IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 69012

IN THE MATTER OF DISH NETWORK DERIVATIVE LITIGATION.

Case 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.

APPELLANT'S PETITION FOR REHEARING

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INTRODUCTION

Appellant Jacksonville Police and Fire Pension Fund ("Appellant") petitions for rehearing of the Court's September 14, 2017 decision ("Op." or the "Opinion") affirming in part and vacating in part the district court's order of dismissal. Appellant respectfully submits that this Court misapprehended a material fact in determining that the district court has already conducted the evidentiary hearing that was required under the legal standard that this Court applied. Op. at 11 (holding that deference to a special litigation committee ("SLC") is inappropriate "unless and until the district court determines at an evidentiary hearing that the SLC lacked independence or failed to conduct a thorough investigation in good faith").

In short, at no time prior to oral argument before this Court did the district Court or any of the parties even suggest, much less assert, that the extremely brief hearing before the district court on July 16, 2015 would be, should be, or was an evidentiary hearing. As discussed below, the district court never gave notice to the parties that this would be an evidentiary hearing. No one briefed or suggested that it was an evidentiary hearing. Respondents did not raise in any of their appeal briefs that this was an evidentiary hearing either. To the contrary, ***the SLC specifically urged this Court to remand the action for an evidentiary hearing if the Court agreed with Plaintiff*** that the district court misapplied the applicable summary judgment standard. Indeed, the very first time that anybody so much as hinted that

the district court had conducted an evidentiary hearing was when Respondents abandoned their prior argument and made this surprising assertion during the argument before this Court on June 5, 2017. Appellant submits that, as a result of Respondents last-second assertion of an entirely new theory, this Court misapprehended a material fact underlying its Opinion and respectfully requests a rehearing to determine if the case should be remanded for an evidentiary hearing consistent with the majority's opinion.

LEGAL STANDARD

A petition for rehearing may be granted when the Court has overlooked or misapprehended a material fact in the record. NRAP 40(c)(2); *Lavi v. Eighth Jud. Dist. Ct.*, 325 P.3d 1265, 1266 (2014); *superseded by statute on other grounds*, Nev. Rev. Stat. §§ 40.495, 40.4639 (2011).

ARGUMENT

1. The District Court Did Not Hold An Evidentiary Hearing

In the Opinion, a majority of this Court held that a shareholder cannot proceed with derivative litigation after an SLC requests dismissal "unless and until the district court determines at an evidentiary hearing that the SLC lacked independence or failed to conduct a thorough investigation in good faith". Op. at 11. In the absence of an evidentiary hearing, the district court cannot resolve disputed factual questions, as the district court did here. *See, e.g.*, *Lexus Project, Inc. ex rel. Mittasch v. City of*

Henderson, 2013 WL 7156060, at *1 (Nev. Dec. 19, 2013) ("We conclude that the district court abused its discretion by failing to hold an evidentiary hearing . . . because there is a disputed factual question").

As a matter of objective and indisputable fact, the district court did not hold an evidentiary hearing here. The hearing took place with Respondents having argued at all times that the district court should grant their motion to defer by applying a summary judgment standard, and Appellant arguing at all times that the SLC bore the burden of proof and that, regardless of who bore the burden, there were material disputes of fact precluding deference under a summary judgment standard. *Cf* Vol. 24 JA005784-JA005788 (SLC Motion to Defer); Vol. 24 JA005903-JA005913 (Plaintiff's Opposition to the Motion to Defer); Vol. 25 JA006013-JA006014; and Vol. 25 JA006021-JA006025 (SLC Reply In Support of Motion to Defer). While Appellant argued that disputed facts meant that the SLC had failed to meet its burden and there was no need for an evidentiary hearing, Respondents, at best, argued that if the district court found disputed facts, "the matter would proceed to an evidentiary hearing, at which both sides would present evidence." Vol. 25 JA006022, fn. 9.

Reflecting the universal understanding of the limited scope of the hearing, the district court informed the parties that each side would have only 15 minutes to present argument on the SLC's motion to defer. Vol. 41 JA010051- JA010052;

JA010057- JA010058 (May 27, 2016 hearing transcript with both parties referring to 15 minute rule). Then, the district court heard argument concerning the applicable *Zapata* or *Auerbach* legal standards and the significance of certain facts in the discovery record given the summary judgment-type standard that all parties agreed applied to the SLC's motion to defer. Vol. 41 JA010051- JA010069. At no point did the district court or any of the parties raise the slightest hint, suggestion or assertion that the May 27, 2016 hearing on the SLC's motion to defer was itself an evidentiary hearing. *Id.*

The district court kept each side strictly to the allotted time. Ultimately, the entire argument lasted less than the district court had even allotted, with the SLC arguing for 12 minutes and 33 seconds and Appellant arguing for only 13 minutes before the district court read its decision that it had prepared in advance. Vol. 41 JA010051- JA0100670. Appellant never had the opportunity to present evidence or call live witnesses to allow the district court to make credibility determinations and decide disputed material facts. *See Stinziano v. Walley*, 2017 WL 1215964, at *10 (Nev. App. Mar. 30, 2017) ("the purpose of an evidentiary hearing is for the district court to see and hear from witnesses in order to gauge their respective credibility in order to resolve the truth of any facts on which the witnesses disagree"). The district court did not ask a single question and read a prepared statement granting the SLC's motion immediately after counsel presented argument. Thus, the district court could

not, and did not, make any determinations concerning the credibility or weight to be given to any evidence. Vol. 41 JA010051- JA0100670. *See* EDCR R. 2.21 ("Factual contentions involved in any pretrial or post-trial motion must be initially presented and heard upon," among other things, "affidavits [and] depositions . . . the court may set the matter ***for a hearing*** at a time in the future and require or allow oral examination of the affiants/declarations ***to resolve factual issues . . . in dispute***"); *Mann v. State*, 118 Nev. 351 (2002) (reversing and remanding to hold an evidentiary hearing, and rejecting proposed resolution of factual disputes based on affidavits); *Hatley v. State*, 100 Nev. 214 (same).

2. The SLC First Raised Its Evidentiary-Hearing Assertion at the Oral Argument on Appeal, thus Waiving It

"Parties may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below." *Dermody v. City of Reno*, 113 Nev. 207, 210, 931 P.3d 1354, 1357 (1997) (quoting *Powers v. Powers*, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989)).

Here, the SLC argued in the district court that it should apply a summary judgment type standard to the SLC's motion to defer. Vol. 24 JA005784-JA005788 (SLC Motion to Defer); Vol. 25 JA006021-JA006025 (SLC Reply In Support of Motion to Defer). On appeal, the SLC affirmatively argued that that if this Court found any genuine disputes of material fact regarding the SLC's independence or investigation, ***this Court should remand this action for an evidentiary hearing***.

Respondent's Answering Brief ("RAB") at 37-38, 68-69. Appellant, on the other hand, expressly argued that no further hearing would be required until trial. Appellant's Opening Brief ("AOB") at 37-38; Appellant's Reply Brief ("ARB") at 13-17.

The very first time anybody ever hinted, suggested, or asserted that the district court had somehow already conducted an evidentiary hearing was when Respondents' counsel presented that position during the oral argument before this Court. Appellant, accordingly, had no opportunity to explain in its appeal briefs why, as a factual and legal matter, any assertion that the district court somehow conducted an evidentiary hearing was wrong. Appellant's briefs affirmatively observed that the SLC had not even sought an evidentiary hearing below. *See, e.g.*, ARB at 3-4, 11 ("***the SLC now seeks for the first time an evidentiary hearing***"), 15-17.

CONCLUSION

The Court misapprehended that the district court conducted an evidentiary hearing on the SLC's motion to defer. Appellant therefore respectfully requests that

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the Court conduct a rehearing to determine if the case should be remanded for an evidentiary hearing.

Dated: October 2, 2017

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By: /s/ *Jeff Silvestri*

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition for rehearing complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font, Times New Roman style. I further certify that this petition complies with the type-volume limitation of NRAP 32(a)(7) as it contains 1502 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this petition, 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 petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that this petition

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is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: October 2, 2017

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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 LLP and that on this 2nd day of October, 2017, a true and correct copy of the foregoing 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 on October 2, 2017, as no notice was electronically mailed to those listed below:

Mary Warren
Emily Barton
Zachary Madonia
Bruce Braun
Brian Frawley
Tariq Mundiya
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/s/ Brian Grubb
An employee of McDonald Carano LLP

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