

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
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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**

**RESPONSE TO APPELLANT'S NOTICE OF SUPPLEMENTAL
AUTHORITY**

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The SPECIAL LITIGATION COMMITTEE OF NOMINAL DEFENDANT DISH NETWORK CORPORATION (the “SLC”), by and through its counsel of record, respectfully submits this response to the Notice of Supplemental Authority (“Notice”), filed by Jacksonville Police and Fire Pension Fund (“Jacksonville”), on February 17, 2017, with respect to *Sandys v. Pincus*, No. 157, 2016, 2016 WL 7094027 (Del. Dec. 5, 2016).

Contrary to Jacksonville’s assertion, *Sandys* is not “instructive” for any issue on appeal. It has no bearing on the standard of review to be applied in evaluating a motion to defer to a recommendation of dismissal by a special litigation committee following its investigation. *Sandys* rather applied the same standard for pleading demand futility adopted years ago by this Court in *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 641, 137 P.3d 1171, 1184 (2006), when it adopted the pleading standard enunciated by the Delaware Supreme Court in *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), and *Rales v. Blasband*, 634 A.2d 927, 933 (Del. 1993). The excerpt from *Sandys* quoted by Jacksonville indeed cites to *Aronson* (though that citation was omitted from Jacksonville’s Notice), and does not reflect a departure from the well-settled pleading standard. (Notice, at 2 (citing *Sandys*, 2016 WL 7094027, at *6).) *Sandys* specifically concerns whether, for purposes of determining whether the well-established pleading standard is satisfied, a court may infer a lack of independence based upon the allegation of two facts not present in this appeal.

Sandys is wholly inapplicable to the present appeal, for at least three reasons: *First*, in contrast to *Sandys*, the present appeal does not concern the *pleading* of a lack of independence. Rather, regardless of whether a lack of independence was adequately pled, the District Court determined, *as a matter of fact*, that the special litigation committee was independent, and that there was no genuine issue that this was so.

Second, in contrast to *Sandys*, the present appeal does not concern whether inferences may reasonably be drawn from certain allegations. In the present appeal, no inferences from allegations are at issue; the District Court made factual determinations based upon an *extensive evidentiary record*.

Finally, the alleged facts at issue in *Sandys* are not present in this appeal; the appeal does not concern the joint ownership of an airplane (or other similar asset). Nor does it concern board determinations that directors were not independent under NASDAQ rules. To the contrary, in the present case, the DISH Network Corporation Board of Directors determined that the members of the special litigation committee *were* independent under NASDAQ rules. (Vol. I AA0379-80 (Apr. 29, 2014 DISH Network Corp., Annual Report (Form 10-K/A)).)

The SLC respectfully refers the Court to its arguments with respect to Delaware standards for director independence and the numerous citations in support thereof, at pages 36-39 and 46 of the SLC's Answering Brief.

DATED this 1st day of March 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of March 2017, a true and correct copy of the foregoing **RESPONSE TO APPELLANT'S NOTICE OF SUPPLEMENTAL AUTHORITY** 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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