidential Information in Court.** In the event that any Confidential

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1 Information is used or referenced in any pretrial Court proceeding in this action, it shall not lose its
2 confidential status through such use, and the party using or referring to such Confidential
3 Information shall take all reasonable steps to maintain its confidentiality during such use or
4 reference, including without limitation, requesting that the Court seal any transcript or portion(s)
5 thereof with respect to such proceeding. Nothing in this Protective Order, or designations of
6 confidentiality hereunder, shall in any way affect the treatment of Confidential Information at the
7 trial of this action. Should the Producing Party desire that Confidential Information be treated as
8 confidential at trial, the Producing Party must make an appropriate request to the Court for such
9 treatment at the time set forth by the Court for consideration of motions *in limine* or at such other
10 time as directed by the Court.

11 **13. Reservation of Rights.** This Protective Order is entered solely for the purpose of
12 facilitating the exchange of Discovery Materials among the parties to this action without involving
13 the Court unnecessarily in the process. Notwithstanding, the Parties hereby reserve the following
14 rights:

15 a. Nothing in this Protective Order, nor the production of any Discovery
16 Materials under the terms of this Protective Order, nor any proceedings pursuant to this Protective
17 Order, shall be deemed or construed (i) to have the effect of an admission or a waiver by any party
18 of the confidentiality or non-confidentiality of any such materials; (ii) to alter the confidentiality or
19 the non-confidentiality of any such materials; (iii) to alter any existing or pending obligation of any
20 party or the absence thereof; or (iv) to affect in any way the authenticity or admissibility of any
21 document, testimony or other evidence at trial.

22 b. Entry of this Protective Order does not preclude any party from seeking or
23 opposing additional or different protection for particular information or documents.

24 c. Each party may object to the production, disclosure or use of any Discovery
25 Materials that a party designates as containing Confidential Information on any other ground(s) it
26 deems appropriate, including, but not limited to, attorney-client privilege, work product, or any
27 other privilege or protection provided under applicable law.

28 d. This Stipulation and Order shall neither enlarge nor affect the proper scope

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1 of discovery in this case or any other litigation, nor shall this Stipulation and Order imply that
2 Confidential Information is discoverable, relevant or admissible in this case or any other litigation.

3 e. Nothing in this Stipulation and Order is intended to expand or limit a party's
4 right under the Nevada Rules of Civil Procedure or other applicable state or federal law to pursue
5 costs and attorneys' fees incurred in making a motion to challenge a confidentiality designation
6 pursuant to Section 11 herein.

7 **14. Inadvertent Failure to Designate Information as Confidential.** The inadvertent
8 failure of a Party to designate Discovery Materials as Confidential Information (whether in the
9 form of documents, interrogatories, testimony or otherwise, and whether produced by that Party or
10 a third party) shall not be deemed, by itself, to be a waiver of the Party's right to so designate such
11 Discovery Materials. Immediately upon learning of any such inadvertent failure, the Party seeking
12 a confidentiality designation shall notify all Parties of such inadvertent failure and take such other
13 steps as necessary to correct such failure after becoming aware of it. However, disclosure by a
14 Receiving Party of such Discovery Materials to any other person or non-party prior to later
15 designation of the Discovery Materials by the Producing Party in accordance with this Stipulation
16 and Order shall not violate the terms of this Stipulation and Order. Notwithstanding the foregoing,
17 a Receiving Party that discloses inadvertently disclosed Discovery Material prior to its subsequent
18 designation as Confidential Information pursuant to this Section must take any and all good faith,
19 reasonable efforts to remediate the disclosure, including, but not limited to, seeking the return of
20 the disseminated Confidential Information and having persons to whom the Confidential
21 Information was given execute a copy of the form Attachment A.

22 **15. Amendment.** This Stipulation and Order may be amended from time to time by
23 written agreement of counsel for the Parties, which agreement shall be submitted to the Court in
24 advance for its approval.

25 **16. Return or Destruction of Confidential Information.** Within thirty (30) days after
26 the conclusion of this action, including any appeal thereof, or at such other time as the parties may
27 agree in writing, all Discovery Material, together with all copies, excerpts, summaries and
28 compilations thereof, which have been designated as containing Confidential Information or

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1 otherwise treated by the parties as confidential, shall be returned to the Producing Party. In lieu of
2 returning such designated Discovery Materials as provided herein, counsel for the Receiving Party
3 may certify in writing to counsel for the Producing Party that the Discovery Materials, together
4 with all copies, excerpts, summaries and compilations thereof, which have been designated as
5 containing Confidential Information have been destroyed. This section shall not apply to the Court
6 or its staff.

7 **17. Injunctive Relief Available.** Each party acknowledges that monetary remedies
8 may be inadequate to protect each party in the case of unauthorized disclosure or use of
9 Confidential Information and that injunctive relief may be appropriate to protect each party's rights
10 in the event there is any such unauthorized disclosure or use of Confidential Information, in
11 addition to whatever relief may be available at law or in equity.

12 **18. Other Actions And Proceedings.** If a Receiving Party (a) is subpoenaed in
13 another action or proceeding, (b) is served with a demand in another action or proceeding in which
14 it is a party, or (c) is served with any legal process by one not a party to this Stipulation and Order,
15 seeking Discovery Materials that were produced or designated as containing Confidential
16 Information pursuant to this Stipulation and Order, the Receiving Party shall forward the subpoena,
17 demand or legal process by hand, email or facsimile transmission to counsel for the Producing
18 Party within five (5) business days of receipt of such subpoena, demand or legal process or such
19 shorter notice as may be required to provide the Producing Party with the opportunity to object to
20 the immediate production of the requested Discovery Materials to the extent permitted by law.
21 Should the person seeking access to the Confidential Information take action against the Receiving
22 Party or anyone else covered by this Stipulation and Order to enforce such a subpoena, demand or
23 other legal process, the Receiving Party shall respond by setting forth the existence of this
24 Stipulation and Order. The Producing Party is solely responsible for intervening to object or seek a
25 limitation of such subpoena, demand or other legal process. The Receiving Party agrees that it will
26 provide its best efforts to cooperate fully with any effort by the Producing Party to object to or
27 limit such disclosure of Confidential Information. In no event shall this stipulation be interpreted
28 to impose a requirement on the Receiving Party to defy a final, non-appealable Court order in any

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1 action.

2 **19. No Waiver of Privilege.** Disclosure (including production) of information that a
3 party or non-party later claims should not have been disclosed because of a privilege, including,
4 but not limited to, the attorney-client privilege or work product doctrine ("Privileged
5 Information"), shall not constitute a waiver of, or estoppel as to, any claim of attorney-client
6 privilege, attorney work product, or other ground for withholding production as to which the
7 Producing or Receiving Party would be entitled in the action.

8 **20. Effect of Disclosure of Privileged Information.** The Receiving Party hereby
9 agrees to return, sequester, or destroy any Privileged Information disclosed or produced by
10 Producing Party upon request, except that, subject to the requirements below, the Receiving Party
11 may retain one copy for submission to the Court in connection with any challenge to the request
12 for the return, sequester, or destruction of purportedly Privileged Information pursuant to Section
13 11. If the Receiving Party retains a copy, the copy must be treated as Confidential Information and
14 the Receiving Party must make its application to the Court pursuant to Section 11 within ten (10)
15 days of the request by the Producing Party to return, sequester, or destroy the Privileged
16 Information.

17 If the Receiving Party reasonably believes that Privileged Information has been
18 inadvertently disclosed or produced to it, it shall promptly notify the Producing Party and sequester
19 such information until instructions as to disposition are received. The failure of any party to
20 provide notice or instructions under this Section shall not constitute a waiver of, or estoppel as to,
21 any claim of attorney-client privilege, attorney work product, or other ground for withholding
22 production as to which the Producing Party would be entitled in this action.

23 **21. Order Survives Termination.** This Protective Order shall survive the termination
24 of this action, including any appeals thereof, and the Court shall retain continuing jurisdiction to
25 enforce or resolve any dispute concerning the use of Confidential Information disclosed hereunder.

26 **22. Compliance with this Order.** All counsel of record in this action shall make a
27 good faith effort to comply with the terms of this Stipulation and Order, and ensure that their
28 clients, and the persons or non-parties receiving or being given access to Confidential Information

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1 pursuant to Section 5 herein, similarly comply herewith. No Receiving Party may utilize any
2 portion of Confidential Information for its/his/her own personal or business advantage or gain,
3 aside from purpose(s) related to these proceedings.

4 In the event of a change in counsel, new counsel shall execute a copy of the form
5 Attachment A affixed to this Stipulation and Order.

6 23. Miscellaneous. When interpreting this Stipulation and Order:

7 a. The term "and" includes the term "or" and the term "or" includes the term
8 "and";

9 b. Defined terms shall have the meanings ascribed to such terms where used or
10 defined;

11 c. The paragraph headings are for convenience only and in no way limit or
12 enlarge the scope or meaning of the language thereof; and

13 d. The terms herein shall be construed as a whole according to their fair and
14 ordinary meaning and not strictly for or against any party.

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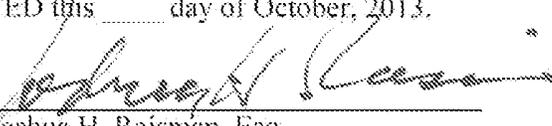
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PROTECTIVE ORDER

Having considered the foregoing and finding good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the foregoing Stipulated Confidentiality Agreement and Protective Order is GRANTED.

Dated this 16 day of October, 2013.



DISTRICT COURT JUDGE

Prepared and submitted by:

By: 

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FORM ATTACHMENT "A"
CONFIDENTIALITY AGREEMENT

I, _____, do hereby acknowledge and agree as follows:

1. I have received and read the Stipulated Confidentiality Agreement and Protective Order entered in the matter entitled *In re Dish Network Corporation Derivative Litigation*, Case No. A-13-686775-B, pending before the Eighth Judicial District Court, Clark County, Nevada, of which the form of this agreement is an attachment.

2. I understand the terms and provisions of the Stipulated Confidentiality Agreement and Protective Order and agree to be bound by and to strictly adhere to all of its terms and provisions.

3. I hereby submit to the jurisdiction of the Clark County, Nevada District Court solely for the purpose of enforcement of the Stipulated Confidentiality Agreement and Protective Order and this Confidentiality Agreement.

DATED this ____ day of _____, 20____.

[Signature]

[Name, Address, Telephone Number]

EXHIBIT A

EXHIBIT A

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF DISH
NETWORK DERIVATIVE
LITIGATION.

SUPREME COURT No. 69012

JACKSONVILLE POLICE AND
FIRE PENSION FUND,

SUPREME COURT No. 69729

Appellant,

vs.

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

Respondent.

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I. INTRODUCTION

The SLC asks this Court to ignore a critical and admitted fact: the District Court misapplied the legal standard for a motion by a corporate special litigation committee seeking deference from Nevada courts. The District Court's admitted error requires reversal, and this important case must proceed to trial.

First, the SLC asks Nevada to adopt a presumption that special litigation committees, despite being created by concededly conflicted boards and seeking to displace the role of the Nevada judiciary, are independent and act in good faith. Thus, the SLC argues, shareholders asserting claims bear the burden of proof on the SLC's independence and good faith. This position is wrong under Nevada law and would leave Nevada alone among all states to consider the issue. Every state in the country, including Nevada, applies the "business judgment rule," which presumes that boards are independent and act in good faith. Critically, however, no other state court has ever done what the District Court did here: apply the business judgment rule's presumption of good faith and independence to a special litigation committee formed by a concededly conflicted board that would never itself enjoy those presumptions if it were directly determining whether to pursue claims against its controlling shareholder. Every other state places the burden on the special litigation committee to prove its independence and good faith, and

would reject a motion to defer when the facts surrounding those key issues are contested.

The SLC's argument is particularly unavailing here given SLC member Ortolf's decades-long close friendship with the Ergens, as well as Brokaw's deeply personal decision to name Cantey Ergen as his son's godmother. This SLC would not pass muster as independent under the law of any state, and presuming the SLC members' independence here, as the District Court did, undermines basic notions of shareholder protection from controlling stockholders. Accepting the SLC's argument would be misplaced, unwarranted, and bad policy.

Second, the SLC argues that Nevada district courts may make factual determinations concerning the purported independence and good faith of special litigation committee members without a trial or evidentiary hearing. Nevada law is to the contrary. Ironically, in the District Court, the SLC insisted that its motion to defer was subject to a summary-judgment standard, thus conceding that material factual disputes regarding independence and good faith would preclude judicial deference. Now, recognizing that the District Court's Order came in the face of numerous such material factual disputes, the SLC argues that this Court's decisions in *Shoen* and *Amerco* somehow allowed the District Court to presume the SLC's independence and good faith. Even if *Shoen* and *Amerco* controlled – and they do not because those cases addressed only the burden of proof to determine

independence in the typical demand-futility context, not in the special litigation committee context – those cases still require the District Court to hold an evidentiary hearing before making any contested factual findings. Thus, *even if this Court accepts the SLC’s argument, which it should not do as a matter of either law or policy, it still must reverse* and instruct the District Court to conduct an evidentiary hearing concerning the SLC’s good faith and independence.

This Court should follow the lead of all others to consider this issue, and place the burden of proof to show independence and good faith on the SLC. This Court should therefore reverse the District Court’s Order and remand the case with instructions to let the case proceed on the merits, without further interference from the SLC, since the SLC failed to prove the absence of materially disputed facts as to its independence and good faith. If, however, this Court accepts the SLC’s position and remands for purposes of an evidentiary hearing, it should clarify that the SLC is afforded no presumption of good faith or independence, and that the SLC bears the burden to establish that it is entitled to deference on the basis of its good faith and independence of the rest of the DISH Board.

II. ARGUMENT

A. The SLC Concedes That the District Court Committed Reversible Error

On appeal, the SLC asserts that its Motion to Defer was not governed by a summary-judgment standard (as the SLC argued before the District Court), such

that disputed issues of material fact preclude fact finding, but rather that the District Court's fact finding was appropriate pursuant to *Shoen v. SAC Holding Corp.*, 122 Nev. 621 (2006), and *In re Amerco Derivative Litigation*, 127 Nev. 196 (2011). (RAB 36.)¹ The SLC thus effectively concedes that the judgment should be vacated and remanded because, pursuant to *Shoen* and *Amerco*, the District Court could have adjudicated the Motion to Defer *only* by conducting an evidentiary hearing. (Respondent's Answering Brief ("RAB") 36.)

To be sure, Appellant disagrees that *Shoen* and *Amerco* provide the applicable procedure to determine the SLC's independence and good faith, and believes that the case should be reversed with instructions to proceed on the merits. Despite disagreeing about the proper remedy on remand, however, both parties agree that reversal is warranted.

Specifically, the SLC cites to *Shoen* for the proposition that the district court should find facts (rather than determine whether factual issues preclude such

¹ This argument is foreclosed, as the SLC argued below that the summary-judgment standard controlled. *See, e.g., So. Cal. Edison v. First Judicial Dist. Ct. of State of Nevada*, 127 Nev. 276, 287 (2011) (party may not take "inconsistent positions" on appeal where doing so will produce "an unfair advantage"). The SLC argued below that "courts have [] placed on the committee an initial procedural burden like that placed on a party moving for summary judgment." (Vol. 24 JA005784.) In fact, the SLC relied upon *Zapata Corp. v. Maldonado*, in which the Delaware Supreme Court expressly stated that judicial supervision over a motion to defer is "akin to proceedings on summary judgment." 430 A.2d 779, 788 (Del. 1981).

findings) only “*unless and until the District Court held an evidentiary hearing.*”

(*Id.*) Under the SLC’s own analysis, the District Court committed reversible error because it did not conduct an evidentiary hearing concerning the SLC’s independence and good faith.

As set forth below, the SLC is wrong that *Shoen* and *Amerco* – both demand-futility cases – provide the applicable legal standard for a special litigation committee’s motion to defer. Courts do not apply the same deferential presumptions to special litigation committees created by conflicted boards that apply when determining whether a board presumed to be independent can pursue alleged shareholder claims. But even if this Court concludes that *Shoen* and *Amerco* do apply, the Court must reverse because the District Court did not hold such an evidentiary hearing.

B. Controlling Law and Sound Policy Require Stringent Judicial Scrutiny of the SLC

1. Special Litigation Committees Require Strict Oversight Because They are Formed by Conflicted Boards

This Court should consider the way special litigation committees come about, including the DISH SLC here. First, stockholders bring suit on the company’s behalf to rectify perceived misconduct by corporate directors and/or officers. Next, either the directors move to dismiss under Rule 23.1 and the court determines that a majority of the board is conflicted, or, as was the case here, the

members of the board of directors waive a motion to dismiss on demand futility grounds and thus concede the futility of making a demand on the board by forming a special litigation committee. The disqualifying conflicts may stem from the likelihood of personal liability, financial interest in the challenged conduct, beholdenness to a conflicted person, or any other reasons.

The special litigation committee, formed by a conflicted board of directors, is markedly different from the full board, which enjoys presumptions of independence and good faith under the business judgment rule. The special litigation committee is “the ‘only instance in American jurisprudence where a defendant can free itself from a suit by merely appointing a committee to review the allegations of the complaint,’” as happened below. *Einhorn v. Culea*, 235 Wis. 2d 646, 671 (2000) (quoting *Lewis v. Fuqua*, 502 A.2d 962, 967 (Del. Ch. 1985)). Sound policy therefore requires searching scrutiny, as the SLC’s own cited authority explains:

The court should not cajole itself into believing that the members of a Board of Directors elected by the dominant and accused majority stockholder, after accusations of wrongdoing have been made, were selected for membership in the Board to protect the interests of the minority stockholders and to assure a vigorous prosecution of effective litigation against the offending majority.

Dennis J. Block & Adam Prussin, *The Business Judgment Rule and Shareholder Derivative Actions: Viva Zapata?*, 37 Bus. Law. 27 (1981) (“Block Article”).²

Because the board cannot act independently, the directors (and their decision not to pursue derivative claims) no longer receive business-judgment rule protections, and the burden of proof shifts to the special litigation committee to establish its independence and good faith. The business judgment rule “presum[es] that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company.” *Shoen*, 122 Nev. at 632 (quotation marks omitted); *see also* NRS 78.138.

When a majority of the board faces conflicts and therefore creates a special litigation committee, the presumption of the rule does not attach, and searching judicial review is required. Specifically, once a conflicted board forms a special litigation committee in an effort to dismiss potentially meritorious claims without judicial scrutiny, the burden shifts to the special litigation committee to establish its own independence by a yardstick that must be “like Caesar’s wife – above

² The SLC cites the article to argue that Nevada should not apply Delaware’s *Zapata* standard. Appellant need not make any argument on appeal regarding the application of *Zapata* or New York’s *Auerbach* standard, since neither “allows a reviewing court to extend to the members of [an SLC] the presumption of good faith and disinterestedness,” and the SLC failed to meet its burden. *Hasan*, 729 F.2d at 376; *see* RAB 38-39.

reproach.” *London v. Tyrell*, 2010 WL 877528, at *12 (Del. Ch. Mar. 11, 2010) (quotation marks omitted); *Booth Family Trust*, 640 F.3d at 144-45 (same); *Hasan v. Clevetrust Realty Invs.*, 729 F.2d 372, 376 (6th Cir. 1984) (“the delegation of corporate power to a special committee, the members of which are hand-picked by defendant-directors, carries with it inherent structural biases”); *Will v. Engretson & Co.*, 213 Cal. App. 3d 1033, 1043-44 (Cal. App. 1989) (courts are “mindful of the need to scrutinize carefully the mechanism by which directors delegate . . . authority to terminate derivative litigation” (quotation marks omitted)).

The SLC asserts that a judicial refusal to place the burden of proof on shareholders would somehow preclude directors from properly governing their companies, which conflates the work of boards as a whole with that of litigation committees. In reality, judicial oversight of the special litigation committee allows for a balanced approach that “empower[s] corporations to dismiss meritless derivative litigation through special litigation committees, while checking this power with appropriate judicial oversight over the special litigation committee’s composition and conduct.” *Id.* Companies with independent board majorities still receive business-judgment protections, but when the board picks its own judge and jury by appointing a special litigation committee, that committee must endure stricter scrutiny in order to assure courts and shareholders of a fair adjudication. Under the SLC’s argument, the Board picks its judge and jury, whom the court

must presume are fair and just. Courts across the country reject such an approach, as this Court should.

Without “confidence in the judiciary and, as important, the stockholders of the company that the committee can act with integrity and objectivity,” a conflicted board could vest authority in a facially conflicted special litigation committee in order to whitewash, rather than meaningfully investigate, credible allegations of misconduct. *In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 940 (Del. Ch. 2003); *see also Booth Family Trust v. Jeffries*, 640 F.3d 134, 143 (6th Cir. 2011) (“Because the corporation has every opportunity to form a perfectly independent special litigation committee, we require that it do so.”). The SLC’s own cited authorities acknowledge the need for such scrutiny, especially for special litigation committees created after the initiation of litigation:

Where the committee is appointed only after the action is filed, the charge can be made that the purpose of the committee is preordained, especially where the alleged wrongdoers do the appointing. Ironically, appointing new directors to the board at this point does not meet such an objection, but exacerbates it.

Block Article, 37 Bus. Law at 26.

The facts as set forth in Appellant’s Opening Brief (“AOB”) highlight the dangers and tremendous prejudice that would occur if the hand-picked special litigation committee were afforded the same presumptions as the Board. Here, the DISH Board and the SLC had numerous chances to demonstrate their fealty to

DISH and its shareholders, yet from its inception, there was little question that the SLC would never pursue claims against Ergen or his fellow directors and officers.

The SLC was formed the night before argument on Appellant's motion for expedited discovery, in order to keep Appellant at bay, and the SLC promptly moved to stay Appellant's claims. (AOB 20.) When formed, the SLC included only the conflict-ridden Ortolf and Brokaw. (*Id.*) Ortolf is one of Ergen's "favorite" friends, travel companion, and colleague for nearly 40 years, whose children worked at DISH. (AOB 21.) Brokaw chose Cantey Ergen to be his son's godmother, and the billionaire Ergens prefer airbeds at the Brokaws' apartment to the comfort of a hotel. (AOB 22-23.) Yet the SLC concealed Ortolf's and Brokaw's extensive personal ties from both Appellant and the District Court. (AOB 22, 23.)

Once Appellant raised Ortolf's and Brokaw's misrepresentations to the Court and clear beholdenness to Ergen, the Board added Lillis, whose non-independence is less glaring only in comparison to Ortolf's and Brokaw's. (AOB 24.) Lillis and his wife are "long-time friends" of Ergen's "right-hand man" Thomas Cullen, and Lillis and Cullen socialize and vacation together, and support each other professionally. (AOB 24-25.) *See Booth Family Trust*, 640 F.3d at 143 (lack of independence where SLC member and defendant had prior working

relationship, defendant “spearheaded the effort” for SLC member to join board, and SLC member and defendant traveled together).

During its “investigation,” the SLC did not even attempt to appear impartial. Just days before the SLC issued its report recommending dismissing Appellant’s claims, Ortolf expressed his love to the Ergens and told Cantey that it is “[a]mazing how real friends always show up when they’re needed.” (AOB 22.) The SLC filed multiple motions to dismiss to thwart Appellant’s attempts to protect DISH and its public investors, while ignoring crucial evidence and claims, and seeking to justify Ergen’s reaping \$800 million in personal profits that could and should have gone to DISH. (AOB 26-34.)

Recognizing that the District Court’s determination that the SLC is independent (notwithstanding the vast record suggesting otherwise) is not defensible, the SLC now seeks for the first time an evidentiary hearing. The SLC is wrong. Disputed facts on the SLC’s independence preclude deference entirely.

C. The District Court Should Have Placed the Burden of Proving Independence and Good Faith on the SLC

Both law and policy require that special litigation committees bear the burden of proof to establish their independence and good faith. Otherwise, “[i]f the members [of the special litigation committee] are not independent, the court will, in effect, be allowing the defendant directors to render a judgment on their own alleged misconduct.” *Einhorn*, 235 Wis. 2d at 671. Indeed, despite the nearly

three years that this litigation has persisted, the SLC has shielded the underlying alleged misconduct from virtually any judicial consideration. Aside from the November 2013 preliminary-injunction hearing – which relief the District Court granted in part (over the SLC’s objection) while stating that certain of Appellant’s claims would survive a motion to dismiss and likely summary judgment – the District Court never considered the claims on the merits.

1. Shoen and Amerco Did Not Involve an Admittedly Conflicted Board

The SLC argues that *Shoen* and *Amerco* – both pre-suit demand futility cases – govern this case. (RAB 36-37.) The SLC is wrong. Importantly, the SLC ignores Appellant’s legal arguments and policy explanations for why a special litigation committee Motion to Defer is and should be governed by a different legal standard. If this Court were to conflate the two situations, as the SLC suggests, it would be in the extreme minority of courts, and perhaps the *only* court, to do so.

The SLC relies on *Shoen* and *Amerco* to argue that the District Court properly found the SLC’s independence and good faith. (RAB 36.) The issue raised in *Shoen* and *Amerco*, however, is not “substantially identical” (*id.*), as those cases did not concern special litigation committees at all. *Shoen* and *Amerco* say nothing regarding the legal standard governing special litigation committee motions to defer. Rather, the Court considered the threshold question of demand futility and full-board independence. *Amerco*, 127 Nev. at 205-06. *Amerco*’s

board had not formed a special litigation committee, and the court had not determined that demand was futile. Accordingly, this Court instructed the district court to conduct an evidentiary hearing to determine whether shareholder plaintiffs overcame business-judgment presumptions by “alleg[ing] particularized facts that satisfactorily demonstrate demand futility.” *Shoen*, 122 Nev. at 642.

Here, in contrast, the DISH board established a special litigation committee, thereby conceding that a majority of the Board was not independent and that demand was futile. *See, e.g., Abbey v. Computer & Commc’ns Tech. Corp.*, 457 A.2d 368, 374 (Del. Ch. 1983) (board’s creation of a special litigation committee “conceded its disqualification”); *Levine v. Smith*, 591 A.2d 194, 209 (Del. 1991) (establishing a special litigation committee “constitutes an implicit concession by a board that its members are interested . . . and that its decisions are not entitled to the protection of the business judgment rule”), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). As discussed in Appellant’s Opening Brief and further herein, under such circumstances, the SLC acts under the shadow of the conflicts of the board, and the presumptions of independence and good faith cannot apply.

2. **An Admittedly Conflicted Board Cannot Delegate a Presumption of Independence and Good Faith**

The board’s ability to create a committee pursuant to NRS 78.125 does not give a conflicted board the power to delegate the powerful presumption of

independence and good faith to a special litigation committee, and neither *Shoen*, *Amerco*, nor any other authority suggests otherwise. (*See* RAB 31-32.)

The SLC argues that under Nevada law, it enjoys business-judgment protections until an ultimate fact-finding otherwise. (*E.g.*, RAB 31-40.) But under Nevada law, and because the SLC was established by an admittedly conflicted Board, the SLC bears the burden of proof and business-judgment presumptions do not apply. *See Taneja v. Familymeds Grp., Inc.*, 2012 WL 3934279, at *4 (Conn. Sup. Ct. Aug. 21, 2012) (applying Nevada law) (demand futility, and delegating investigation of derivative claims, “overcome this presumption”) (quotation marks omitted). A searching review is especially important where, as here, the company has a controlling shareholder. *See* Block Article, 37 Bus. Law. at 24 (when a controlling shareholder is a defendant, “the director’s possible reluctance to act may go beyond a desire for peaceful relations with his codirectors to the quest for survival itself”; it is “appropriate in these cases to shift the burden of proof to the directors on the issues of due care, independence and good faith”).

Here, because the admittedly conflicted DISH Board created a special litigation committee to investigate derivative claims, the SLC bears the burden of proof and neither an evidentiary hearing nor any presumption of business-judgment deference is appropriate. *See, e.g., London*, 2010 WL 877528, at *12-13 (special litigation committees “are not given the benefit of the doubt as to their

impartiality and objectivity”); *Hasan*, 729 F.2d at 376 (special litigation committees do not receive “the presumption of good faith and disinterestedness”).

3. If an Evidentiary Hearing is Warranted, It Should Come at the Time of Trial

Because issues of fact exist regarding the SLC’s independence and thoroughness, reversal and remand are appropriate so that Appellant’s substantive claims may proceed.³ *Booth Family Trust*, 640 F.3d at 142-43; *see also London*, 2010 WL 877528, at *12 (if material factual disputes exist, court “must deny the SLC’s motion” and “control of the litigation is returned to the plaintiff shareholder”). Should this Court, however, accept the SLC’s invitation and order an evidentiary hearing focused on the SLC (as opposed to a hearing focused on the Board as a whole, which is proper in the demand-futility context), such hearing should occur at the time of trial. Moreover, the SLC should bear the burden of proof, and no presumptions of independence or good faith should apply.

Courts regularly decline “to put the parties and the court through an expensive, time-consuming pre-trial evidentiary hearing that would involve most of the same proof that the [parties] would eventually submit at trial.” *In re Cysive*,

³ Importantly, it is not truly a summary-judgment motion, although a summary-judgment standard is used. Unlike a summary-judgment motion, where issues fact later get resolved by the court, there is no further consideration or resolution of the issue of independence or thoroughness once the court finds a “reasonable doubt” as to the SLC’s impartiality. *Booth Family Trust*, 640 F.3d at 142-43 & n.3.

Inc. S'holder Litig., 836 A.2d 531, 549 (Del. Ch. 2003). For instance, in *Trump v. Eighth Judicial District Court*, the Court discussed procedures for resolving jurisdictional disputes, recognizing that “[a] pretrial evidentiary hearing may not always be appropriate” because “[w]hen jurisdiction turns on the same facts as the merits of the case, an evidentiary hearing . . . infringes on the right to a jury trial and is an inefficient use of judicial resources (hearing the same evidence twice).” 109 Nev. 687, 693 n.2 (1993). See also *Thomas v. Cnty. of Los Angeles*, 978 F.2d 504, 514 (9th Cir. 1992) (“a preliminary full-dress hearing before trial disserves . . . judicial efficiency”); *Cysive*, 836 A.2d at 551 (“Because the proof of that question overlaps with the trial evidence . . . , it will rarely, if ever, be efficient to hold such a hearing before trial.”).

Here, the substantive evidence regarding Appellant’s claims is intertwined with the SLC members’ interests in the underlying litigation, including Ortolf’s participation in the Board’s challenged decision to prematurely terminate the STC – a claim that the District Court already determined should survive a motion to dismiss (and that the SLC never investigated). (AOB 32.) The evidence is also relevant to the SLC’s good faith and thoroughness, as the Court will have to consider both the record on which the SLC based its recommendation and additional, inculpatory evidence that the SLC misconstrued and/or ignored. Given the fact-intensive nature of the independence and thoroughness inquiries, and the

complex legal questions that the SLC was tasked with investigating, a separate pre-trial hearing would be duplicative and wasteful.

D. Disputed Issues of Material Fact as to the SLC’s Purported Independence and Good Faith Precluded Deference to the SLC

1. The Materiality Standard Protects Shareholders While Allowing Independent Boards and Committees to Function Without Undue Interference

The SLC misrepresents the evidence and Appellant’s briefing when it contends that (1) the record does not raise material factual disputes about independence and thoroughness, and (2) Appellant has not argued that the District Court’s improper findings on those issues were clearly erroneous. (RAB 29-30.) The SLC’s contention is plausible only if this Court accepts the SLC’s improperly narrow definition of materiality. Moreover, Appellant has detailed why the District Court’s findings were clearly erroneous, and the court’s legal conclusions constituted reversible error. (*E.g.*, AOB 19-34 (discussing why each SLC member lacked independence, and the SLC’s investigation was a “sham”).)

Contrary to the SLC’s alarmist argument that applying a summary-judgment standard will “severely compromise[]” directors’ ability to oversee the corporation because plaintiffs could always manufacture some dispute (RAB 39), the requirement that a special litigation committee establish the absence of *material* factual disputes focuses courts on the key facts relevant to independence and thoroughness. Moreover, the summary-judgment standard applies only to special

litigation committees, formed by conflicted boards and not entitled to business-judgment protections. Independent boards are still protected by the business judgment rule.

In other words, Appellant does not seek to open the derivative-litigation floodgates. Instead, and recognizing that Nevada law offers protections to faithful fiduciaries what some other states may provide, Appellant urges this Court to affirm that Nevada protects the “paramount role of the board” (RAB 39) while also ensuring that disloyal and conflicted fiduciaries cannot insulate actionable misconduct from judicial review.

2. The Independence Inquiry Looks Beyond the SLC Members’ Financial Interest

The independence standard is stricter for special litigation committees, created by admittedly conflicted boards, than for presumably independent directors in the demand-futility context. The type of evidence material to independence, however, is the same: a special litigation committee must show an absence of factual disputes concerning whether the special litigation committee can base its decision on the “corporate merits,” “rather than extraneous considerations or

influences.” *Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1984), cited in *Shoen*, 122 Nev. at 638-39.⁴

As this Court recognized in *Shoen* and *Amerco*, courts evaluating independence must assess whether a director is “beholden to” potentially liable directors, or for *any* “other reasons . . . is unable to consider a demand on its merits, for directors’ discretion must be free from the influence of other interested persons.” *Shoen*, 122 Nev. at 639 (“directors’ independence can be implicated by particularly alleging that the directors’ execution of their duties is unduly influenced”); *see also, e.g., Boland v. Boland*, 423 Md. 296, 355 (2011) (“The [special litigation committee] independence inquiry should not end with an examination of business relationships,” and includes “evidence of significant personal or social relationships”); *London*, 2010 WL 877528, at *12 (“an SLC member is not independent if he or she is incapable, for any substantial reason, of making a decision with only the best interests of the corporation in mind. . . . ***This sense of obligation need not be of a financial nature.***”). Indeed, contrary to the

⁴ A secondary authority the SLC cites (*see* RAB 48) acknowledges that “the Delaware courts have expanded their inquiry into director independence to include non-economic relationships,” and “courts have recognized the rule in *Oracle* that independence may be questioned for ‘any substantial reason.’” Rocky Dallum, *The Oracle that Wasn’t: Why Financial Ties Have Remained the Standard for Assessing the Independence of Corporate Directors*, 46 Willamette L. Rev. 99, 102, 128 (2009). Focusing only on financial interest may be “under-protective of shareholders.” *Id.* at 131.

SLC’s premise that only financial ties are material to independence, this Court determined that one of the Amerco directors lacked independence based on allegations of a “close, bias-producing relationship,” rather than for purely financial reasons. *Amerco*, 127 Nev. at 221.

The SLC employs contortionist logic to argue that recent Delaware case law instructing courts to consider the “totality of th[e] facts” helps them. (See RAB 50.) In *Delaware County Employees Retirement Fund v. Sanchez*, the Delaware Supreme Court held that a director could not independently consider a litigation demand against the company’s board chairman, where, among other things, the two had been close friends for decades and had professional connections, resulting in a likely “precious” relationship of “trust[], care[] . . . , and respect[].” 124 A.3d 1017, 1022-23 (Del. 2015). That relationship closely tracks the relationship between Ergen and Ortolf, who have close personal and business ties since 1977, including working and investing together, traveling the world together, and Ortolf’s children working at DISH. Yet the SLC contends that facts such as the Ergens serving as pillars of support for their “favorite” friends the Ortolf’s during life crises, Brokaw’s asking Cantey Ergen to be godmother to his son,⁵ and

⁵ The SLC argues that the godparent relationship is not material to Brokaw’s independence, based on an advisory opinion discussing recusal by federal judges. (RAB 51.) But the opinion recognizes that “[r]ecusal may . . . be required if the circumstances are such that the judge’s impartiality could reasonably be

frequent expressions of love, are “wholly irrelevant” to the independence analysis. (RAB 48-55.) The SLC’s argument asks the law to depart from the human realities that “deeper human friendships . . . exist that would have the effect of compromising a director’s independence.” *Sanchez*, 124 A.3d at 1022.

3. Facts Material to the Good-Faith Thoroughness Inquiry Include Whether the SLC Actually Investigated and Analyzed All Claims

As with independence, the facts material to good faith and thoroughness require a searching review. By considering whether a special litigation committee prejudged its investigation, failed to investigate claims, failed to consider the potential recovery to the company, or disregarded inculpatory evidence, courts can ensure that corporate and shareholder interests are protected without micromanaging the special litigation committee. That approach is sound policy. *See, e.g., Taneja*, 2012 WL 3934279, at *5 (applying Nevada law and denying a special litigation committee motion to defer because “[t]he assumption and the expectation were that the investigation’s conclusion was predetermined . . . in the

questioned,” including “if the godfather is a close friend whose relationship is like that of a close relative.” Fed. Advisory Op. 11, 2009 WL 8484525, at *1 (June 2009). Also, while decisions of a potentially conflicted judge are subject to appellate review, a conflicted special litigation committee that secures dismissal faces no further review whatsoever. There is also ample contrary evidence that Brokaw’s relationship with Ergen is simply “of historical significance,” including hosting the Ergens on airbeds, exchanging children’s report cards, and frequent expressions of affection. (AOB 22-23.)

board's favor"); *In re Galena Biopharma, Inc. Derivative Litig.*, 2014 WL 5410831, at *8 (D. Or. Oct. 22, 2014) (denying motion to defer by a special litigation committee, represented by same counsel as the DISH SLC, because of prejudgment); *London*, 2010 WL 877258, at *17, 23 (a special litigation committee's failure to "investigate all theories of recovery asserted in the plaintiffs' complaint" was "not reasonable"); *Joy v. North*, 692 F.2d 880, 897 (2d Cir. 1982) (no deference to a special litigation committee's recommendation to dismiss claims that "far exceed[] the potential cost of the litigation" because "the probability of a substantial net return . . . is high").

Importantly, the independence and thoroughness inquiries are not mutually exclusive, and findings in both areas can inform the court's assessment of the SLC. *See Johnson v. Hui*, 811 F. Supp. 479, 485-86 (N.D. Cal. 1991) (independence and good faith are assessed on "the totality of the circumstances to determine whether the members of the SLC are 'in a position to base [their] decision on the merits of the issue rather than. . . extraneous considerations or influences'"). Again, Respondent's cited Block Article supports Appellant's arguments:

It is difficult to imagine how the board could make a rational decision as to whether the action should proceed without considering the claims made, the relief sought, and, at least in a rough way, the prospects for success. This, in fact, is what the court must do; why not the board? In the absence of such an evaluation, the board will have nothing against which to measure the negative impact of the action Such traumas may be justified where the case is important and shows some prospects for success.

Block Article, 37 Bus. Law. at 35.

4. The SLC's Conduct Shows the Dangers of Presuming Independence and Good Faith Business-Judgment

The whitewash investigation by the conflicted SLC here demonstrates the potential harm to companies and investors if courts do not require special litigation committees to affirmatively establish the absence of material issues regarding their independence and good faith. The record evidence of conflicts, bad faith, and the SLC's investigatory failures that Appellant discussed in detail in its Opening Brief highlight the need for a summary-judgment standard subject to judicial oversight. (AOB 48-53, 62-75.) Key facts and analysis are summarized below.

a. The SLC's Composition Raises Genuine Issues of Material Fact As to Independence

Any presumption or undue deference in the SLC's favor risks allowing the SLC to secure the dismissal of Appellant's claims despite the extreme conflicts that tainted the SLC from its inception. With regard to Ortolf and Brokaw, the record reflects friendships with Ergen that constitute *prima facie* evidence of Ortolf's and Brokaw's lack of independence. *See Sanchez*, 124 A.3d at 1022 (“[W]hen a close relationship endures for that long, a pleading stage inference

arises that it is important to the parties.”).⁶ Ortolf and Brokaw admitted that they intentionally withheld these facts from the District Court. (AOB 22, 23.)

Because Ortolf’s and Brokaw’s conflicts are so extreme, the SLC’s only refuge is to argue that Lillis’s purported independence cures the patent deficiency. However, Lillis’s relationships show that the ties that compromise SLC independence may take many forms. The SLC does not deny that Cullen is beholden to Ergen, but glosses over Lillis’s conflicts by claiming that Lillis’s relationship to Cullen is merely a “casual friendship.” (RAB 41.) But the record shows a much deeper relationship. (*See, e.g.*, AOB 24-25.)⁷ If such close, familial friendships do not raise a question of material fact concerning their independence, a controlling stockholder could ensure that there would never be any judicial scrutiny of any self-dealing by appointing the controller’s closest and longest friends to the SLC.

⁶ Concerning Ergen’s daughter calling Ortolf “Uncle Tom” (AOB 21), the SLC cites to dictionary definitions of “Uncle” as merely a term of respect (RAB 53 n.22), ignoring that it is frequently “used by children in front of the name of a man who is a close friend of their parents.” “Uncle,” *MacMillan Dictionary*, available at: <http://www.macmillandictionary.com/dictionary/american/uncle> (last visited Sept. 17, 2016).

⁷ These relationships are far more conflicted than those in the SLC’s cited cases. *See, e.g., La. Mun. Police Emps. Ret. Sys. v. Wynn*, 2016 WL 3878228, at *7-8 & n.5 (9th Cir. July 18, 2016) (applying Nevada law) (director’s and defendant’s fathers ran bingo hall together); *Beam v. Stewart*, 845 A.2d 1040, 1054 (Del. 2004) (director and defendant attended the same wedding, and a magazine described a “close personal relationship”).

Next, the SLC asks the Court to hold that the presence of one independent director could somehow “establish the independence of the committee.” (RAB 43.) The SLC provides no support for that proposition, and none of its cited cases defer to a multi-person special litigation committee with a majority of conflicted members. *See, e.g., Johnson*, 811 F. Supp. at 48-87 (no conclusion that either committee member lacked independence); *Strougo ex rel. The Brazil Fund, Inc. v. Padeys*, 27 F. Supp. 2d 442, 450 n.3 (S.D.N.Y. 1998) (challenged special litigation committee member did not lack independence); *In re Oracle Sec. Litig.*, 852 F. Supp. 1437, 1442 (N.D. Cal. 1994) (same). Moreover, under the SLC’s argument, a special litigation committee comprising Charles and Cantey Ergen and a third, independent member would be entitled to a business-judgment presumption and could demand that Nevada courts defer and dismiss an action against the Ergens. Any such rule would make a mockery of the law and invite controlling stockholders to abuse their power at the expense of minority stockholders in any Nevada corporation.

b. The SLC’s Investigation Raises Genuine Issues of Material Fact Concerning Good Faith and Thoroughness

The SLC’s whitewash investigation shows precisely how, without judicial scrutiny, a special litigation committee can paper the record to absolve defendants at the company’s expense. Even before “investigating” anything, the SLC

defended Ergen and opposed all relief Appellant sought, while ignoring critical evidence. (*See* AOB 66-75.) Appellant does not “merely quibble[]” with the SLC’s investigation (RAB 61), but raises material factual disputes concerning the SLC’s good faith and thoroughness, including its prejudgment and refusal to investigate claims.⁸ The SLC has repeatedly ignored and misrepresented Appellant’s allegations and key evidence (*see* AOB 66-75), including:

- Ergen conditioned DISH’s LightSquared bid on his being paid in full on his debt purchases and a release of all claims against him – evidence Appellant elicited only after a protracted discovery fight. (Vol. 30 JA007264:3-7, JA007267:10-12.)
- DISH had both an interest in, and the ability to buy, LightSquared secured debt. (AOB 11.)⁹ Contrary to the SLC’s assertion (RAB 62-

⁸ Contrary to the SLC’s assertion, Appellant did not misrepresent *Peller v. The S. Co.*, 707 F. Supp. 525, 529 (N.D. Ga. 1988), which provides that, even when there is a facially thorough investigation, “[t]he conduct of special litigation committee interviews is a most important factor in determining whether the special litigation committee pursued its charge with diligence and zeal.” Appellant did not suggest that the SLC was required to transcribe its interviews (AB 63), but rather cited to a case where the court expressed concern that failing to transcribe interviews, among other things, “would impermissibly allow the SLC to insulate its investigation from scrutiny.” *Weiser v. Grace*, 683 N.Y.S.2d 781, 786 (N.Y. Sup. Ct. 1998).

⁹ The SLC’s focus on Appellant’s inadvertent omission of an ellipsis while quoting Ergen’s admission of his fiduciary duty to allow DISH the opportunity to invest in LightSquared debt (RAB 21) is unavailing. Appellant cited to a full and accurate transcript of Ergen’s testimony, which supports Appellant’s argument. (RAB 11.)

63), the Bankruptcy Court did not determine that the LightSquared credit agreement barred DISH or its affiliates from purchasing the debt, only that Ergen’s *surreptitious* purchases improperly manipulated the bankruptcy process and breached the agreement’s implied covenant of good faith and fair dealing. (Vol. 22 JA005402, JA005412, JA005428-29; *see also* AOB 12.)¹⁰

- The SLC incredibly claims that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (RAB 65.) It is implausible that Miller provided (free) legal advice to Ergen in response to Kiser’s question concerning whether DISH could purchase LightSquared debt. Moreover, Kiser breached his fiduciary duties by ignoring DISH’s interest in investing in LightSquared debt – a claim the SLC nevertheless will dismiss absent reversal.

¹⁰ The SLC wrongly suggests that Appellant misrepresented the Bankruptcy Court’s findings regarding Ergen’s influence over the Board. (RAB 22 n.3.) *See In re LightSquared Inc.*, 511 B.R. 253, 337-38 (Bankr.S.D.N.Y. 2014) (“Charles Ergen is, in every sense, the controlling shareholder of DISH and wields that control as he sees fit.”).

- The SLC mischaracterizes Appellant’s corporate resources claim as concerning the arguably *de minimis* value of the resources Ergen used to purchase LightSquared debt, rather than Ergen’s resulting \$800 million windfall. (*Compare* AOB 72-73 with RAB 23.)

There is ample evidence that the SLC’s investigation was predetermined and inadequate. The presumptions and deference that the SLC seeks would place shareholders and companies at the mercy of disloyal or impermissibly careless directors, without any recourse.

E. The District Court Abused its Discretion In Awarding Costs

Appellant’s prior discussion of the District Court’s costs award (RAB 75-80) does not need repeating. Appellant writes here only to address two arguments raised by the SLC.

1. Almost No Federal Courts Have Awarded Electronic-Discovery Costs

NRS 18.005 does not include electronic discovery, and case law requires that the legislature amend the statute to include such an item. *Bergmann v. Boyce*, 109 Nev. 670, 679 (1993). The legislature has not done so. The SLC nevertheless urges the Court to affirm the award of electronic-discovery costs on the basis that some federal courts have permitted such recovery. (RAB 74 & n.32.) Although “some courts have deemed [electronic discovery] a taxable cost. . . . many more courts have denied such recovery.” *Finnerty v. Stiefel Labs, Inc.*, 900 F. Supp. 2d

1317, 1320-21 (S.D. Fla. 2012); *see also Moore v. Weinstein Co., LLC*, 40 F. Supp. 3d 945, 953-54 (M.D. Tenn. 2014) (“agree[ing] with the prevailing view that [deduplication, running searches, and data processing] are not taxable”).

Federal courts overwhelmingly reject taxation beyond the minimal amounts attributable to converting documents into a producible format. Those taxable costs are analogous to fees for making paper copies; other costs – including maintaining databases, document searches, and data collection (all of which the SLC used to justify its claim) – are not taxable. *See, e.g., Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158 (3d Cir. 2012) (rejecting costs beyond document scanning and “conversion of native files”); *Country Vintner of N.C., LLC v. E. & J. Gallo Winery, Inc.*, 718 F.3d 249, 260 (4th Cir. 2013) (rejecting claim for electronic discovery costs); *Eolas Techs. Inc. v. Adobe Sys., Inc.*, 891 F. Supp. 2d 803, 806 (E.D. Tex. 2012) (\$2 million for document collection, processing, and hosting was “not recoverable”).

2. The Burton Declaration is Self-Serving and Inadequate to Show Reasonableness and Necessity

The SLC argues that the Declaration of Emily V. Burton adequately demonstrates the reasonableness and necessity of its claimed costs. (RAB 76; *see* Vol. 43 JA010621-23 (“Burton Declaration”).) The Burton Declaration is inadequate. The SLC initially submitted only basic records showing photocopying and scanning charges, and did not submit the Burton Declaration until after

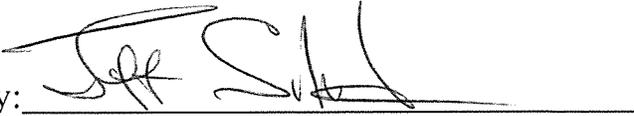
Appellant noted the lack of evidentiary support and other deficiencies in the SLC's memorandum of costs. (Vol. 43 JA010589-JA010601.) The Burton Declaration merely discussed counsel's photocopying practices and included the conclusory assertion that the costs incurred were reasonable and necessary, without any explanation why. (Vol. 43 JA010621-63.) Under Nevada law, that is not enough. *See, e.g., Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. Adv. Op. 15 (2015) (rejecting taxation where affidavit "did not demonstrate how" fees were necessary); *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1353 (1998) (rejecting taxation for "fail[ure] to provide sufficient justifying documentation").

III. CONCLUSION

Respectfully, the Court should reverse and vacate the judgment of the District Court, and remand the case for further proceedings on the merits. Even if

the Court affirms the judgment, the Court should reverse the District Court's decision on taxable costs.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font, Times New Roman style. I further certify that this brief contains 7,000 words

Pursuant to NRAP 28.2, I hereby certify that I have read this brief and, to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in this brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found.

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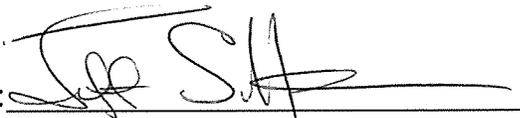
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I understand that I may be subject to sanctions in the event that this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: September 26, 2016.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify, under penalty of perjury, that I am an employee of McDonald Carano Wilson LLP and that on this 26th day of September, 2016, a true and correct copy of the foregoing Appellant's Reply Brief was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system, which will provide copies to all counsel of record registered to receive such electronic notification and was also served to the following via U.S. Mail, postage prepaid, as no notice was electronically mailed to those listed below:

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/s/ CaraMia Gerard

An employee of McDonald Carano Wilson LLP

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.

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

Respondents.

Supreme Court Case No.: 69012

District Court Case No. A-13-686775-B
Electronically Filed
Oct 03 2016 03:07 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

Consolidated with:

Supreme Court Case No.: 69729

**Appeal from Eighth Judicial District Court, State of Nevada, County of Clark
The Honorable Elizabeth Gonzalez, District Court Judge**

**MOTION FOR LEAVE TO REDACT PORTIONS OF
APPELLANT'S REPLY BRIEF**

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Corporation*

The SPECIAL LITIGATION COMMITTEE OF NOMINAL DEFENDANT DISH NETWORK CORPORATION (the “SLC”), by and through its counsel of record hereby move this Court for an order granting it leave to redact portions of Appellant’s Reply Brief filed on September 27, 2016 (the “Motion”).

Pursuant to Rule 3.2 of the Rules Governing Sealing and Redacting Court Records (“SRCR”), the SLC respectfully requests that the Court issue an order directing the clerk to (1) withdraw and file under seal the unredacted Reply Brief, (2) remove the unredacted Reply Brief from the docket to maintain the confidential

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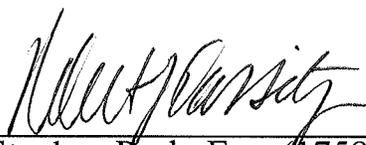
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nature of the protected information contained therein, and (3) to file, in its place, the Redacted Reply Brief, attached hereto as **Exhibit "A."**

DATED this 30th day of September, 2016.

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION FOR LEAVE TO REDACT PORTIONS OF
APPELLANT’S REPLY BRIEF**

**I.
INTRODUCTION**

Appellant Jacksonville Police & Fire Pension Fund (“Jacksonville” or “Appellant”) filed *Appellant’s Reply Brief* (the “Reply Brief”) on September 27, 2016. The Reply Brief discusses and cites to confidential information protected by the work product doctrine and previously redacted in the Answering Brief of Respondent Special Litigation Committee of DISH Network Corporation (“SLC”) as authorized pursuant to this Court’s August 17, 2016 Order, which must remain confidential. *See* Reply Brief at 27. The SLC respectfully moves this Court for an order granting it leave to redact a portion of the Reply Brief containing the confidential information.

The parties are subject to two stipulated protective orders entered by the District Court: (1) a *Stipulated Confidentiality Agreement and Protective Order* entered on October 21, 2013 (attached hereto as **Exhibit “B”**) and (2) a *Stipulation and Protective Order* entered on March 30, 2015 (attached hereto as **Exhibit “C”**) (collectively, the “Protective Orders”). Pursuant to the Protective Orders, the parties agreed to file and maintain under seal, and/or redact, certain Confidential

Information¹ and Protected Documents.²

The SLC seeks to redact certain language at page 27 of the Reply Brief that should remain nonpublic on the basis that this language contains Confidential Information.³ The language redacted on page 27 also describes the contents of a

¹ The *Stipulated Confidentiality Agreement and Protective Order*, entered on October 21, 2013, permits the parties to designate as confidential:

Discovery Materials that consist[] of (i) previously non-disclosed financial information (including but not limited to profitability reports or estimates, percentage fees, commercial rates, sales report and sales margins), (ii) previously non-disclosed trade secrets, business plans or prospects, product development information, or marketing information, (iii) any information of a personal or intimate nature regarding any individual, (iv) attorney-client privileged information and work product, and (v) any other category of information hereinafter giving confidential status by the Court. In designating information as "CONFIDENTIAL—Authorized Eyes Only," the Producing Party represents that he, she or it maintains the information in confidence and in good faith believes in fact that it is confidential and that its unprotected disclosure might result in economic or competitive injury.

Ex. B § 1.

² Pursuant to the *Stipulation and Protective Order*, entered on March 30, 2015, "Protected Documents" includes, among other things, any documents selected by the SLC's counsel and provided to the SLC for its work in preparing the *Report of the Special Litigation Committee of DISH Network Corporation* filed in the District Court on October 24, 2014 (the "SLC Report"). See Ex. C at 4:13-24.

³ Notably, the citation in the Reply Brief for the confidential language on page 27 erroneously points to an unredacted portion of the SLC's Answering Brief ("RAB 65") unrelated to the proposition being asserted on page 27. The correct citation for the confidential language on page 27 of the Reply Brief is to page 62 of the Answering Brief, which was previously ordered by the Court to be redacted on August 17, 2016 ("Aug. 17, 2016 Order") (attached hereto as **Exhibit "D"**). See Ex. D at 3 ("SLC has also filed . . . a motion for leave to file a redacted version of its answering brief Having considered the motions, we grant them. The clerk of this court shall file SLC's redacted answering brief"). The confidential language on page 27 of the Reply Brief and on page 62 of the Answering Brief both describe the same Protected Document.

Protected Document that constitutes a portion of the SLC's work product, which was produced without waiver and previously sealed pursuant to the District Court's March 30, 2015 *Stipulation and Protective Order* as well as pursuant to the District Court's August 21, 2015 Minute Order (attached hereto as **Exhibit "E"**). *See* Ex. C; Ex. E. Because the redacted language at page 27 of the Reply Brief discusses work product-information protected by the *Stipulation and Protective Order* and the District Court's August 21, 2015 Minute Order, this language should remain nonpublic, and the Court should allow this information to be redacted.

II.

LEGAL ANALYSIS

The Nevada Rules for Sealing and Redacting Court Records ("SRCR") requires records sealed pursuant to a district court order to be provided to the Nevada Supreme Court in the event of an appeal. *See* SRCR 7 ("A civil court record or any portion of it that was sealed in the trial court shall be made available to the Nevada Supreme Court in the event of an appeal."). The sealed records shall remain sealed and any motion to unseal previously sealed records must be filed in

In addition, the Aug. 17, 2016 Order also granted, among other things, the SLC's countermotion for leave to make additional redactions to the Appellant's Opening Brief, which ordered the redaction of certain language on page 74 of the Opening Brief describing the contents of the same Protected Document referenced on page 27 of the Reply Brief and page 62 of the Answering Brief. Because the document, Vol 29 JA007170, constitutes a portion of the SLC's work product and was produced without waiver and previously sealed, the Court authorized the redaction of the language on page 74 of the Opening Brief for "[c]ause appearing." Ex. D at 2. To be consistent with its prior Aug. 17, 2016 Order, the Court should also order the redaction of the language on page 27 of the Reply Brief.

the Supreme Court action. *See id.* (“Court records sealed in the trial court shall be sealed from public access in the Nevada Supreme Court subject to further order of that court.”).

Court records that are sealed may be examined by the public only after entry of a court order allowing access to the record in accordance with the SRCR. *See* SRCR 4(1). Rule 4 provides that “[a] sealed court record in a civil case shall be unsealed only upon stipulation of all the parties, upon the court’s own motion, or upon a motion filed by a named party or another person.” SRCR 4(2). Any party opposing the motion to unseal shall appear at a hearing and show cause why the motion should not be granted. *Id.* The responding party must show that compelling circumstances continue to exist or that other grounds provide a sufficient legal or factual basis for keeping the record sealed. *Id.*

SRCR 3 sets forth the grounds upon which the Court may seal or redact documents or exhibits filed with the Court:

Grounds to seal or redact; written findings required. The court may order the court files and records, or any part thereof, in a civil action to be sealed or redacted, provided the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety interests that outweigh the public interest in access to the court record. The parties’ agreement alone does not constitute a sufficient basis for the court to seal or redact court records. The public interest in privacy or safety interests that outweigh the public interest in open court records include findings that:

(a) The sealing or redaction is permitted or required by federal or state law;

(b) The sealing or redaction furthers an order entered under NRCP 12(f) or JCRCP 12(f) or a protective order entered under NRCP 26(c) or JCRCP 26(c);

(c) The sealing or redaction furthers an order entered in accordance with federal or state laws that serve to protect the public health and safety;

(d) The redaction includes only restricted personal information contained in the court record;

(e) The sealing or redaction is of the confidential terms of a settlement agreement of the parties;

(f) The sealing or redaction includes medical, mental health, or tax records;

(g) The sealing or redaction is necessary to protect intellectual proprietary or property interests such as trade secrets as defined in NRS 600A.030(5); or

(h) The sealing or redaction is justified or required by another identified compelling circumstance.

SRCR 3(4). In accordance with the requirements of the Protective Orders, and consistent with this Court's August 17, 2016 Order and the provisions of SRCR Rule 3, the SLC requests that the Court permit the redacted version of the Reply Brief submitted herewith as Exhibit A to be filed publicly in place of the version filed on September 27, 2016.

Here, the redacted information on page 27 of the Reply Brief is Confidential Information and should remain nonpublic pursuant to SRCR 3(4)(a), (b), (c), and (h). The redacted language contained on page 27 describes the contents of a

Protected Document that constitutes a portion of the SLC’s work product, which was produced without waiver and previously sealed pursuant to the District Court’s March 30, 2015 *Stipulation and Protective Order* and also previously sealed pursuant to the District Court’s August 21, 2015 Minute Order. *See* Ex. C; Ex. E. The underlying document constitutes work product because it was selected by the SLC’s counsel and provided to the SLC for its work in preparing the SLC Report. *See* Ex. C at 3:25-4:25. Jacksonville sought production of this work product, and the SLC objected. *See id.* at 2:18-27. In an effort to resolve the parties’ dispute, the SLC agreed to produce this document to Jacksonville on the condition that Jacksonville enter into the *Stipulation and Protective Order*. *See id.* at 3:7-16. Through the *Stipulation and Protective Order*, Jacksonville agreed and the District Court ordered that the document – a “Protected Document” –

shall continue to be afforded attorney work product protection . . . while in the possession of derivative plaintiff Jacksonville and its counsel[,] . . . and the production of the Protected Documents shall not waive the work product protection for such documents, nor waive the work product protection for any other documents possessed by the members of the SLC or counsel for the SLC[.]

Ex. C at 4:19-25.

Further, the *Stipulation and Protective Order* precludes Jacksonville and its counsel’s use of the document “for any purpose other than to respond to the Motion to Defer” to the SLC’s Determinations that the Claims Should Be Dismissed, which

was filed in the underlying litigation and is at issue in this appeal. *See id.* at 5:13-18. Because the language redacted on page 27 of the Reply Brief cites to and discusses work product-information protected by the *Stipulation and Protective Order* and sealed pursuant to the District Court's August 21, 2015 Minute Order, compelling circumstances exist under SRCR 3(4)(a), (b), (c), and (h) to redact the language in the Reply Brief to ensure that the information remains nonpublic for the duration of the appeal.

In addition, the redaction of this information is supported by the Court's public policy favoring redaction, which weighs in favor of allowing further redaction of the Reply Brief rather than filing the Reply Brief entirely under seal. Furthermore, this Court previously entered the Aug. 17, 2016 Order authorizing similar redactions to the Appellant's Opening Brief and the SLC's Answering Brief, both of which described the contents of the same Protected Document described on page 27 of the Reply Brief. Because the document constitutes a portion of the SLC's work product and was produced without waiver and previously sealed, the Court should also order the redaction of the language on page 27 of the Reply Brief to be consistent with the August 17, 2016 Order. *See Ex. D.*

III.

CONCLUSION

Based on all of the foregoing reasons, the SLC respectfully requests that the

Court issue an order directing the clerk to (1) withdraw the unredacted Reply Brief filed on September 27, 2016, (2) remove the unredacted Reply Brief from the docket to maintain the confidential nature of the protected information contained therein and (3) to file, in its place, the Redacted Reply Brief attached as Exhibit "A."

DATED this 30th day of September, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of September, 2016, a true and correct copy of the foregoing **MOTION FOR LEAVE TO REDACT PORTIONS OF APPELLANT'S REPLY BRIEF** was electronically filed with the Nevada Supreme Court. Electronic Service of the foregoing document shall be made in accordance with the Master Service List to the persons and email addresses listed below:

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