IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S REPLY BRIEF

Jeff Silvestri (NSBN 5997)
Amanda C. Yen (NSBN 9726)
Debbie Leonard (NSBN 8620)
2300 W. Sahara Avenue, Suite 1200
Las Vegas, NV 89102
Telephone: 702.873.4100
Facsimile: 702.873.9966
jsilvestri@mcdonaldcarano.com
ayen@mcdonaldcarano.com
dleonard@mcdonaldcarano.com

Mark Lebovitch (*pro hac vice)*
Jeroen Van Kwawegen (*pro hac vice)*
Adam D. Hollander (*pro hac vice)*
Bernstein Litowitz Berger & Grossmann LLP
1241 Avenue of the Americas, 44th Floor
New York, NY 10020
Telephone: 212.554.1400
markL@blbglaw.com
jeroen@blbglaw.com
adam.hollander@blbglaw.com

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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

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[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

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[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, inculpating 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"); s*ee 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 Ortolfs 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 inculpating 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

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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.

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[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. Padegs*, 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] (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 [de-duplication, 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

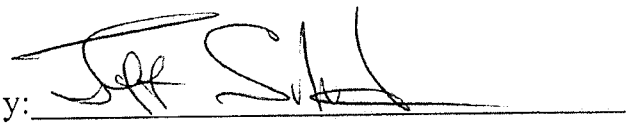
Appellant noted the lack of evidentiary support and other deficiencies in the SLC's memorandum of costs. (Vol. 43 JA010589-JA010601.) The Burton Declaration merely discussed counsel's photocopying practices and included the conclusory assertion that the costs incurred were reasonable and necessary, without 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.

McDonald Carano Wilson LLP

By: 

Jeff Silvestri (NSBN 5997)
Debbie Leonard (NSBN 8620)
2300 W. Sahara Avenue, Suite 1200
Las Vegas, NV 89102
Telephone: 702.873.4100
Facsimile: 702.873.9966

Mark Lebovitch (*pro hac vice)*
Jeroen Van Kwawegen (*pro hac vice)*
Adam D. Hollander (*pro hac vice)*
Bernstein Litowitz Berger & Grossmann LLP
1251 Avenue of the Americas, 44th Fl.
New York, NY 10020
Telephone: 212.554.1400

Attorneys for Jacksonville Police and Fire Pension Fund

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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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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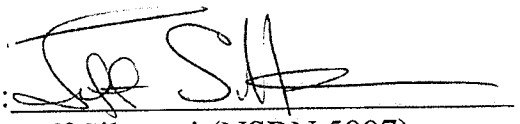
By: 

Jeff Silvestri (NSBN 5997)
Debbie Leonard (NSBN 8620)
2300 W. Sahara Avenue, Suite 1200
Las Vegas, NV 89102
Telephone: 702.873.4100
Facsimile: 702.873.9966

Mark Lebovitch (*pro hac vice)*
Jeroen Van Kwawegen (*pro hac vice)*
Adam D. Hollander (*pro hac vice)*
Bernstein Litowitz Berger & Grossmann LLP
1251 Avenue of the Americas, 44th Fl.
New York, NY 10020
Telephone: 212.554.1400

Attorneys for Jacksonville Police and Fire Pension Fund

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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Emily Barton
Zachary Madonia
Bruce Braun
Brian Frawley
Tariq Mundiya
James Dugan
C. Flinn
Robert Brady
David McBride
Holly Sollod
Alla Zayenchik
Jeroen Van Kwawegen
Robert Warns

/s/ CaraMia Gerard
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