

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF DISH NETWORK
DERIVATIVE LITIGATION.

JACKSONVILLE POLICE AND FIRE
PENSION FUND,

Appellant,

vs.

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

Respondent.

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**JOINT APPENDIX
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¹ JA = Joint Appendix

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1 take the \$2 billion bid, there's no bid increment, you don't
2 have to overbid me, you just take it over. Why did it go to
3 2.2 billion? It's not that \$220 million is some kind of bid
4 increment in this case; there's a reason to go there. They
5 were advised by Perella Wineberg, they were advised by
6 Cadwalader, and they had to go someplace where they thought
7 they would win, where they thought they would get stalking
8 horse bidder. The special committee comes through with that.
9 The special committee recommends that valuation. I'll deal
10 with the conditions later. We'll talk about the conditions
11 the special wanted. But in terms of the valuation it's clear.
12 Perella approved it, the special committee approved it, and
13 there was a reason to go higher than 2 billion.

14 In fact, on the floor question plaintiff showed you
15 some deposition testimony from Mr. Goodbarn. They didn't show
16 you the testimony from the Perella Wineberg representative,
17 which is on page 37. And I would have produced all kinds of
18 pretty slides and videos, but I didn't know exactly where
19 plaintiffs have been going, but I knew this one might come up.
20 Perella Wineberg on page 37 says I think three times to
21 plaintiff's questioning, it wasn't a floor, we could have done
22 whatever we wanted, we recommended what we recommended.

23 One other thing on this point that plaintiffs, while
24 they embrace a lot of things -- the scary factors of what
25 Harbinger said in its original adversary complaint which is

1 now dismissed, what LightSquared is still saying in its
2 adversary proceeding -- excuse me, adversary complaint, one of
3 the things that both those entities say is that 2.22 billion
4 is a lowball bid. They want the 6 billion. That's what going
5 on on the other side. So while plaintiff wants to embrace
6 what this adversary to DISH in the bankruptcy is saying, they
7 don't want to embrace it all, because now there's a question,
8 is 2.22 too low. Obviously if 2.22 is too low, we can look at
9 all this past stuff, which we can't do any injunction on,
10 because it's already happened, and just say, well, it doesn't
11 matter because there's going to be topping bids and we're
12 going to have to figure out what's going next. And that's
13 really where the focus is for today.

14 Now, in the line of things that plaintiff has said
15 that this Court must enjoin so it doesn't happen, there's the
16 stalking horse thing. That one they were wrong on. There's
17 this floor. They're wrong on that. There's the original
18 Harbinger adversary complaint. They were wrong on that, it
19 got thrown out. In throwing it out the court also dismissed
20 with prejudice the equitable disallowance claim. In
21 LightSquared's new complaint they renew that claim, and then
22 they footnote and say, we know the court hates this complaint
23 -- excuse me, hates this claim, but we're keeping it here just
24 for appellate purposes, we know you're going to throw it out.
25 Okay. So it's still there. I don't know why plaintiffs would

1 rely on that.

2 Then in the -- I'm now lost -- I think it's the
3 supplement to the supplement plaintiffs throw out this new
4 theory of the release and that really what we need to enjoin
5 the DISH board for is because without this interference by Mr.
6 Ergen we would get rid of the release and LightSquared
7 magically would give up its assets, would agree that DISH is
8 the best bidder, would drop its potential claim that it's not
9 a good-faith bidder, and would just say, you know what, all we
10 wanted was to remove the release from Mr. Ergen. Mr. Goodbarn
11 said, no. Mr. Goodbarn said, LightSquared and Harbinger are
12 holding out for \$6 billion. The release is potentially worth,
13 I don't know, couple hundred million maybe if they even get
14 there. But, again, plaintiffs don't want to address that
15 inconsistency in their position.

16 One of the other inconsistencies that I was
17 surprised to hear today from plaintiff was that they seem to
18 still want to pursue this corporate opportunities issue. They
19 point out that somewhere in the -- that through their
20 recitation of the facts that nobody, Mr. Ergen, Mr. Goodbarn,
21 nobody said, oh, by the way, our articles say that you can't
22 do this, it's not a corporate opportunity, oh, by the way, the
23 credit agree. Cadwalader was so intelligent, they should have
24 been able to figure it out. I don't want to take anything
25 away from Cadwalader. Where I do want to put the pressure

1 here is the Bankruptcy Court opinion that you were just
2 handed. The Bankruptcy Court opinion on page 28 -- and you
3 had seen the transcript that we used here on November 1st, but
4 the Bankruptcy Court has now put this into pretty
5 straightforward language. In the second paragraph on the page
6 it says, "Pursuant to the credit agreement there is
7 competitors of debtor, including DISH and EchoStar and any of
8 their subsidiaries, were defined as disqualified companies
9 and, as such, were not eligible to purchase the loan debt."

10 Plaintiff's theory would have Your Honor reverse
11 what the Bankruptcy Court just did. They would have Your
12 Honor say, to pursue their corporate opportunities claim, that
13 the Bankruptcy Court can't read those documents, the
14 Bankruptcy Court is wrong. That's not appropriate, Your
15 Honor. And, with all due respect, this was an issue for the
16 Bankruptcy Court to decide, and it was appropriately decided
17 there.

18 Now let's talk about DBSD, because plaintiffs still
19 want that one to play a role. And first, Mr. Peek had a lot
20 of ground to cover, and I just want to correct one
21 misstatement he made about DBSD. The purchaser of the debt in
22 DBSD wasn't Mr. Ergen, wasn't an entity controlled by Mr.
23 Ergen, it was DISH. And those facts are very different,
24 because you had DISH purchasing the debt, as plaintiffs at
25 least at one point wanted them to do for this case, and DISH

1 also making the asset purchase in the bankruptcy. And there
2 was the facts of they bought it at a 100 percent par. They
3 weren't going to make any profit on the debt. And those
4 issues played a role in the DBSD case. None of those issues
5 are present here. And the Bankruptcy Court again had a
6 comment on this. The Bankruptcy Court -- well, I'm not going
7 to say the Bankruptcy Court decided it, but on page 42 said,
8 "However, DBSD is not dispositive with regard to the motion to
9 dismiss and perhaps not even relevant to this case."

10 So the Bankruptcy Court that's going to be focused
11 with the DBSD decision and deciding whether that's a basis to
12 now knock Mr. -- disqualify Mr. Ergen's vote thinks that the
13 case isn't really even relevant. But even if it was relevant,
14 we go back to status quo for my clients and for the company,
15 which is they don't have -- they don't have a vote to be
16 disqualified. At best DBSD would disqualify Mr. Ergen's vote,
17 but the rest of the ad hoc committee is already locked in
18 based on their commitment to the plan, and we'll go forward
19 from there. So DBSD, just a red herring.

20 Now -- and this was me predicting, Your Honor. I
21 thought plaintiffs would also make an issue out of the fact
22 that LightSquared has now exercised its option under their
23 previously approved plan to extend out the bidding process.
24 Which they did. Doesn't extend it very long, and we know that
25 today there was a bunch of activity over in the Bankruptcy

1 Court, and we'll all find out what that means for this case a
2 little later on.

3 The sum total of that aspect, of that recitation of
4 plaintiff's various theories of harm that was going to befall
5 DISH in the bankruptcy case and all of them going away were
6 being completely [unintelligible] is that there's no
7 irreparable harm left for Your Honor to think about an
8 injunction to prevent. Because the injunction they're
9 proposing, you can't go back and undo what happened in May,
10 you can't go back and undo what happened in July. All you can
11 do is look forward. And looking forward, there's no
12 irreparable harm about to befall DISH.

13 And this is a point -- also, I was a little
14 disturbed about this, plaintiffs put up in their Slide
15 Number 5 the statement that essentially they attributed to me
16 and my colleagues that, "Plaintiff seeks this --"this is on
17 their Slide 5. "Plaintiffs seek this injunction without ever
18 alleging, much less proving, that DISH board will be required
19 to make any future decisions in respect to the LightSquared
20 bankruptcy"; notably, they don't put a period there at the end
21 of their quote, because that's not where the sentence ends.
22 If you read -- and maybe they only read up through
23 page 2, because that actually is the bottom of page 2 of my
24 brief. But at the top of page 3, where the sentence
25 continues, it says, "that implicates any actual conflicting

1 financial interest of even one director." This is an
2 important difference. If there's going to be a breach of
3 fiduciary duty, there's got to be a conflict of interest. We
4 recognize that, and we're looking forward and saying not that
5 there's no decisions to be made in the Bankruptcy Court, but
6 there are no decisions that are going to be -- that plaintiff
7 can't show a decision that implicates a conflict of interest.
8 Mr. Ergen and his debt is fully satisfied. That half sentence
9 disturbed me.

10 Now, knowing that plaintiffs were going to come here
11 with a slide deck, I did want to do something pretty. And I
12 wasn't sure where they'd go. And the honest truth is, and I
13 think we said this to Your Honor early on, I don't really
14 think the facts are that significant to the issue before the
15 Court, because really this is a question of Nevada law. So I
16 prepared slides, and I've given a copy of this to the
17 plaintiffs, and I'm hesitant to give it to you. My slides are
18 the Nevada statutes.

19 THE COURT: I have the book right here. I don't --

20 MR. RUGG: That's what I figured.

21 THE COURT: -- really need it.

22 MR. RUGG: Yeah. I know that Your Honor's been down
23 this road. I know that Your Honor has had plaintiffs show up
24 in this court and say, Your Honor, I know what statutes say --
25 or Nevada statutes say, for most of them --

1 MR. LEBOVITCH: I think I got it right at least.

2 MR. PEEK: You did.

3 THE COURT: That would be the primary rule of local
4 counsel to get pronunciation correct.

5 MR. RUGG: Right. But we think Delaware law should
6 still play a role here. And these plaintiffs are asking you
7 to do that, too. They're saying, you know what, let's just
8 take entire fairness, because even though the Nevada
9 Legislature set up 78.140 and said, you just have to do one of
10 these things, which includes fairness and also includes,
11 importantly at the top, that you have a disclosed conflict,
12 everybody can participate, and then you just throw out those
13 votes.

14 More importantly in 78.140 it talks about what is an
15 interested director. This is different than what is an
16 interested director for the demand futility question. 78.140
17 uses the word "financial interest." Pretty much undisputed
18 here that the only person with a potential financial interest,
19 doesn't mean it's an actual financial interest, is Mr. Ergen
20 and Mrs. Ergen. We'll leave them aside. That doesn't mean
21 they can't participate. They absolutely can participate.
22 Doesn't mean that you enjoin them. You just take aside their
23 votes.

24 Then you have my clients. My clients are never
25 really mentioned. Mr. Vogel, Mr. Moskowitz, Mr. Clayton, the

1 CEO and president, Mr. DeFranco, one of other founders of this
2 company, these are real people who had real interest in seeing
3 DISH move forward. These right board members that have helped
4 DISH achieve where it is today. I don't know what happened
5 actually in the stock market today. I know where it was on
6 Friday. On Friday it was just under 52, which was a 10-year
7 high for this stock. So if plaintiff is concerned about
8 getting a return on their investment, these are good members
9 for plaintiff, they're getting a nice return. I don't know if
10 they bought it longer ago than that. There was a different
11 peak back in the year 2000. But they're getting pretty good
12 service here. So when you talk about my people ask what is
13 their financial interest in the transaction. Their financial
14 interest is that they're invested in DISH, their jobs are at
15 DISH, and they want to see that investment keep going. And
16 they are. They're doing the things they need to do for that
17 purpose.

18 So I want to go back to 78.140. Why should my
19 people not be allowed to vote? Plaintiff has no real reason.
20 They just say. they're loyalists. Well, wait a minute. These
21 are the same loyalists who on May 8th set up the special
22 committee and empowered them. But when they on July 21st
23 said. you know what, we've looked at what we did on May 8th,
24 we've looked at what the special committee has now recommended
25 to us, and we think circumstances have changed, so we want to

1 exercise our inherent powers as the board of this company to
2 control all of its aspects -- that's 78.120 -- and we're going
3 to take the power back, if a new conflict comes up we'll
4 address it, we'll wait for that stream, but for right now
5 we're all going to be involved in this process. There's
6 nothing in Nevada law that says a special committee is
7 required procedure.

8 I'm trying to skip a little bit, Your Honor.

9 THE COURT: Because Mr. Peek was so thorough.

10 MR. RUGG: Yes. Well, I hope that when I get to Mr.
11 Peek's years of experience that you're not saying that about
12 me.

13 Now, why did -- why were my clients as members of
14 the board able to make that decision that a conflict didn't
15 exist? Because at that time it was clear that all the secured
16 debt was going to be paid, adding money to the bid was not
17 going to cause Mr. Ergen through SPSO to get a dollar more.
18 So it wasn't a motivation there.

19 And then there's the preferred stock. And I think
20 plaintiffs made this argument best on the preferred stock.
21 Your Honor asked them about it. Your Honor acknowledged that
22 it's blocked. And I think Mr. Lebovitch said two or three
23 times, we don't know, Your Honor, we just don't know. Well,
24 "we don't know" is not a basis for an injunction. We don't
25 know what's going to happen in the future. Well, that's not a

1 basis to make a decision to take away the powers of a board.

2 The bottom line on the preferred stock -- and Mr.
3 Ergen's counsel can address this -- is, well, it's blocked,
4 and that's not going to -- that doesn't -- there's no
5 foreseeable change in that position coming up.

6 Now, one of the other things that's mentioned to
7 question the overall fairness here that would go into the
8 78.140 decision Your Honor has to make is the question of this
9 indemnity and compensation for the prior special committee and
10 whether there was leverage put on the prior special committee
11 to come out with the bid it came out with. Mr. Goodbarn
12 addressed this. And Mr. Peek was right underneath that
13 question in some of the things he mentioned, but I still think
14 it's worth saying. He was asked by Mr. Frawley, who was
15 representing -- is my co-counsel and wasn't representing DISH,
16 was representing the other board members -- plaintiffs
17 misspoke on that.

18 He said, "Did any of the issues with respect to the
19 transaction committee --"

20 This is on page 234, starting at line 22.

21 "-- with respect to the transaction committee
22 earlier this year with respect to the indemnity or
23 the compensation affect your ability to reach an
24 independent judgment with respect to the
25 LightSquared acquisition?"

1 Answer, "No."

2 So while, you know, throwing a bunch of smoke in the
3 air and saying, well, we were unhappy because we wanted
4 indemnification differently, and now, you know, when the
5 special litigation committee came out saying, I won't do it
6 unless you give me a different indemnity package than everyone
7 else is happy with, and different compensation package, but
8 asked the question, he said it didn't affect his judgment.
9 And even the testimony that plaintiff showed just said he
10 thought it was a sign that he needed -- that he wanted the
11 board to show. He didn't get it, but it didn't affect the
12 recommendation they made.

13 One other point on 78.140 that I find a little
14 disturbing in plaintiff's presentation is their cite of the
15 Foster case from back 1958. And, again, I'm always hesitant
16 to tell Your Honor what the law is, but I think Your Honor
17 knows this. They like to cite that one quote. They use it in
18 their brief, they put it on the screen. They don't tell Your
19 Honor that that's not the Nevada Supreme Court speaking.
20 That's the Nevada Supreme Court reviewing caselaw from other
21 places and actually taking a direct quote not as a holding,
22 but actually noting, it's often cited that Justice Douglas
23 said this in the Supreme Court decision. I think it's Pepper
24 versus Litton. It's a direct quote from Pepper versus Litton
25 [phonetic]. The Nevada Supreme Court sets it forth. But, as

1 you and I know from reading Nevada law, the Supreme Court does
2 that -- our Supreme Court does that a lot. They'll cite
3 things, and then they'll reach their own conclusion somewhere
4 else down the line.

5 Now, I don't really think that it matters very much,
6 because that was 1958, and the Nevada Legislature has stepped
7 in --

8 THE COURT: Statute's changed substantially since
9 then; right?

10 MR. RUGG: Right. And so that's where the law is.
11 It's not what the Nevada Supreme Court quoted the U.S. Supreme
12 Court saying. But I think plaintiffs should have at least
13 told you that that was not actually a quote from a holding of
14 the Nevada Supreme Court, it was a quote of a quote of the
15 United States Supreme Court addressing some other issue.

16 Now, the other important statute here, as Your Honor
17 is aware, is 78.138. 78.138 includes the business judgment
18 presumption. Now, as I've already mentioned -- and plaintiffs
19 are perfectly happy to embrace the business judgment of the
20 board, my clients, on May 8th, yet they complete reject the
21 same business judgment of the same people on July 21st, only
22 because it reaches a different conclusion. Circumstances have
23 changed, but the business judgment question was the same, is
24 there a conflict by which we have to do something. On May 8th
25 said, there's a potential conflict, let's do a special

1 committee. On July 21st they said, you know what, that
2 potential conflict is now exhausted, we're taking back the
3 power. That's a business judgment decision. Plaintiffs are
4 asking Your Honor to step into the shoes of my clients and
5 replace their business judgment with your own or with
6 plaintiff's. And that's not appropriate.

7 Now, with regard to the conditions, I don't want to
8 go through these in detail, not because I don't think that
9 they're important. We address them in our brief. It's on
10 page 24 through 25. Plaintiffs have no response to what we
11 put into our brief. If you look at the July 24th -- excuse
12 me, July 21st resolution, it went through the conditions, too.
13 The board went through the conditions and said, this is how
14 we're going to address them. Nothing wrong with that. They
15 understood what the special committee was saying. They also
16 understood that a lot of those conditions had been satisfied
17 or the one about potential conflicts in the future will be
18 addressed in the future by this board, not by Mr. Goodbarn
19 alone and not by plaintiff.

20 One other point on 78.138 is 78.138(4). This is
21 something where Mr. Pitt's universe of good corporate
22 governance doesn't apply. And, remarkably, plaintiffs seem to
23 be running away from -- well, I don't know if they're running,
24 but they don't really seem to be embracing Mr. Pitt's
25 thousand-dollar-an-hour opinion. Mr. Pitt doesn't understand

1 that Nevada is a constituency jurisdiction. The focus of
2 Nevada boards -- and this comes up before Your Honor all the
3 time in our shareholder class action suit -- is not to focus
4 on one shareholder, it's to focus on the interests of the
5 corporation. The interests of the corporation are broad.
6 There are four different lists in 78.138(4) for things that
7 the board can look at. But ultimately it's wrong to say that
8 the sole interest should be one minority stockholder.

9 And we move beyond that to the point they already
10 made about the stock price. The other minority stockholders
11 here are pretty happy with DISH. They're the ones driving up
12 the value of the stock. The market is showing that DISH,
13 through this board's actions in placing itself into the
14 stalking horse bidder position and placing itself before the
15 FCC and getting preliminary rulings that are going to help
16 DISH apply the spectrum if it succeeds in getting from
17 LightSquared in way that benefits DISH that other companies
18 might not be able to do. This is the actions of the board
19 that they want to displace but which the other minority
20 stockholder's saying, you know what, this company gets more
21 valuable every day, this minority shareholder shouldn't be
22 believed.

23 Now, wrapping all this up we can almost use Mr.
24 Goodbarn, because Mr. Goodbarn -- and they showed you this
25 clip -- said, wanted -- you know, plaintiff's counsel asked

1 him, why did you do the July 24th letter. And he was of the
2 opinion that the chairman had a conflict. He didn't say the
3 rest of the board had a conflict. Didn't say Mr. Vogel, he
4 didn't even say Mrs. Ergen. He said the chairman had a
5 conflict and that's why we need to [unintelligible] around.
6 Okay. Let's take Mr. Goodbarn at his word on that. Whether
7 we disagree with him or not, it's Mr. Ergen that they're --
8 that Goodbarn is worried about, that plaintiffs seem to be
9 worried about. 78.140 applies. You have an interested
10 director. All we have to do is throw out his vote at the end
11 of the day to decide whether the transaction is within the
12 fiduciary duties. Not my clients. Mr. Vogel, Mr. Moskowitz,
13 Mrs. Ergen -- I understand she has a financial interest
14 through her spouse -- Mr. Clayton, Mr. DeFranco. These people
15 don't have a financial interest in the transaction. Mr.
16 Goodbarn didn't say that we have to worry about a conflict
17 with them. Nevada law applies. Leaves that there's no
18 likelihood of success in plaintiff's claim for this
19 injunction, and the injunction shouldn't grant.

20 THE COURT: I have a note being passed, Mr. Rugg.

21 MR. RUGG: Thank you.

22 It's a good point, and I'll take the note at face
23 value. I was trying to give plaintiffs a little bit of
24 benefit of the doubt and say that the release was worth a
25 couple hundred million. That's totally speculation on my

1 part. I'm not saying that I know that to be a fact. And so,
2 you know, I was trying to set up against plaintiff's confusion
3 about the millions versus billions.

4 And it comes back to something Your Honor asked me
5 about several hearings ago, the Citi Research Report that
6 showed independently that the market research out there is
7 that DISH stock could go up 17 points -- up to 17 points if it
8 completes this transaction because of the way the board has
9 positioned the company to use the spectrum. And so you look
10 at millions versus billions with Mr. Ergen, the 53 percent
11 interest holder in the company, making billions in increased
12 stock price versus the millions that he has at issue in the
13 debt. That's a logical answer. You get billions instead of
14 millions. You and I never have to worry about these
15 questions, unfortunately, but for Mr. Ergen it's a simple
16 question.

17 Same thing goes for Harbinger and LightSquared, and
18 that's why I mentioned it with regard to the release.
19 Harbinger and LightSquared are trying to get \$6 billion to
20 recover their investment in the spectrum. They're not trying
21 to make a few hundred million off of suing Mr. Ergen and not
22 having him released. That's the whole point of that little
23 comparison. It's not to say that it's specific that the
24 release will be actually worth anything in the end.

25 Unless Your Honor has questions, I will seat.

1 THE COURT: So can I ask you a question, Mr. Rugg.

2 MR. RUGG: Of course.

3 THE COURT: Is there a reason that your clients did
4 not notify Mr. Ergen of the appointment of the special
5 transaction committee at the time the special transaction
6 committee was formed on May 8th?

7 MR. RUGG: It's a good question, Your Honor,
8 though --

9 THE COURT: Or about May 8th.

10 MR. RUGG: Yeah. And though I don't know where it's
11 relevant in Your Honor's decision making and my clients have
12 yet to be the focus of any discovery, so they haven't given an
13 answer to that question, in terms of what was actually going
14 on -- this is a point that Mr. Peek made -- Mr. Ergen was very
15 busily working on the Sprint transaction and the Clearwire
16 transaction.

17 THE COURT: No. I gathered that from my in-camera
18 review of documents.

19 MR. RUGG: Yes.

20 THE COURT: But I'm just trying to figure out
21 procedurally why there wasn't some sort of notice. And it may
22 be just curiosity on my point [sic], but it's mentioned in
23 every single one of the briefs. I'm not sure how relevant it
24 is, but everybody has mentioned it in their brief, which is
25 why I'm asking you the question.

1 MR. RUGG: And I said --

2 THE COURT: I didn't ask Mr. Peek, because he's a
3 new guy, being the special litigation committee.

4 MR. RUGG: Correct. I have not asked my clients how
5 that played out, so I don't have an answer for you on that.

6 THE COURT: Okay. Thank you.

7 MR. RUGG: Thank you, Your Honor.

8 THE COURT: Mr. Reisman. Someone?

9 MR. REISMAN: Good afternoon, Your Honor. Josh
10 Reisman on behalf of Charles Ergen.

11 Charles Ergen founded DISH in 1980. He's been a
12 DISH fiduciary for over 30 years. He owns 53 percent of
13 DISH's equity. His reputation, almost the entirety of his
14 personal net worth is invested in DISH Network. He knows
15 DISH. He knows its business, he has decades of experience
16 valuing spectrum and participating in spectrum auctions. Yet
17 plaintiff seeks to disenfranchise him from one of the largest,
18 most complex contested acquisitions in DISH's history. Not
19 only is this harmful to Mr. Ergen, who has so much to lose
20 from this transaction, but it's harmful to DISH, who would
21 only benefit from his considerable expertise.

22 Plaintiff seeks to exclude Mr. Ergen from the
23 process because of alleged historical conflicts of interest
24 which are not supported by the record here. First there
25 LightSquared wasn't a corporate opportunity. This was

1 effectively determined by the Bankruptcy Court on November
2 21st, when it determined that DISH was a disqualified company
3 under the credit agreement. Mr. Ergen was also permitted to
4 purchase the debt under DISH's articles, which the plaintiffs
5 sidestep completely, and there's no evidence that Mr. Ergen
6 interfered with the special transaction committee. There's no
7 proof he was involved in the indemnity or compensation
8 discussions or the decision to disband the committee. In
9 fact, he wasn't even at the meeting in which the committee was
10 disbanded.

11 As to the info regarding Mr. Ergen's trades, these
12 were disclosed to the Bankruptcy Court on July 9th, 2013. The
13 special committee was monitoring the bankruptcy proceeding at
14 that time. Only the prices were withheld from the transaction
15 committee, because divulging that information would be harmful
16 to DISH from a litigation perspective under the circumstances
17 by creating impression -- a potential impression that Mr.
18 Ergen was acting as a shill for DISH in purchasing the
19 LightSquared debt.

20 Now, plaintiffs assert that this is a fabrication or
21 a pretext for litigation purposes, but this rationale was
22 memorialized in a special transaction committee's minutes on
23 July 21st, 2013, well before the litigation. At best, at best
24 plaintiffs have evidence -- the best evidence of plaintiff's
25 alleged interference is -- are emails that Mr. Ergen

1 complained that the committee was prematurely spending the
2 company's money by hiring legal advisors and financial
3 advisors while the Sprint and Clearwire acquisitions were
4 still pending. This isn't interference. This is good
5 corporate governance. This is -- this is watching corporate
6 spending for a good reason. And this blew me away. The
7 Perella opinion, the Perella opinion cost the company
8 \$5 million. The legal advise that the special transaction
9 committee obtained it's my understanding was in excess of a
10 million dollars. So we're not talking about low expenses
11 here. So it was -- it was within Mr. Ergen's role as a
12 fiduciary of the company to raise the amount of money that
13 might needlessly be spent while the company was focusing on
14 Plan A, which was Sprint and Clearwire. Plaintiffs assert
15 that Mr. Ergen's bid set the floor for DISH's bid. But both
16 director Goodbarn and the special committee's financial
17 advisor, Perella, testified other words.

18 This is Perella. They asked Mr. Essaid:
19 "Do you believe it that it would have been realistic
20 for Mr. Dish [sic] to acquire the assets for less
21 than the \$2 billion price that Mr. Ergen had
22 proposed in non-binding fashion?"
23 Answer, "Absolutely. It would have been realistic
24 and within the realm of possible. It was certainly
25 -- it was certainly something that was discussed

1 with the special committee. 'Mr. Goodbarn, quote, I
2 don't think this put a floor on what we could bid'
3 end of quote."

4 The bottom line is that Mr. -- the bottom line with
5 regard to Mr. Ergen's bid is that his strategic planning was
6 instrumental in DISH obtaining the stalking horse bidder
7 status. And as Your Honor pointed out earlier, he sold LBAC
8 to dish for one dollar here.

9 Plaintiff says that Ergen's -- Mr. Ergen is
10 conflicted going forward. But there's no incentive for Mr.
11 Ergen to pay any more for the assets here. Under the
12 preexisting DISH bid he'll be paid in full for his debt
13 investment. And 53 cents of every dollar thereafter comes out
14 of Mr. Ergen's personal pocket.

15 As to the preferred stock, here's the record that's
16 currently before the Court. Mr. Ergen doesn't currently own
17 any preferred stock. LightSquared won't consent to the
18 assignment. There is nothing in the record, there is no
19 evidence that says that these trades will ever close.

20 None of these circumstances, none of these
21 circumstances are reasons that most invested person in the
22 company with the most expertise should be precluded from the
23 process. And under Nevada law, NRS 78.140, which has been
24 discussed at length, Mr. Ergen's permitted to participate in
25 the bidding process. If a true conflict arises in the future,

1 the board's equipped to deal with it at that time.

2 And I'm concluded, unless you have other --

3 THE COURT: Anything else?

4 MR. REISMAN: That's it, Your Honor.

5 THE COURT: All right.

6 MR. REISMAN: Okay.

7 THE COURT: Final word.

8 MR. BOSCHEE: If we promise to be done by 3:30, can
9 we have five minutes?

10 THE COURT: You can have five minutes.

11 MR. BOSCHEE: Thank you, Judge.

12 (Court recessed at 2:54 p.m., until 3:04 p.m.)

13 THE COURT: Are you still caucusing?

14 MR. PEEK: We're just talking, Your Honor. They're
15 talking about my knowledge of spectrum, Your Honor, and --

16 MR. BOSCHEE: Having a little bit of fun with Mr.
17 Peek.

18 THE COURT: Are they asking you about technical
19 stuff now?

20 MR. PEEK: Yeah. They said they were glad that
21 you're not included in the decision because you don't know
22 very much.

23 THE COURT: I've got to tell you that some of the
24 attorneys of Mr. Peek's experience level don't even know how
25 to turn off their cell phones. So we can make fun of him, but

1 he's not the worst.

2 (Off-record colloquy)

3 THE COURT: All right. Now that we've introduced
4 you to the history of Nevada lawyers --

5 MR. LEBOVITCH: Yes. Thank you. I will try to be
6 concise and focused.

7 You know, somewhere along the line, Your Honor, I'm
8 going to learn my lesson and when I answer a question of Your
9 Honor and you're not satisfied with the answer, I will
10 immediately turn to Mr. Boschee and say, Brian, pick it up.
11 Because as soon as we were done he pointed out to me, Your
12 Honor, that we actually did answer your question as best we
13 could in our order, our proposed order, at the end of it.

14 THE COURT: I haven't seen your proposed order.

15 MR. LEBOVITCH: We emailed the findings of fact and
16 conclusions of law.

17 THE COURT: Hold on a second. Because I was going
18 to ask you guys at the end today where they were.

19 MR. LEBOVITCH: We emailed them.

20 MR. BOSCHEE: We did, yeah.

21 THE COURT: To Dan?

22 MR. RUGG: You should have one from me, as well.
23 Max sent it in. And it's on behalf of both --

24 MR. BOSCHEE: Actually, I think we sent them -- we
25 sent them to the law clerk.

1 THE COURT: Hold on a second.

2 MR. PEEK: Kris didn't print them out for you, Your
3 Honor.

4 THE COURT: How could you tell, Mr. Peek? He did
5 save them to the file, though, this morning at 8:30 -- or 8:39
6 and 8:35. So they're there.

7 MR. LEBOVITCH: Okay, Your Honor. So at the end of
8 our documents we state the order. And I should have picked up
9 on this when Your Honor asked the question, because we tried
10 very directly to anticipate this question. We say that --

11 THE COURT: I've been asking it since September.

12 MR. LEBOVITCH: I understand. You know what, Your
13 Honor, I have literally no excuse other than my mind just was
14 not processing at the end of that argument. But Brian
15 corrected me, said we have answered in what we said -- the
16 order says that, "The preliminary injunction is granted. Mr.
17 Ergen is enjoined from controlling DISH's efforts in
18 connection with the remainder of the LightSquared bankruptcy
19 proceedings, including, but not limited to, the December 3rd,
20 2013, auction. The directors involved in the termination of
21 the committee and the members of the SLC are not independent
22 from Mr. Ergen and are similarly enjoined from controlling
23 DISH's bidding efforts. The Court observes that Mr. Goodbarn
24 and Mr. Lillis did not vote in favor of terminating the
25 committee and are not members of the SLC. Neither Mr.

1 Goodbarn nor Mr. Lillis is subject to this injunction." And
2 then we write, "The independent directors who control DISH's
3 bidding efforts remain free at all times to solicit and
4 consider the views of Mr. Ergen, other directors, and DISH
5 management."

6 So, Your Honor, we also know that -- from Exhibit 10
7 to our papers -- well, I guess -- have you had a chance to
8 review?

9 THE COURT: Uh-huh.

10 MR. LEBOVITCH: That's the best I'm going to do in
11 answering Your Honor's question what exactly we are seeking.
12 Exhibit 10 is the stipulation that we entered with Mr.
13 Goodbarn when we released him from the case, and in Exhibit 10
14 there's a "whereas" clause that was important to us, and he
15 made a representation to us that -- he represented, quote,
16 that he is "willing to serve as a member of an independent
17 special committee of the DISH board of directors charged with
18 evaluating any participation by DISH in bidding for
19 LightSquared LP or certain LightSquared assets, provided that
20 such special committee is independent and has an adequate
21 charged scope of authority and funding to act solely in DISH's
22 interests." That's what he said then. We believe that Mr.
23 Goodbarn has shown that he's acted in good faith. He has
24 knowledge of the company, deep knowledge, years of knowledge.
25 He can hit the ground running because of his experience as

1 being a member of the prior committee.

2 We do list also Mr. Lillis, and we want to point out
3 that Mr. Lillis is new. He doesn't have a lot of background
4 with the company. But what he brings -- what he can bring to
5 the special transaction committee, if in fact one is created
6 to resolve the injunction, is ironically exactly why, based on
7 our investigation to date, we would have some concerns about
8 him being on a special litigation committee. And that's
9 because he has expertise in spectrum. His expertise in
10 spectrum, based on our investigation, comes from his years of
11 being a business partner with Tom Cullen. Tom Cullen is
12 Ergen's right-hand man on spectrum issues. Tom Cullen is the
13 guy Ergen goes through for strategic advice on spectrum
14 issues.

15 So those ties -- now, the ties with Cullen, who
16 obviously works for Ergen and is clearly beholden to Ergen,
17 are several hedge funds. I can go into it. But we have
18 concerns about his ability to be on an SLC, but he does have
19 expertise in spectrum, and he could bring something to the
20 table, so -- as far as the transaction process. And, frankly,
21 I mean, if Ergen controls Cullen and Cullen has this 25-year
22 relationship through three different businesses, one of which
23 is a hedge -- is a fund that they co-founded together, if
24 Cullen can actually influence Lillis, I mean, Ergen probably
25 takes some comfort that he can still influence the committee

1 just through the fact that Lillis, you know, will -- he's here
2 because of Cullen. And that's Ergen's guy. So that's our
3 findings of fact.

4 Mr. Peek spoke a lot about how the purchase price
5 was fair, and he said that the committee has passed on the
6 valuation and approved the valuation of the bid as fair.
7 There's a difference between finding that the price you're
8 paying is fair to the company and simply finding that it's an
9 adequate price to pay. I'll try to give, I think, Your Honor,
10 a very simple -- you know, again, a mathematical formula or
11 situation to illustrate it. Picture a company whose market
12 cap is \$100 million, that's what the market values it at. If
13 someone goes to the CEO and says, I'll pay \$150 million for
14 your company, now the CEO says this bidder, you know what, you
15 can pay your hundred fifty, give me 20 million myself, and
16 we'll pay the shareholders 130 million. It's possible that
17 the price being paid to the shareholders is adequate, but I
18 find it inconceivable any court would find that that
19 transaction is fair to the shareholders of that company. That
20 CEO insisted on in that case a bribe, but essentially he's
21 skimming money off the top at the expense of the shareholders.
22 It doesn't matter if the 130 million is an okay price for the
23 shareholders to take.

24 Now, Mr. -- maybe it was -- I missed one -- one
25 excerpt, and it was where Mr. Goodbarn I think refutes the

1 assertion by Mr. Peek that Mr. Goodbarn separated out the
2 assessment of the bid with the assessment of Ergen's conflict.
3 To the contrary. He said it's integral. And I have one -- I
4 have one more clip, one more clip we'll play, and then no
5 more.

6 (Video played - Mr. Goodbarn)

7 "And was the judgment that the special committee at
8 the time made that recommendation that the
9 transaction recommended to the board was fair to the
10 DISH shareholders?"

11 "No. Because we had not completed the process. We
12 only reached a conclusion on the valuation. We did
13 not reach a conclusion regarding the conflict of
14 interest. And that's really integral to that
15 decision. That has not been -- that decision has
16 not been reached."

17 MR. LEBOVITCH: He said it was integral. I don't
18 think it's possible for the defendants to still argue that the
19 committee said the deal was fair or even that the bid was
20 fair. They just said the price being paid was an appropriate
21 price to offer for the asset. And I'm going to get to the
22 Perella opinion in a moment.

23 There was mention about the Sprint Clearwire deal.
24 Your Honor, companies pursue alternative strategies all the
25 time. They don't put all their eggs in one basket. And here

1 Mr. Ergen presented -- while the Sprint deal was still out
2 there he presented a proposal on May 2nd, asking the board to
3 go ahead and make an offer right away. He said, let's make an
4 offer right away. So I don't really understand why it's okay
5 to say to the committee, don't spend any money on this until
6 we're done with Sprint. And Your Honor was told that the
7 money is \$5 million. That's what Perella got paid at the end
8 of the process when it gave an opinion. The retention of
9 Perella, we don't have the number right here, but it's going
10 to be less than \$100,000. And, yeah, the lawyers did work
11 over the course of time. But it doesn't make sense that
12 you're looking at a Plan B, an important strategy, and you
13 really for fiduciary duty reasons to save money shut down the
14 committee's work, it's not a lot of money, he just didn't want
15 the committee going -- getting ahead of its skis, essentially.

16 Now, I dealt with the conclusion. The conclusion
17 was not that it's a fair value. Exhibit 57, the LightSquared
18 deal, Perella's work -- I guess it's 59 is the LightSquared
19 letter. Your Honor, we don't have a signed fairness opinion
20 from Perella. We just don't have one. Exhibit 59 is the only
21 thing that you've got, and that's because Perella was fired so
22 quickly. I don't know if Your Honor has it, but on the top
23 corner of the document it says, "Draft. Not to be Relied
24 Upon," okay.

25 Now, there was an oral opinion given at that

1 meeting, but let's take a look at what this letter says,
2 because I don't believe there's ever a signed version of it.
3 Does Your Honor have the document, or --

4 THE COURT: I did not go to the whole stack. But
5 that's okay. I looked at them yesterday and this morning.

6 MR. LEBOVITCH: Okay. So I'll read the relevant
7 parts to Your Honor very quickly. The request of Perella was,
8 "You requested our opinion as to the fairness from a financial
9 point of view to the company of the consideration proposed to
10 be paid by the purchaser for the assets." Everyone here who
11 sees fairness letters, very often it's the fairness of the
12 transaction. That is not what Perella said.

13 And then on page -- well, I guess the third page of
14 the letter, I'll give you the Bates stamp, is DISHNEV8363,
15 they have a caveat that is critical. They say, "This opinion
16 addresses only the fairness from a financial point of view to
17 the company of the consideration proposed to be paid." They
18 then go on to say, "We have not been asked to, nor do we,
19 offer any opinion as to any other term of the transaction or
20 the former structure under which the transaction may be
21 affected or the time frame in which the transaction may be
22 consummated."

23 Now, here's the kicker. They add, "In addition, we
24 express no opinion as to the fairness of the amount or nature
25 of any compensation to be received by any officers, directors,

1 or employees of any parties to the transaction or any class of
2 such persons, whether relative to the consideration or
3 otherwise."

4 So they said exactly what Mr. Goodbarn said, it's an
5 adequate price to pay, but that doesn't mean that the
6 transaction is fair. And in fact they expressly carved out
7 any money that other people are going to make.

8 Now, all the committee did, it says, "We want to
9 pursue an opportunity for DISH." We do all agree there's an
10 opportunity. But, again, taking the 130 million may be an
11 opportunity for those shareholders, it doesn't mean it's fair
12 when the CEO could have gotten 150 million if he was loyal.

13 The ad hoc committee is committed to vote for DISH's
14 bid. I think there's been a couple of representations. And
15 on this one, Your Honor -- you know, I like to make sure I'm
16 right when I say something. I'm going to pass along something
17 that I learned from my bankruptcy experts. And so if I'm
18 wrong, you know, I'm wrong. But my understanding is they're
19 not seeking to disqualify votes and make them disappear. What
20 people are seeking is to designate Ergen's votes. And my
21 understanding of what happens when votes are designated is
22 they can be voted whichever way the court wants. And so if
23 the court, which I understand today has expressed some real
24 frustration, unfortunately, with LBAC, if the court decides to
25 designate Ergen's votes, since he's the majority creditor, I

1 am told, Your Honor, my understanding is that can actually
2 override what the ad hoc committee has contractually agreed to
3 vote, and I think the Court has equitable power to simply
4 override that support agreement. But, again, I just want to
5 pass it along to make sure there's no misstatement that this
6 is all locked up.

7 Just briefly, I mean, Mr. Peek actually got up and
8 talked about what Messrs. Rugg and Reisman would say. We
9 pointed out in our footnote that, you know, the
10 [unintelligible] defendants incorporated the SLC brief before
11 it was even out. You know, I don't know if that's --

12 THE COURT: You think maybe they're working
13 together?

14 MR. LEBOVITCH: Well, I know they're working
15 together, but --

16 THE COURT: Okay.

17 MR. LEBOVITCH: But --

18 THE COURT: I recognized that, too. I don't know
19 that you need to go much further.

20 MR. LEBOVITCH: Thank you, Your Honor. I think that
21 has legal significance.

22 THE COURT: And it was nice they didn't duplicate
23 their efforts in making the arguments, because I wouldn't have
24 wanted to hear the same argument from Mr. Rugg that I heard
25 from Mr. Peek.

1 MR. LEBOVITCH: I know, Your Honor. But I think
2 we're -- I think an SLC that's supposedly still under
3 investigation working together with the people they're
4 supposed to be investigating creates some legal issues We
5 cited the HealthSouth case, which may have been from Alabama,
6 I don't remember if it was Delaware, but it's supposed to be a
7 problem when you're independent and you're actually working
8 with the people you're investigating.

9 The comment about apples and oranges on the bid and
10 Ergen debt, the court, again, expressly said that it's waiting
11 on ruling on good faith. The DSBD case, our understanding is
12 DISH won the bidding initially, then the case went to Second
13 Circuit, then they redid the bidding process and did pay more.
14 So, yeah, they won, but only by paying more.

15 As far as the apples and oranges comment, I mean, we
16 cited in our complaint the statement that Mr. Mundiya's
17 partner said to the Bankruptcy Court when there were questions
18 about what hat she's wearing, and the attack was, you just
19 mixed DISH and Ergen together, the statement made to the court
20 was, you have to understand that DISH has independent
21 directors. We think it could be an issue that there was no
22 disclosure that in fact the committee had just been shut down.

23 But, in any event, we were criticized for not
24 showing fraud or collusion in the bid. Your Honor, we -- it's
25 not our burden to show what Harbinger or LightSquared might be

1 trying to prove. In fact, if we did this, I'm quite confident
2 defendants would be all over us, would kill us for trying to
3 help Harbinger. Our point is that there's a lack of
4 independence now that prevents DISH from protecting itself
5 anytime the conflict emerges, and we think it's an ongoing
6 thing.

7 Now, let me see here. The LightSquared complaint,
8 okay. LightSquared seeks damages. I think you were told that
9 there's no claim for damages. LightSquared is seeking damages
10 from DISH, and clearly in the complaint. They're seeking
11 equitable disallowance, and that's the claim that you heard
12 about. They're also seeking statutory disallowance, which I
13 don't believe there's a dispute that they're allowed to seek
14 that. That's a claim that I believe can be brought. So
15 that's that complaint.

16 The U.S. Trustee's objection. I heard the SLC
17 defending the release. And essentially the argument was that
18 the U.S. Trustee is raising a frivolous point because everyone
19 always has a release that's too broad. I mean, the U.S.
20 Trustee's raising an objection. I do assume that other
21 companies are going to explore whether their desire to buy
22 assets outweighs their desire to have a release of a certain
23 scope, particularly if it's protecting third parties. And on
24 that note, Your Honor, you were handed -- or I guess I handed
25 to you the omnibus objection, and Mr. Peek I believe went to

1 page 5, the language from the different releases. It's not
2 the same. LightSquared's release --

3 THE COURT: I've got it. They're all a little
4 different.

5 MR. LEBOVITCH: And the difference is releasing the
6 stalking horse bidder, as the others want to do, is not the
7 same as releasing the stalking horse bid parties, as LBAC
8 wants to do. That's the whole point about --

9 THE COURT: Or Harbinger's not releasing them at
10 all.

11 MR. LEBOVITCH: Well, Harbinger is trying to bring
12 claims. I understand.

13 THE COURT: So I read it, Counsel.

14 MR. LEBOVITCH: But I just wanted Your Honor to
15 understand that DISH is reaching to protect Ergen here, not
16 just the stalking horse, which is DISH and -- which is I guess
17 DISH and LBAC. So there's a difference there. They're being
18 broader in their release. Again, it's an issue that
19 independence would at least look at.

20 There was quotes from Mr. Goodbarn that says
21 negotiating with Harbinger not viable, that it's not viable.
22 That was with respect to the summer. And I asked the
23 question, I said, you know, do you think you could have
24 negotiated something; he says, no, it wasn't practical,
25 they're out too much money, they want too much. Okay. Fine.

1 That's not the same as right now trying to work with
2 LightSquared, which, again, has an independent committee
3 because DISH was successful in insisting that they have an
4 independent special committee. The fact that Harbinger is bad
5 guys, fraudsters, or just plain bad managers who lost so much
6 money that their bidders is irrelevant if you can work out
7 something with LightSquared, the U.S. Trustee, or any of the
8 other bidders that are out there.

9 I mentioned -- just a few more. I mean, the
10 argument we've heard and the brief from the SLC, I don't know
11 if Your Honor's, you know, there or not, but they've said
12 repeatedly that the transaction is fair, they've said
13 repeatedly that there were no breaches of duty. We pointed
14 out in our reply what they said about damages, which gives up
15 the formula on which you could get damages down the road
16 against Ergen. We think, frankly, I mean, they're protecting
17 Ergen's control here, rather than doing the job they're
18 supposed to do. You know, frankly, there's a reason why in
19 our view a typical SLC keeps its mouth -- you know, kind of
20 stays quiet until its work is done. And we're told this SLC
21 is still doing an investigation -- prejudices -- not only does
22 disclosing things to the defendants that you're supposed to be
23 investigating waive privileges, but it prejudices what they're
24 supposed to be doing if they open their mouths. That -- I
25 think that might also be the HealthSouth-Beyonde [phonetic]

1 case that we cited.

2 Now, there was a comment about indemnity, that the
3 indemnity issue was resolved by a commitment to let Ortolf
4 control indemnity. They were going to say, well, we won't
5 change our indemnity provision, we're going to let Ortolf
6 control. Your Honor heard Mr. Goodbarn's testimony. He
7 doesn't think that anyone else can act independent of Ergen.
8 So if his concern is how can I go up against Ergen if Ergen
9 can deny me the ability to pay for lawyers -- that was his
10 concern, he said it. Having Ortolf do it from Goodbarn's
11 perspective and our perspective doesn't really achieve
12 anything, because the guy is still beholden to Ergen.

13 Which brings us to 78.140, Your Honor. We don't
14 dispute that it doesn't deny Ergen the right to participate.
15 You heard our order. Ergen can participate. The question is
16 control. We were told that the relief we're seeking -- and
17 I'll get back to 78.140 in a second -- but the relief we're
18 seeking is improper because it would vest all of the board's
19 powers in one person. We think, Your Honor, right now all of
20 the board's powers are essentially vested in one person. So
21 that's -- I don't think -- I think that that argument
22 shouldn't be accepted.

23 Now -- and you heard Ergen say that he was okay with
24 the way the former process worked. Here's the thing. On
25 78.140, the argument that Mr. Rugg made -- Oh. Sorry. And

1 I'm going to be done very quickly.

2 Hollinger case was not applicable. Mr. Peek said
3 that. I'll read two sentence from Hollinger which I think are
4 very much applicable. And again, it's just persuasive,
5 hopefully, for Your Honor. But at 844 A.2d at 1080 the
6 chancellor writes, "In this case the bylaw amendments --"
7 these are the amendments that shut down a transaction
8 committee "-- were clearly adopted for an inequitable purpose
9 and have an inequitable effect." We think that's the same
10 with the July 21st decision.

11 And then on the next page, 1081, the court says,
12 "Although it is no small thing to strike down bylaw amendments
13 adopted by a controlling stockholder, that action is required
14 here because those amendments complete a course of contractual
15 and fiduciary improprieties. Inc.'s written consent was the
16 culmination of Black's effort on his and Inc.'s behalf to end-
17 run the strategic process he had agreed to lead and support."
18 We think that's very similar to what Mr. Ergen has done here.

19 The idea that Goodbarn may bid \$6 billion for an
20 asset, I mean, I think it's just fanciful, it's just
21 hyperbole. He's independent, he's got good-faith judgment,
22 he's entitled to the protection of 78.138. There's no reason
23 not to presume he would do what's best for the company,
24 including, as he said, confer with others. And, as Ergen
25 said, yeah, that's fine, they conferred with me, I would give

1 my advice.

2 The ad hoc committee -- let me deal with 78.140,
3 actually, first. The argument we heard from Mr. Rugg is
4 essentially that you really just need -- you can insulate a
5 deal as long as there's beholden directors who aren't
6 financially interested.

7 THE COURT: That's what the Nevada statutes say,
8 Counsel.

9 MR. LEBOVITCH: Your Honor, I think there's two
10 problems with that. I believe there's two problems with that.
11 One is that just makes a deal not void or voidable. I don't
12 think that makes a deal insulated from review for breaches of
13 fiduciary duty. The other thing --

14 THE COURT: I don't disagree with you on that.

15 MR. LEBOVITCH: Okay. Okay. And we're not trying
16 to void or, you know, render void or voidable a transaction,
17 we're not trying to stop --

18 THE COURT: But then you've got to go to the
19 business judgment rule.

20 MR. LEBOVITCH: Which is a presumption. I mean,
21 there are cases where a director is conflicted or lacking of
22 independence. And by the way, lacking of independence can
23 also be because you're financially controlled by a person,
24 you're the CEO of a company, you've made all your money over
25 years because of Ergen's control, you're getting big

1 consulting fees right now because of Ergen. And so I actually
2 think that -- if you want, we can go through it -- a majority
3 of the board is -- in the sense that Ergen controls their
4 financial status, they are financially interested, because
5 what's interested to Ergen becomes interest to those he
6 controls through financial control. So I don't think that
7 78.140 can insulate the board's conduct here from review.

8 And again, I mean, if the statute is a fully safe
9 harbor, which I don't believe any state statute has been
10 actually interpreted to allow a board to get rid of the
11 fiduciary duties, I think then what you're going to see is
12 packing boards with your buddies and family and people that
13 you control even financially. There's no reason to have
14 independent directors if you just don't need them to approve
15 anything. You just get rid of them. Which I think is
16 essentially what's happened here.

17 The ad hoc committee wanted more than 2 billion,
18 we're told.

19 Oh. Number one -- I mean, in the quote -- 78.138.1
20 says, "Directors and officers shall exercise their powers in
21 good faith and with a view to the interests of the
22 corporation," okay. I mean, that's their duty.

23 THE COURT: And that's your breach of loyalty claim.

24 MR. LEBOVITCH: That is the breach --

25 THE COURT: That's your business judgment breach of

1 loyalty claim.

2 MR. LEBOVITCH: That's correct. That's correct.
3 That's the breach of loyalty claim. But what we say is the
4 termination of the committee was not in good faith for the
5 protection of the company, it was elevating Ergen's interests
6 over those of the company. That's a breach of loyalty claim.
7 And I can't believe that -- we respectfully submit that 78.140
8 is not intended to allow people who breach their duty of
9 loyalty by elevating their controlling shareholders' interests
10 over the company to then insulate the same transaction that
11 the independent directors said, we're not going to bless this
12 as fair under the circumstances.

13 THE COURT: That's not what the independent
14 directors said, Counsel. What the independent directors said,
15 at least from my hearing of the evidence that's been presented
16 to me, is, we agree the value is appropriate but we have
17 concerns about the breaches of loyalty that we need to
18 investigate further to make recommendations related to this
19 transaction. So it's a two-prong analysis. It's the analysis
20 on the valuation, which is the bid price, which I think we all
21 agree has been fairly well accomplished and we may be facing
22 some more things in another week or so, but it's fairly well
23 accomplished at this point. And then there's other issues
24 that may ultimately result in a trial of this matter that may
25 not be appropriate for injunctive relief. And so you've got

1 two analyses that the special transaction committee did, one
2 where you, if we were talking about a value issue, you'd have
3 a really strong argument on irreparable harm. But you're not.
4 Because everybody says the value is fair. We're talking --

5 MR. LEBOVITCH: Or that the value is adequate. But
6 I understand Your Honor's point.

7 THE COURT: I mean, you've got loyalty issues that
8 you're going to be able to allege and get past a motion to
9 dismiss and probably a motion for summary judgment based on
10 what I've seen. But, you know --

11 MR. LEBOVITCH: Your Honor, I understand.

12 THE COURT: -- that's not irreparable harm.

13 MR. LEBOVITCH: I understand that, and I appreciate
14 that. I mean, I'll -- the special committee -- because I want
15 to -- I want to keep trying, Your Honor, before -- and when
16 it becomes too much, I'll stop. The special committee on July
17 21st did say there's ongoing conflicts. The board overrode
18 that. And so when you think about loyalty, I do think that
19 there's the predecessor loyalty issue with Ergen, but there's
20 also the loyalty issue of the board doing what it did with the
21 committee.

22 So why did the committee go to 2.2 billion if they
23 could have had the company at 2 billion? We're told that
24 Ergen essentially said that's okay to buy LBAC at 2 billion.
25 I mean, the answer, again, is the one that's been ignored, is

1 he threatens to make a bid, you know, and Your Honor's seen
2 the numbers there. So they could stick with 2 billion when he
3 says, I'm going to make my own bid financed by EchoStar. The
4 ad hoc committee said, you know, we want more money,
5 basically. They were cleared on the secured, so their letter
6 just says, we want to get some money for the preferred. I
7 submit, Your Honor, that when initial offer is made by almost
8 anyone it's not -- it's not unusual that you would expect
9 people to say, hey, let's get more, let's get for the
10 preferred. If you paid off the preferred, they'd probably
11 come in and say, hey, let's get some money for the equity.
12 It's just natural. This isn't -- I mean, people are big boys.
13 They can negotiate.

14 THE COURT: That's part of the bankruptcy process,
15 to maximize the value of bankruptcy estate. That's their job
16 over there.

17 MR. LEBOVITCH: Understood.

18 THE COURT: I have a different job over here.

19 MR. LEBOVITCH: Understood.

20 Now, there was a statement that people agreed that
21 it's not a floor and that Perella said, well, it's not a
22 floor. Again, I think what they're saying is, look, we can
23 come in with whatever value we want, but we know that there is
24 a letter. This is our Exhibit 11, and it's referenced on page
25 11 of our brief. Gary Howard tried to feel out, you know, is

1 your offer now expired. That would free them up to really
2 come in with a bid that's lower, because you're not going to
3 have an angry controlling shareholder. And Charlie said --
4 Charlie Ergen responded, "The offer is still open and did not
5 expire on May 31st," okay. It is still open. So he says, no,
6 2 billion is out there, you can't go thinking about 1.5 or
7 1.8.

8 The Bankruptcy Court said neither DISH nor Ergen can
9 buy the debt directly. That's actually at page 6 of the
10 opinion. They said, "Accordingly, DISH and EchoStar is a
11 disqualified company, and thus neither can be an eligible
12 assignee." And then they say, "Mr. Ergen himself as a natural
13 person also cannot be an eligible assignee." The question to
14 be decided is is Mr. Ergen an affiliate that would somehow be
15 allowed to buy -- and I think the question Cadwalader was
16 asking when they said, can we indirectly buy, is, if you're an
17 affiliate why can't we be in part or something like that an
18 affiliate, why can't we become a partner with you, we're not
19 having a subsidiary, but we're an affiliate and can benefit
20 through this transaction, which I think the committee was
21 saying, obviously you're buying this debt because, you know,
22 you see that it's a safe bet because this is part of our
23 strategy so why couldn't we benefit from it. I think that was
24 the point.

25 Your Honor, Mr. Rugg said that we miscited their

1 brief when we quoted, you know, that there's no decision for
2 the board to make. Your Honor, there was no intent --

3 THE COURT: He was personally offended, if you
4 couldn't tell.

5 MR. LEBOVITCH: No. He was personally offended, and
6 this has been a very hard-fought and sometimes acrimonious
7 litigation, but he and I will hopefully get along. But just
8 to be clear, there was no effort to mislead the Court. And we
9 do believe every decision the board is making right now
10 implicates a conflict, okay. And if you look at the quote on
11 page 14, I'm not sure it has the same caveat. But, in any
12 event, that's that.

13 On the preferred stock. We didn't say we don't
14 know what'll happen. We said he has a pending trade. And at
15 page 125 I asked him -- let's see. He says -- at 124-125 he
16 says, "I did try --" oh. Here it is. "I don't want to get --
17 tried to get the company to consent, which they did not..."
18 Well, I think at 124-125, I'm just not finding it right here,
19 somewhere in here he says that he still has an open trade,
20 okay. And he says "No, has the transaction been cancelled? I
21 don't know the only way I look at is I would stand by any
22 commitment I made." That's at page 124. So he has a pending
23 trade. I don't understand why the fact that someone is
24 objecting to the closing of that trade means it's not a
25 conflict. It absolutely should be.

1 We don't think the conditions were satisfied.
2 Again, I showed you that we think what's happened is board is
3 abdicating -- abdicated its oversight responsibility to Ergen
4 and his lawyers, as shown by the LDOT filing. That's what
5 they mean when they're not making decisions.

6 Nevada is a constituency jurisdiction. I don't mean
7 to -- it's too easy, Your Honor. I think this board actually
8 acts like it has only one constituency, but we know who that
9 is.

10 The stock is going up, Your Honor? The stock on
11 Friday hit an all-time high. I mean, I don't want to get into
12 a fight about what moves stock, but Time-Warner is in play.
13 Every single telecom stock went up pretty dramatically on
14 Friday because Time-Warner's in play. But, again, I just
15 don't think there's any evidence before the record to evaluate
16 what stocks are doing, why they're moving, where they might
17 move.

18 Okay. And the last point is Ergen -- is for Mr.
19 Reisman. He says Ergen owns 53 percent of the company and so
20 essentially therefore why would he ever do anything that's bad
21 for DISH. Your Honor, that's why we have a duty of loyalty.
22 I mean, if we assume he would never do anything that's bad for
23 DISH, there's really no need for fiduciary duties. I don't
24 think that's -- I don't think that that's Nevada law,
25 respectfully.

1 If Your Honor has any more questions --

2 THE COURT: Actually, I think we had the discussion
3 on one. But if you have anything you want to add related to
4 my interpretation of this as a two-step viewpoint, one of
5 value and one of breach of loyalty, which is more akin to
6 monetary damages. Anything else you want to tell me to try
7 and give me further information or sway me on that issue?

8 MR. LEBOVITCH: Yes. Thank you for that question.
9 Hopefully I can respond to it. Hopefully my example of the
10 value being adequate, you know, resonates. Now, I think your
11 question is, if I find a breach of the duty of loyalty why
12 can't it just be resolved with monetary damages. Is that --

13 THE COURT: Where's the irreparable harm?

14 MR. LEBOVITCH: Okay. Okay. I think, Your Honor,
15 you know, again, there are certain elements of this case that
16 are -- we've admitted are for monetary damages. His profits
17 we all know. We -- if we had to and if Your Honor pursuant to
18 the Beaumarco case and other cases that may be in Nevada, we
19 haven't researched the issue, if you find the duty of loyalty,
20 we think it would be appropriate to have essentially a more
21 liberal approach to awarding damages in order to
22 disincentivize breaches of the duty of loyalty. So I think
23 that there's a way to get damages on the, you know, did DISH
24 overpay, even if it was an adequate price did they overpay
25 because maybe they could have gotten the company for less.

1 As far as the ongoing process, again, there's been
2 nothing but -- there's been no evidence, just rhetoric about
3 why it's somehow a calamity to empower Mr. Goodbarn and Mr.
4 Lillis indirectly, which is the way we tried to write the
5 order, but effectively it would empower Goodbarn and Lillis,
6 there's no harm that could possibly come from that. There is
7 harm that's going on right now. Like I said, in today's
8 hearing, our understanding from someone who's there is the
9 court has essentially complained that LBAC is taking positions
10 that's putting a gun to the court's head and the court's upset
11 about that. If Ergen's insistence on protecting his position
12 --

13 THE COURT: If I got upset every time somebody was
14 so aggressive and tried to force me --

15 MR. LEBOVITCH: I might be kicked out of here.

16 THE COURT: -- I mean, I wouldn't be able to do my
17 job.

18 MR. LEBOVITCH: Understood, Your Honor. But what
19 I'm saying is we think we've presented enough issues in the
20 bankruptcy that do relate to Ergen controlling DISH in ways
21 that can benefit him and in ways that can hurt DISH, that that
22 does create irreparable harm. Because how can you possibly
23 know afterwards -- and, by the way, if they lose LightSquared
24 on account of something that Ergen and -- you know, through
25 his lawyers, does, that's clearly irreparable. And, you know

1 what, maybe that's not the biggest risk. Maybe it's not a
2 70 percent risk, but I think Your Honor should weigh a
3 20 percent risk that something bad happens. And we've
4 identified some real things. And we're not the boy who cried
5 wolf, okay. LightSquared came in with a claim, U.S. Trustee
6 is objecting, there are issues here, and there's going to be
7 objections going forward. Through the end of this process it
8 should help the company if it can say, look, we've got
9 independent people making independent decisions. And if Ergen
10 is in control I don't think that we want to bear the losses to
11 DISH if Ergen does something that, because he's protecting
12 himself, hurts DISH. That's irreparable, and we can avoid
13 that.

14 And so with that -- I don't know if that has helped
15 to persuade Your Honor, but we think ultimately there's harm
16 that can easily be avoided. And the remedy we seek is not
17 stopping a transaction; it is, frankly, going back to what
18 Ergen said he was fine with in the first place. It's just his
19 lawyers that are saying this is some calamity to let
20 independent directors guide the process.

21 THE COURT: Okay. Does anybody know what the term
22 "stalking horse bid parties" means in the ad hoc LP Secured
23 Group Plan release?

24 MR. PEEK: Your Honor, I have my colleague Mr.
25 Brady, who's been monitoring the bankruptcy process.

1 THE COURT: I just want to know what the definition
2 of the "stalking horse bid parties," which is a defined
3 term --

4 MR. PEEK: -- it's a defined term.

5 THE COURT: -- what it means. Anybody got the
6 definition? And I'd prefer it from the document from which it
7 comes from, which would be the plan, it sounds like.

8 MR. LEBOVITCH: Well, it's in my binder.

9 MR. PEEK: Your Honor, while you're waiting for
10 that, I did want to address one issue that Mr. Lebovitch --

11 THE COURT: Not yet.

12 MR. PEEK: Not yet? Okay.

13 THE COURT: Don't move ahead of me.

14 MR. LEBOVITCH: Your Honor, I'm told -- oh. Here.
15 Let's see if the definition -- we have the ad hoc proposal
16 somewhere, and so it's not going -- it's going to be in the --

17 THE COURT: Why don't you guys stop talking so it's
18 not on the record, find it, and then call me when you find it,
19 unless you've got it already. Okay.

20 MR. PEEK: Your Honor, there was one thing, if I --

21 THE COURT: Not yet.

22 (Court recessed at 3:40 p.m., until 3:47 p.m.)

23 THE COURT: What do we think the definition of "the
24 stalking horse bid parties" is?

25 MR. PEEK: There are two issues, Your Honor, related

1 to that. One is the definition --

2 THE COURT: You know me. I'm just asking a
3 question.

4 MR. PEEK: I know that, Your Honor. But I don't --
5 it's, "The stalking horse bid parties are the released
6 parties."

7 THE COURT: That's (d).

8 MR. PEEK: That's (d).

9 THE COURT: Correct.

10 MR. PEEK: Okay. So may I then address the
11 definition of "stalking horse bid parties"?

12 THE COURT: Absolutely.

13 MR. PEEK: That's what I wanted to do. So in the
14 original ad hoc plan that was submitted there are definitions
15 of "stalking horse bid," "stalking horse bidder," and
16 "stalking horse bid parties." I'm going to read all three, if
17 I may.

18 THE COURT: Yes.

19 MR. PEEK: And they actually then appear again in a
20 subsequent filing in October.

21 THE COURT: Are they the same?

22 MR. PEEK: They are the same.

23 THE COURT: That's lucky.

24 MR. PEEK: Yeah. And they -- so let me tell you
25 where these are in the court record. In the court record they

1 are -- Exhibit 24 is the 7/28 -- or 7/23/13 joint plan
2 submitted by the ad hoc committee. On page -- it's Roman
3 numeral II, so that means it must be part of an exhibit.

4 THE COURT: Exhibit A, Glossary of Defined Terms.

5 MR. PEEK: It's Glossary of Defined Terms. There
6 you go. Thank you, Your Honor. You're way ahead of me, which
7 I should have known anyway.

8 And then similarly, in the plan submitted on
9 10/28/13, Docket Number 970, our Exhibit 46, it appears in the
10 glossary of terms on Roman numeral small xii.

11 The "released parties" appears in that glossary of
12 terms, as well, Your Honor, on Roman numeral XI of Docket 764,
13 which is the glossary of defined terms in Exhibit 24 to the
14 plaintiff's bid.

15 So let me read the definitions. "'Stalking horse
16 bid' means the initial bid of the stalking horse bidder
17 pursuant to the stalking horse agreement pursuant to which the
18 stalking horse bidder has offered a cash purchase price of
19 2.22 billion for the acquired assets." And then defines
20 "stalking horse bidder" as L-Band Acquisition, and then it
21 defines "stalking horse bid parties" as the stalking horse
22 bidder, which is LBAC and the parent entity.

23 So in that circumstance as of that day with -- let
24 me make sure I'm saying this correctly to everybody here, so
25 I'm looking around at my colleagues. The parent would have

1 been DISH, because it bought LBAC for one dollar.

2 MR. RUGG: It's on page x, which is two pages ahead.

3 MR. PEEK: Two pages ahead. See, they're all --
4 they're all ahead of me.

5 So then when you look at "released parties" it says,
6 "stalking horse bid parties."

7 THE COURT: Okay. Thanks.

8 MR. LEBOVITCH: Your Honor, I was -- we just figured
9 out that page 5 of the objection quotes the release. And
10 actually I apologize for focusing on stalking horse bid
11 parties. The language that brings Ergen into it -- so let me
12 be clear. My understanding of what Mr. Peek said, which I
13 agree with, is "stalking horse bid parties" is LBAC and DISH.
14 If you look at H, okay, and then the little i, H and little i
15 afterwards, that's the language that brings in Ergen.

16 THE COURT: No. I understand that, Counsel.

17 MR. LEBOVITCH: Oh. Okay. No, I -- I didn't want
18 to -- because I had said that it's the stalking horse bid
19 parties was the problematic language --

20 THE COURT: Yes. But in order to be A through H you
21 have to be part of A through H.

22 MR. LEBOVITCH: Yes. And H includes the present and
23 former directors, officers, managers --

24 THE COURT: Yes.

25 MR. LEBOVITCH: -- equityholders. And so that would

1 include Ergen. And then you get to each of the respective
2 affiliates of the parties. So I think the objection of the
3 U.S. Trustee is related to that. And I know that I mentioned
4 stalking horse bid parties. People smarter than me have
5 clarified that the way Ergen gets covered is by the subsequent
6 language.

7 THE COURT: Which is a modifier of A through G.

8 MR. LEBOVITCH: H.

9 THE COURT: Well, actually A through G.

10 MR. LEBOVITCH: Well, right. But I guess -- in
11 other words, the present directors of DISH, which is in D,
12 that would include Ergen.

13 THE COURT: Right.

14 MR. LEBOVITCH: The present and former directors,
15 officers, managers. So that's true.

16 THE COURT: See, H is modifying A through G. I is
17 modifying A through H. So I really want to know the answer to
18 A through G. But I'll figure that out now that I will look at
19 Exhibit 24 and Exhibit 46 at Exhibit A, Glossary of Defined
20 Terms, around pages small Roman x and xi.

21 MR. LEBOVITCH: And I think we agree, Your Honor --
22 just I think the parties agree that the definition of
23 "stalking horse bid parties," if you track it, what it comes
24 down to is LBAC and DISH. That's the -- that's that
25 definition.

1 THE COURT: Thank you. Okay.

2 All right. Was there anything else you wanted to
3 tell me? Because if Mr. Peek talks, then I will, of course,
4 come back and ask you if there's anything else.

5 MR. LEBOVITCH: Unless Your Honor has any questions,
6 no.

7 MR. PEEK: Your Honor, the only thing I wanted to
8 correct, and I was hopeful that I would actually have a
9 Bate number to refer to to show that Mr. Lebovitch had the
10 Perella opinion which is signed, and it's referenced in our
11 Exhibit 61 in which it was sent. But there's no attachment
12 to Exhibit 61, so I apologize that there's no -- there's an
13 oversight on our part. I was trying to find it, but --

14 THE COURT: Would you like to supplement Exhibit 61?

15 MR. PEEK: I would. And I'm also, Your Honor, I'm
16 reading on my iPad the actual document itself, which is dated
17 July 21st, and is signed by Perella Wineberg Partners LLC.
18 I'm not going to go into the amount that's --

19 THE COURT: Is that like the signature at White &
20 Case by the receptionist?

21 MR. PEEK: It's very similar, Your Honor.

22 But just to correct, when Mr. Lebovitch said that
23 there is no signed fairness opinion by Perella, he knows
24 better, and I'm surprised that he even said that, because he
25 has this.

1 THE COURT: Would you like to supplement Exhibit 61
2 with Exhibit 61A, which has the attachment --

3 MR. PEEK: I will, Your Honor.

4 THE COURT: -- to 61?

5 MR. PEEK: I will.

6 THE COURT: Thank you.

7 MR. PEEK: And I'm surprised Mr. Lebovitch even said
8 that.

9 THE COURT: Don't stand up yet, because I've still
10 go to go the rest of the row. Wait don't stand up yet.

11 Mr. Peek, was there anything else?

12 MR. PEEK: No, Your Honor, there's not. I'll let
13 Mr. --

14 THE COURT: Mr. Rugg, you had something else you
15 wanted to say.

16 MR. RUGG: Yes, Your Honor. Since Mr. Lebovitch is
17 going to get another crack anyway, there's two things I'd like
18 to say. One, we obviously hadn't seen plaintiff's proposed
19 findings of fact, conclusions of law. I didn't know that
20 plaintiff was going to -- were going to change from what they
21 asked for in their complaint and what Mr. Lebovitch said
22 earlier today, which was "influence or interfere," which is
23 what they originally were seeking for their injunction, now
24 apparently it's they don't want him to control. I don't think
25 that clarifies anything, I don't think that's less vague.

1 Control -- well, Mr. Ergen has one vote on the board. Is that
2 control to have one vote? Or if he asks Mr. Goodbarn to vote
3 -- if he tries to persuade Mr. Goodbarn to vote in the way
4 Charlie wants him to vote, is that control? I don't know. I
5 still think that their injunction fails for vagueness at that
6 point.

7 The other point, just to clarify, because I did
8 mention in my presentation the July 21st board minutes with
9 the resolutions, and one thing that I left out that I think is
10 still relevant and goes against what plaintiffs are suggesting
11 is that Mr. Goodbarn voted in favor of these minutes, which
12 specifically say that, "The proposed transaction is fair to
13 the corporation and its subsidiaries." That was the finding
14 of the board that Mr. Goodbarn agreed with in entering the
15 minutes. Those are my two points, Your Honor.

16 THE COURT: Okay.

17 MR. REISMAN: Nothing further, Your Honor.

18 THE COURT: All right. Now you get the last word,
19 and then we're going to finish.

20 MR. LEBOVITCH: Thank you, Your Honor. And I'll be
21 very, very concise.

22 We actually went onto the system. At the time that
23 we had the Perella deposition we didn't have a signed copy.
24 We did find a copy. I'll just note that it has all the same
25 language that I read to Your Honor. It was --

1 THE COURT: And it's signed?

2 MR. LEBOVITCH: Yes. I had never seen a signed one.
3 Someone went on the system and found a signed one.

4 THE COURT: What is the exhibit number?

5 MR. LEBOVITCH: I don't have an exhibit number.

6 THE COURT: Okay.

7 MR. LEBOVITCH: And the copy we have doesn't have
8 Bates numbers, either.

9 THE COURT: Then Mr. Peek will supplement 61 with
10 61A, and then we'll all have a copy in the record of the
11 signed version.

12 MR. LEBOVITCH: All right. And it has the same --

13 MR. PEEK: Thank you, Mr. Lebovitch, for
14 acknowledging that you had it.

15 MR. LEBOVITCH: And it has -- well, I don't know
16 about the outrage from Mr. Peek, but it has the same language
17 that I read to Your Honor, just --

18 THE COURT: That was not outrage from Mr. Peek. If
19 you ever see outrage from Mr. Peek, it looks different than
20 that.

21 MR. LEBOVITCH: Fair enough.

22 I don't -- I don't believe Mr. Rugg could have heard
23 me today say that what we're seeking is to keep Ergen or the
24 other directors from influencing or interfering. I think I
25 did say control.

1 And the last thing is the July 21 minutes, just so
2 Your Honor knows, we were trying to get that in discovery all
3 along. We asked, "Where are these minutes? It's been
4 months." We asked for metadata for these minutes because they
5 were prepared in litigation. We got them essentially hours
6 before our brief -- the night before our brief was due. So,
7 again, that would be a topic of discovery in any further
8 proceedings. But we don't really know where those minutes
9 came from.

10 THE COURT: All right.

11 MR. LEBOVITCH: That's all, Your Honor.

12 THE COURT: Now I'm going to ask one last question,
13 and this is of counsel. Does anybody feel the need to have
14 any supplement to anything that occurred today, other than
15 Exhibit 61?

16 MR. PEEK: May I just have a moment with Mr. Brady
17 and Mr. Barr [sic]?

18 THE COURT: You may. And then there will be a next
19 question, too.

20 MR. PEEK: So just the three of us from --

21 THE COURT: Go to that little room.

22 MR. PEEK: -- our special litigation committee
23 group, Your Honor.

24 THE COURT: Would you like me to leave?

25 MR. PEEK: No. We're fine, Your Honor.

1 THE COURT: All right.

2 (Pause in the proceedings)

3 MR. PEEK: Your Honor, from the special litigation
4 committee we had nothing further that we think is necessary to
5 supplement, other than our 61A.

6 THE COURT: Thank you.

7 MR. RUGG: Nothing further, Your Honor.

8 MR. REISMAN: Nothing further.

9 MR. BOSCHEE: We think the record supports an
10 injunction. Nothing further from us, Your Honor.

11 THE COURT: All right. Now, here is the next
12 question. And this is something I'm asking only -- you guys
13 don't have to stand up -- I'm asking, and that's only because
14 Mr. Rugg said something. We received this morning your draft
15 findings from the plaintiff and from the defendant directors.
16 We have not received anything from the special litigation
17 committee, I assume, because you're trying to stay more
18 independent than otherwise.

19 Do either of the sides who submitted proposed
20 findings wish by tomorrow morning at 9:00 o'clock to have any
21 updates to your proposed findings based upon what was argued
22 here today and any spin that was put on any of the evidence?
23 "Spin" also being a lawyering word.

24 MR. BOSCHEE: Perhaps not necessarily, because --

25 THE COURT: Wait. They're caucusing over there,

1 too.

2 MR. RUGG: Go ahead.

3 MR. BOSCHÉE: Our answer is probably going to be yes
4 with respect to -- and I would only say that, Your Honor --

5 THE COURT: What time?

6 MR. BOSCHÉE: We're going to add the U.S. Trustee.

7 THE COURT: What time?

8 MR. BOSCHÉE: We can have it to you --

9 MR. LEBOVITCH: Within an hour. We can submit it in
10 an hour, Your Honor.

11 THE COURT: Okay. I don't want it tonight, I want
12 it tomorrow morning.

13 MR. PEEK: Your Honor, mine was a report, as you
14 said, so I'm not looking to --

15 THE COURT: I'm not asking you to.

16 MR. BOSCHÉE: It'll be on Your Honor's computer the
17 first -- by the time you get in tomorrow morning. It'll be
18 done tonight.

19 THE COURT: I get here at 7:00.

20 MR. RUGG: At the moment I can't think of anything,
21 but if they're taking till 9:00, I'll take until 9:00 in the
22 morning. If you don't get anything, we're standing --

23 THE COURT: Well, but the reason I say it is because
24 you said, I didn't see their findings. And you're absolutely
25 right. I didn't make you exchange them. Sometimes I do that,

1 and I overlooked that in this case.

2 So if either of you wish to modify the draft
3 proposals that you've given me, please email them to my office
4 prior to 9:00 in the morning. I take the bench at 8:30
5 tomorrow morning. My civil calendar is 45 matters tomorrow.
6 So that means I might be done by about 3:00 tomorrow.

7 MR. PEEK: So I think with that kind of what you're
8 saying is that whatever you would enter wouldn't be until
9 after 3:00.

10 THE COURT: I'm going to try and get to it sooner,
11 rather than later, but it depends how long Jim Pisanelli and
12 Pete Bernhard take, the ladies on the pharmacy case take, and
13 then I have those -- the actual SandPoint case back.

14 (Off-record colloquy)

15 THE COURT: All right. I'm taking my file and I'm
16 leaving. Have a nice day. Thank you again for your thorough
17 presentations. You all did a great job. It was very, very
18 good briefing.

19 THE PROCEEDINGS CONCLUDED AT 4:00 P.M.

20 * * * * *

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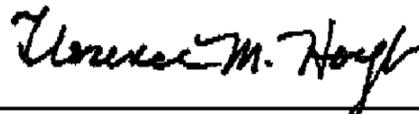
CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

**FLORENCE HOYT
Las Vegas, Nevada 89146**



FLORENCE M. HOYT, TRANSCRIBER

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

IN RE DISH NETWORK CORPORATION
DERIVATIVE LITIGATION

Case No.: A-13-686775-B

Dept. No.: XI

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Date of Hearing: **November 25, 2013**

This cause came on regularly for hearing on Plaintiffs' Motion for Preliminary Injunction (as supplemented) on November 25, 2013; Plaintiff Jacksonville Police and Fire Pension Fund ("Plaintiff") appeared by and through its counsel of record Brian W. Boschee, Esq. and William N. Miller, Esq. of Cotton, Driggs, Walch, Holley, Woloson & Thompson and Mark Lebovitch, Esq. of Bernstein Litowitz Berger & Grossman LLP; Defendants Joseph P. Clayton, James DeFranco, David K. Moskowitz, Cantey M. Ergen and Carl E. Vogel (the "Director Defendants") appeared by and through their counsel of record Jeffery S. Rugg, Esq. and Maximilien D. Fetaz, Esq. of Brownstein Hyatt Farber Schreck, LLP and Brian T. Frawley, Esq. of Sullivan & Cromwell LLP; Defendant Charles W. Ergen appeared by and through his counsel of record Joshua H. Reisman, Esq. of Reisman Sorokac and Tariq Mundiya, Esq. of Willkie Farr & Gallagher LLP; and the Special Litigation Committee of DISH Network Corporation, including Defendant Tom A. Ortoff, appeared by and through its counsel of record J. Stephen Peck, Esq. and Robert J. Cassity, Esq. of Holland & Hart LLP and C. Barr Flinn, Esq. of Young, Conway, Stargatt & Taylor, LLP; the Court having read the pleadings filed by the parties,

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1 listened to the testimony of the witnesses presented by video deposition, reviewed the evidence
2 attached to the briefing and introduced during the hearing, and considered the oral and written
3 arguments of counsel, and with the intent of deciding solely the issue of injunctive relief
4 pursuant to NRC 52(a) the Court makes the following findings of fact and conclusions of law.¹

5
6 **FINDINGS OF FACT**

7 1. This action surrounds DISH Network Corporation's ("DISH or the Company") bid
8 to acquire certain wireless spectrum and related assets from LightSquared L.P. ("LightSquared"),
9 which assets may be valuable to DISH's future growth and business strategy (the "LightSquared
10 Transaction").

11 2. DISH Network Corporation is a Nevada corporation in good standing.

12 3. On August 9, 2013, Plaintiff filed a Verified Derivative Complaint on behalf of
13 DISH against DISH Board of Directors members Charles W. Ergen, Joseph P. Clayton, James
14 DeFranco, Cantey M. Ergen, Steven R. Goodbarn, David K. Moskowitz, Tom A. Ortolfo and Carl
15 E. Vogel (the "Defendants").

16 4. Shortly thereafter, Plaintiff filed an Ex Parte Motion for Order to Show Cause and
17 Motion to (1) Expedite Discovery and (2) Set a Hearing on Motion for Preliminary Injunction
18 (the "Plaintiff's Discovery Motion") seeking expedited discovery, among other things.

19 5. On September 10, 2013, this Court held a hearing on Plaintiff's Discovery
20 Motion. At that time, this Court did not render a decision on Plaintiff's request, and instead
21 directed Plaintiff to file a motion for preliminary injunction.

22 6. On September 12, 2013, Plaintiff filed its Amended Verified Derivative
23 Complaint against the Defendants.

24 7. On September 13, 2013, Plaintiff filed its Motion for Preliminary Injunction.
25
26

27 ¹ The Court notes that these findings are preliminary as they are based on the limited evidence presented
28 in conjunction with the preliminary injunction hearing after limited discovery conducted by the parties on
an expedited basis.

1 8. Defendant Charles W. Ergen ("Ergen") founded DISH Network Corporation
2 ("DISH" or the "Company") in 1980 and currently serves as the Company's Chairman. Ergen
3 holds 52% of the Company's outstanding equity and 88% of DISH's voting power. DISH's
4 filings with the United States Securities and Exchange Commission (the "SEC") describe DISH
5 as a "controlled company."

6 9. As the Company's Chairman, Ergen guides DISH's strategic direction. Ergen has
7 publicly stated the importance to DISH of acquiring spectrum assets. DISH successfully
8 acquired spectrum assets from TerreStar and DBSD.

9 10. On September 18, 2013, the DISH Board of Directors created a special litigation
10 committee consisting of DISH Board of Directors members Tom A. Ortolfo and George R.
11 Brokaw (the "SLC"). The resolution creating the SLC delegated the Board of Directors' power
12 to review, investigate and evaluate Plaintiff's claims. The Board of Directors resolution does not
13 specifically address issues related to the LightSquared bankruptcy.

14 11. LightSquared, a subsidiary of LightSquared, Inc., is a company with substantial
15 spectrum assets. In February 2012, the Federal Communications Commission (the "FCC")
16 announced that it intended to suspend LightSquared's spectrum license until conflicts with the
17 global position system were resolved.

18 12. On May 14, 2012, LightSquared filed a petition pursuant to Chapter 11 of the
19 United States Code (the Bankruptcy Code) in the Bankruptcy Court for the Southern District of
20 New York, In re LightSquared, Inc., Case No. 12-12080 (SCC) (the "LightSquared
21 Bankruptcy").

22 13. LightSquared has approximately \$1.7 billion face amount of secured debt
23 outstanding (the "I.P Debt"). The I.P Debt is governed by a certain Credit Agreement, dated
24 October 1, 2010 (the "Credit Agreement").

25 14. As found by the LightSquared Bankruptcy Court in an adversary proceeding
26 against, among others, DISH and Ergen, "each of DISH and EchoStar is a 'Disqualified
27 Company' under the Credit Agreement, and thus neither can be an 'Eligible Assignee' [of LP
28

1 Debt]. Ergen himself, as a natural person, also cannot be an 'Eligible Assignee.' (Nov. 21, 2013
2 decision at 5).

3 15. Between the fall of 2011 and May 2013, Ergen, through an entity that he owns
4 and controls, SP Special Opportunities LLC ("SPSO"), agreed to acquire approximately \$1
5 billion of LightSquared secured debt. SPSO also entered into a transaction for approximately
6 \$125 million of LightSquared preferred stock. The preferred stock acquisition has been
7 "blocked" by LightSquared but has not been canceled by Ergen.

8 16. On May 2, 2013, Ergen disclosed to the DISH Board of Directors, during a
9 meeting of the DISH Board of Directors, that he had purchased I.P Debt.

10 17. At the May 2, 2013 meeting, Ergen also (a) proposed that the DISH Board of
11 Directors consider participating in a potential acquisition of the spectrum assets of LightSquared;
12 (b) provided information regarding that opportunity, including a timeline for the bankruptcy
13 process; and (c) noted his interest in a potential acquisition of the spectrum assets of
14 LightSquared and the possible interest of another public company controlled by Ergen, EchoStar
15 Corporation, in the potential acquisition of the same LightSquared assets.

16 18. At the May 2, 2013 meeting, Ergen disclosed that he was planning to make a bid
17 for LightSquared (in which DISH could participate if it so chose) later that month. Ergen
18 excused himself and his wife and fellow Board of Directors member, Cantey Ergen, from the
19 remainder of the meeting to allow the DISH Board of Directors to consider the opportunity to
20 buy those assets.

21 19. During the May 2, 2013 meeting, the Board of Directors discussed, among other
22 things, Ergen's potential conflict of interest in connection with a transaction involving
23 LightSquared and the need to have an independent committee vet any such transaction.

24 20. Ergen acknowledged that he had a potential conflict of interest in connection with
25 a transaction involving LightSquared.

26 21. On May 8, 2013, the DISH Board of Directors adopted a resolution establishing a
27 special committee of independent directors (the "Special Committee") with respect to a possible
28 transaction involving LightSquared and DISH in which Ergen had a potential conflict of interest.

1 22. The Special Committee consisted of two directors, Gary S. Howard and Steven R.
2 Goodbarn. There has been no challenge to the independence of Howard and Goodbarn.

3 23. The May 8, 2013 Board of Directors Resolution delegated all of the powers and
4 authority of the Board of Directors to the Special Committee to, among other things:

- 5 (i) review and evaluate (including any potential conflicts of interest arising out of, or
6 in connection with, the Ergen LightSquared Transaction) the terms and conditions
7 of the Ergen LightSquared Transaction, determine whether it is in the best
8 interests of the Corporation and its stockholders to proceed with the Ergen
9 LightSquared Transaction, engage in discussions and/or negotiations relating to
10 the Ergen LightSquared Transaction, and to reject any proposal from Mr. Ergen
11 relating to the Ergen LightSquared Transaction;
- 12 (ii) negotiate definitive agreements with parties concerning the terms and conditions
13 of the Ergen LightSquared Transaction; and
- 14 (iii) determine whether such terms and conditions (if any) of the Ergen LightSquared
15 Transaction are fair to the Corporation.

16 24. The May 8, 2013 Board of Directors Resolution provided that the DISH Board of
17 Directors did not intend to approve any transaction involving LightSquared without a favorable
18 recommendation by the Committee.

19 25. The May 8, 2013 Board of Directors Resolution allowed the Special Committee
20 to retain independent legal counsel and independent financial advisors to advise and assist the
21 Special Committee in carrying out its duties.

22 26. The May 8, 2013 Board of Directors Resolution provided that the Special
23 Committee's authority would expire only upon the earlier of one of two events: (a) a
24 determination by the Board of Directors that the continuation of the Committee is no longer
25 necessary, desirable or appropriate because DISH had abandoned any proposal to enter into a
26 transaction involving LightSquared; or (b) upon the Committee's own determination, in its sole
27 and absolute discretion.

28 27. The evidence presented to the Court does not establish that anyone informed
Ergen of the establishment of the Special Committee or its scope of investigation for
approximately two weeks.

1 28. On May 15, Ergen submitted a bid of approximately \$2 billion to acquire for
2 LightSquared, spectrum assets through an entity that he owned and controlled called L.-Band
3 Acquisition LLC ("LBAC").

4 29. On or about May 20, 2013, the Special Committee retained the law firm of
5 Cadwalader, Wickersham & Taft. LLP, as the Special Committee's independent legal advisor.

6 30. Ergen did not inform the Board of Directors or the Special Committee about his
7 bid until May 22, 2013, shortly after he reportedly learned of the existence of the Special
8 Committee.

9 31. Ergen has a significant personal interest in the LightSquared bankruptcy
10 proceedings as a direct result of his interests in LightSquared debt and preferred stock through
11 SPSO.

12 32. On May 21, 2013, the Committee held its first formal meeting and, among other
13 things, discussed the need to obtain detailed facts on the status of Ergen's ownership of
14 LightSquared debt and preferred stock.

15 33. Ergen's personal bid impacted DISH's strategy with respect to a potential
16 transaction involving LightSquared. Mr. Ergen testified that, having made a bid of \$2 billion, he
17 did not know of a way that the ultimate transaction price for LightSquared spectrum assets could
18 be less than \$2 billion.

19 34. On May 30, 2013, LBAC (then wholly owned by Ergen) offered DISH the
20 opportunity to participate in a potential acquisition of the LightSquared assets.

21 35. Also, on May 30, 2013, the Special Committee selected Perella Weinberg
22 Partners ("Perella") as the Special Committee's independent financial advisors, and subsequently
23 finalized that retention in an engagement letter dated June 28, 2013.

24 36. Shortly thereafter, the Special Committee requested that Ergen provide
25 information of his ownership of LightSquared debt and preferred stock. Ergen did not respond.

26 37. On July 6, 2013, Howard informed the Board of Directors that Ergen had not
27 provided the Committee with requested information regarding his purchases of LightSquared
28

1 debt and preferred stock. The Board of Directors did not instruct Ergen to comply with the
2 Special Committee's request for information.

3 38. Perella Weinberg monitored the LightSquared bankruptcy proceedings on behalf
4 of the Special Committee. Details of SPSO's debt purchases were publicly filed in the
5 Bankruptcy Court on July 9, 2013, and, thus, were available to the Special Committee from at
6 least that time.

7 39. On behalf of the Special Committee, Perella conducted an analysis of the
8 LightSquared assets and it prepared and delivered a written report opining that an acquisition of
9 the LightSquared assets at the level under consideration was fair.

10 40. On Sunday July 21, 2013, the Special Committee decided to recommend to the
11 Board of Directors that DISH participate in a bid for LightSquared spectrum assets, subject to a
12 number of conditions. The Special Committee's conditions included that (1) any material
13 changes to the terms of the bid or the asset purchase agreement would be subject to review and
14 approval of the Special Committee; (2) the Special Committee and its legal and financial
15 advisers would remain involved in all negotiations regarding the proposed transaction going
16 forward, so that the Special Committee would be able to, among other things, monitor and
17 manage potential conflicts of interest as they arise, and react quickly in the event that any of the
18 material terms (including price) of the transaction changed; and (3) the Special Committee
19 reserved the right to obtain all of the requested information regarding Mr. Ergen's purchases of
20 LightSquared debt and preferred stock, as well as the right to evaluate potential corporate
21 opportunity issues in connection with the acquisition of such debt and other securities.

22 41. The DISH Board of Directors convened for a special meeting to discuss a possible
23 transaction involving LightSquared spectrum assets during the evening of July 21, 2013.

24 42. During the July 21, 2013 special meeting, the Special Committee delivered its
25 conditional recommendation to the Board of Directors and based upon Perella's written opinion,
26 recommended that DISH submit a bid of \$2.22 billion for the LightSquared assets and suggested
27 additional conditions related to the transaction.

28

1 43. At that same meeting on July 21, 2013, the DISH Board of Directors meeting
2 without Ergen and his wife, resolved to accept the Special Committee's recommendation and to
3 make a bid for LightSquared's assets. Further, the DISH Board of Directors resolved to dissolve
4 the Special Committee based on the DISH Board of Directors finding that the previously
5 articulated need for the Special Committee no longer existed. With the exception of the Special
6 Committee members (Howard and Goodbarn), all members of the Board of Directors present at
7 the meeting voted in favor of terminating the Special Committee.

8 44. On July 22, 2013, Ergen and DISH entered into a Purchase and Sale Agreement
9 pursuant to which Ergen sold all of the units in LBAC to DISH for the purchase price of one
10 dollar (\$1.00).

11 45. On July 23, 2013, a group of LightSquared secured creditors, including Ergen's
12 entity SPSO, submitted a plan in the LightSquared bankruptcy proposing the sale of
13 LightSquared's spectrum assets through an auction process (the "Ad Hoc Secured Group Plan").

14 46. The Ad Hoc Secured Group Plan² proposed that LBAC, now wholly-owned by
15 DISH, would act as a stalking horse bidder³ for the spectrum assets in an auction to be held at a
16 future date by offering to pay \$2.22 billion for LightSquared spectrum assets (the "DISH
17 Stalking Horse Bid").

18 47. On July 23, 2013, DISH filed a Form 8-K with the SEC announcing that the
19 Board of Directors approved the DISH Stalking Horse Bid based on the recommendation of a
20 Special Committee of independent directors. The Form 8-K did not disclose that the Special
21 Committee had made its recommendation subject to a number of conditions, including the
22 Special Committee's continuing involvement in the acquisition process. DISH's Form 8-K did
23 not disclose that the Special Committee had not reached the conclusion that the ultimate

24 _____
25 ² The Ad Hoc Secured Group Plan includes a third party release, which purports to release all directors
26 officers and agents of DISH. As a result, of his position as a secured debt holder and as an officer and
27 director of DISH, this provision is of some concern to the Plaintiffs and the Court.

28 ³ A stalking horse bid is an initial bid that is then shopped around to attract higher offers. *In re Integrated Resources, Inc.*, 135 BR 746 (Bankr. SDNY 1992) at 738. The bidder is frequently given some sort of deal protection.

1 acquisition would be fair to DISH or its minority stockholders, unless the Special Committee
2 remained involved through the end of the acquisition process to address conflicts as they would
3 arise. DISH's Form 8-K also did not disclose that the Special Committee had been terminated
4 by the Board of Directors immediately after the Special Committee informed the Board of
5 Directors of its conditional recommendation.

6 48. On July 24, 2013, the Special Committee informed the Board of Directors that the
7 Special Committee did not know the Board of Directors had been planning to terminate the
8 Special Committee on July 21, 2013, and that the Special Committee did not recommend or
9 endorse the termination. The Special Committee reiterated the express conditions to its
10 recommendation that were not met when the Special Committee was terminated on July 21,
11 2013. In addition, the Special Committee noted that there were unresolved issues relating to the
12 fairness of a potential LightSquared transaction, including potential conflicts of interest between
13 DISH and Ergen that should be subject to independent scrutiny and evaluation during the
14 acquisition process. The Board of Directors did not respond.

15 49. Effective July 31, 2013, Gary Howard resigned as a director of DISH. Howard
16 did not state a reason for his resignation.

17 50. On August 6, 2013, LightSquared's controlling shareholder, Harbinger Capital
18 Partners, LLC, and various funds under its control (collectively, "Harbinger"), initiated an
19 adversary proceeding against DISH, Ergen and others (the "Harbinger Adversary Proceeding")
20 as part of the LightSquared Bankruptcy against seeking (1) disallowance of Ergen's bankruptcy
21 claims with respect to his purchases of LightSquared secured debt; and (2) compensatory and
22 punitive damages from Ergen and DISH based on allegations of fraud, tortious interference and
23 civil conspiracy. Harbinger alleged that Ergen controls DISH's actions, and thus tainted those
24 actions, in the LightSquared bankruptcy proceedings.

25 51. On August 22, 2013, LightSquared intervened and joined in Harbinger's claims,
26 but not in respect of any claims against DISH.

27 52. On August 22, 2013, LightSquared intervened and joined Harbinger's claims
28 seeking disallowance of Ergen's bankruptcy claims based on his LightSquared debt.

1 53. On August 30, 2013, Harbinger filed a bankruptcy reorganization plan (the
2 "Harbinger Plan"). The Harbinger Plan proposed a reorganization of LightSquared by paying off
3 all of LightSquared's creditors with cash and newly issued notes. The Harbinger Plan does not
4 contemplate the sale of LightSquared's spectrum assets. According to Harbinger, the Harbinger
5 Plan is superior to the Ad Hoc Secured Group Plan, in part, because there are doubts about
6 DISH's ability to purchase LightSquared's spectrum assets free and clear as a good faith
7 purchaser if DISH is the winning bidder at the auction.

8 54. On August 30, 2013, LightSquared filed its own bankruptcy plan (the
9 "LightSquared Plan"). Under the terms of the LightSquared Plan, the spectrum assets will be
10 sold at an auction, with distribution of proceeds to satisfy allowed bankruptcy claims.

11 55. On October 29, 2013, the Bankruptcy Court dismissed the Harbinger Adversary
12 Proceeding. On November 21, 2013, the Bankruptcy Court issued an opinion providing reasons
13 for its dismissal of the Harbinger Adversary Proceeding.

14 56. As permitted in the Bankruptcy Court's "stalking horse bidder" order issued on
15 October 1, 2013, LightSquared on November 18, 2013 elected to extend the bid deadline in the
16 LightSquared Bankruptcy to 5:00 p.m. EST on November 25, 2013.

17 57. Notwithstanding the Harbinger Adversary Proceeding and Plaintiff's allegations
18 in this action, LBAC (now wholly owned by DISH) was designated a qualified bidder and
19 received "stalking horse" status in the LightSquared Bankruptcy on October 1, 2013, which
20 entitled LBAC to purchaser protections, including a break-up fee and expense reimbursement.

21 58. On October 1, 2013, the Bankruptcy Court approved a special committee to lead
22 LightSquared with respect to the sale of its assets during the bidding and auction process.

23 59. On October 29, 2013, the Bankruptcy Court dismissed Harbinger's complaint
24 against Ergen and DISH without prejudice and with leave to LightSquared to replead.

25 60. On November 15, 2013, LightSquared filed a complaint against Ergen and DISH
26 seeking, among other relief: (1) disallowance of Ergen's bankruptcy claims with respect to his
27 purchases of LightSquared debt; and (2) compensatory and punitive damages from Ergen and
28

1 DISH based on allegations of tortious interference. LightSquared's complaint alleges that Ergen
2 controls DISH's actions in the LightSquared bankruptcy proceedings.

3 61. Further, LightSquared's complaint alleges that DISH's asset purchase agreement
4 improperly releases LightSquared's claims against Ergen and his affiliates, including SPSO.

5 62. On November 22, 2013, the U.S. Bankruptcy Trustee filed an objection to the
6 plans submitted in the LightSquared bankruptcy, including the Ad Hoc Secured Group's plan,
7 because, among other things, the plans have not been shown to be "warranted or justified."
8 According to the U.S. Trustee, the Ad Hoc Secured Group plan's release, objected to by the
9 Trustee, would improperly release claims against the Ad Hoc LP Secured Group and each
10 member thereof, which includes Ergen's wholly-owned entity SPSO holding Ergen's debt and
11 preferred investments in LightSquared.

12 63. Following the U.S. Trustee's objection November 22, 2013, LBAC through
13 Ergen's personal counsel in this matter, Willkie, Farr & Gallagher, filed a statement with the
14 Bankruptcy Court defending a release of LightSquared's causes of action against third parties,
15 including Mr. Ergen.

16 64. Objections to the sale of LightSquared's assets are due November 26, 2013.

17 65. The auction of LightSquared's assets is currently scheduled to take place on
18 December 3, 2013.

19 66. The Bankruptcy Court is scheduled to conduct a hearing on December 10, 2013,
20 to determine whether to approve the sale of LightSquared assets to the winning bidder at the
21 auction, including whether the winning bidder is entitled to a "good faith purchaser" finding
22 under the Bankruptcy Code. On December 10, 2013, the Bankruptcy Court will also determine
23 which of the competing bankruptcy plans should be approved.

24 67. If any findings of fact are properly conclusions of law, they shall be treated as if
25 appropriately identified and designated.

26 CONCLUSIONS OF LAW

27 1. This Court has subject matter jurisdiction over all of the parties' claims and
28 personal jurisdiction over these parties.

1 2. Injunctive relief is available where: (1) the party seeking such relief enjoys a
2 reasonable likelihood of success on the merits; and (2) the party's conduct to be enjoined, if
3 permitted to continue, will result in irreparable harm for which compensatory damages are an
4 inadequate remedy. When deciding whether to grant a preliminary injunction, the Court must
5 also consider (3) the relative interests of the parties -- how much damage the plaintiff will suffer
6 if injunctive relief is denied versus the hardship to the defendant if injunctive relief is granted,
7 and (4) the interest the public may have in the litigation, if any.

8 3. In Plaintiff's Motion, Plaintiff sought injunctive relief, alleges that Defendants
9 breached their fiduciary duty based on an alleged ongoing conflict of interest between Ergen and
10 DISH related to his acquisition of LightSquared secured debt and the on-going bankruptcy
11 auction process.

12 4. Plaintiff further alleged that the alleged conflict is a threat to DISH, that will
13 cause damages to DISH from the Adversary proceeding, and prevent DISH from becoming the
14 successful bidder in the LightSquared Bankruptcy and subject DISH to other equitable remedies.

15 5. Plaintiff also alleged that Ergen controls the Director Defendants, and both alone
16 and through the Director Defendants is interfering with DISH's bid for the LightSquared assets.

17 6. Plaintiff also alleged that DISH does not have an adequate remedy at law,
18 accordingly, Plaintiff seeks entry of an order, on behalf of DISH, enjoining the Defendants from
19 continuing to interfere with or influence DISH's efforts to acquire LightSquared or any of its
20 assets and to exclude the named defendants, from continuing to interfere or influence DISH's
21 efforts to acquire LightSquared or its assets. Plaintiff also proposes barring these directors and
22 Brokaw (who is not a defendant in this case) from "controlling" DISH's efforts to acquire
23 LightSquared or its assets. Thus, Plaintiff seeks an injunction that effectively empowers only one
24 director, Steven R. Goodbarn (and potentially DISH's newly appointed director Charles M.
25 Lillis) with the full power of the Board of Directors regarding the LightSquared Transaction.

26 7. With the sole exception of the issue related to the release provision, Plaintiff
27 presented no evidence and no coherent legal theory of any irreparable harm that DISH might
28

1 face in the absence of an injunction precluding the Director Defendants and Ergen from
2 participating further in DISH's bid to acquire the LightSquared assets.

3 8. The fact that the Bankruptcy Court in the LightSquared Bankruptcy may make a
4 determination at some point in the future regarding the good faith of DISH's bid, through LBAC,
5 for the LightSquared assets does not support Plaintiff's request for an injunction.

6 9. Plaintiff has not submitted any credible evidence to support its allegation that
7 DISH's corporate governance procedures are now or will become in the future relevant to the
8 Bankruptcy Court's determination of whether DISH is a good-faith bidder.

9 10. When the LightSquared opportunity was first presented to the DISH Board of
10 Directors, the Board of Directors, excluding Ergen and his wife, recognized the existence of a
11 perceived conflict, and implemented procedures that the Board of Directors deemed appropriate
12 in the exercise of valid business judgment, including the formation of the Special Committee on
13 May 8, to vet the possibility of a bid.

14 11. After the Special Committee recommended that DISH proceed with a bid for
15 LightSquared, and the DISH Board of Directors, without Ergen and his wife, determined to
16 accept that recommendation, the DISH Board of Directors, still excluding Ergen and his wife,
17 concluded that "no apparent conflict exists and the Ergen LightSquared Transaction should now
18 be handled by the Board of Directors as a normal strategic opportunity, unless and until the
19 Board of Directors believes the need for another special committee is warranted."

20 12. As a result, the DISH Board of Directors, without Ergen and his wife, resolved to
21 dissolve the Special Committee "provided that at such time, if any, as the Board of Directors
22 determines, in the good faith exercise of its reasonable business judgment, that it is advisable and
23 in the best interests of the Corporation and its subsidiaries to establish a special committee with
24 respect to any of the items identified by the [Special] Committee . . . , it may do so."

25 13. The Board of Directors created the SLC to investigate the conditions related to
26 this litigation and the transaction as identified by the Special Committee.

27 14. Issuing the broad injunctive relief sought by Plaintiff could lead to significant
28 harm to DISH with respect to the ongoing bankruptcy auction and the acquisition of

1 LightSquared. Plaintiff cannot establish a risk of probable and immediate irreparable harm
2 related to DISH's pursuit of the LightSquared assets.

3 15. Plaintiff's requested relief is likely to harm DISH by depriving it of having
4 directors most experienced and knowledgeable of the issues related to the LightSquared
5 transaction and the value of the LightSquared spectrum assets involved in and making the
6 decisions on behalf of DISH regarding the ongoing auction process in the LightSquared
7 bankruptcy.

8 16. Plaintiff failed to demonstrate a reasonable probability of irreparable harm in the
9 absence of injunctive relief.

10 17. The Court finds that with the exception of the sole issue related to the broad
11 release language, that no risk of irreparable harm has been established. The valuation of the bid
12 was approved by the Special Committee after consulting with its own independent advisors, the
13 issue of whether any of the other conditions or issues raised are not appropriate for injunctive
14 relief related to the bid process and bankruptcy proceedings on the basis presented.

15 18. With respect to the third party release provision, it appears, given the Trustee's
16 objection that there is a likelihood of success on the merits related to the conflict issues which
17 would result in irreparable harm if Ergen in his capacity as a secured debtholder of LightSquared
18 is permitted to be involved in the resolution of the objection to that portion of the Plan.

19 19. While Ergen has significant personal interests in maintaining control over DISH's
20 actions in the bankruptcy proceedings and has a significant personal interest in the LightSquared
21 bankruptcy proceedings because of his purchase of \$1 billion of LightSquared debt through his
22 entity SPSO, the Court finds that there is no risk of irreparable harm as money damages are
23 sufficient to compensate if Plaintiff is ultimately successful on their claims.

24 20. LightSquared and Harbinger are seeking disallowance of Ergen's bankruptcy
25 claims in connection with his personal debt purchases and LightSquared is seeking money
26 damages from Ergen and DISH based on Ergen's control over DISH in the LightSquared
27 bankruptcy proceedings. According to LightSquared, its claims against Ergen will be released if
28 DISH purchases LightSquared assets pursuant to DISH's asset purchase agreement because

1 LightSquared's claims against Ergen are not excluded from the assets that will be transferred
2 following the sale. DISH has an economic interest in exploring a settlement of Lightsquared's
3 claims against DISH in return for carving out LightSquared's claims against Ergen from the
4 DISH asset purchase agreement. DISH is unable to explore this option so long as DISH's
5 actions in the LightSquared bankruptcy related to the release provisions are controlled by Ergen.

6 21. The U.S. Bankruptcy Trustee has made an objection to the scope of the releases in
7 the bankruptcy plans, including the Ad Hoc Secured Group's plan. DISH has a significant
8 interest in exploring the possibility of resolving the Bankruptcy Trustee's objection by modifying
9 the release and carving out claims against SPSO and Ergen. However, DISH is unable to explore
10 this option so long as DISH's actions in the LightSquared bankruptcy related to the release
11 provisions are controlled by Ergen.

12 22. Because Ergen's personal lawyers (Willkie Farr & Gallagher) on November 22,
13 2013, filed the LBAC response in Bankruptcy Court, there is currently no fiduciary in a position
14 to make decisions for DISH in the LightSquared bankruptcy proceedings related to the release
15 provisions that are solely in the best interests of DISH.

16 23. Plaintiff's request for a finding by this Court of the substantial likelihood of
17 success on the merits for claims the Court has found are not likely to result in irreparable harm,
18 is a request for an advisory opinion on the ultimate merits of its claims. Nevada courts disfavor
19 rendering advisory opinions. Thus in this respect, Plaintiff's request, is legally improper.

20 24. If any conclusions of law are properly findings of fact, they shall be treated as if
21 appropriately identified and designated.

22 THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that
23 Plaintiffs' Motion for Preliminary Injunction be, and the same is, hereby Granted in part.

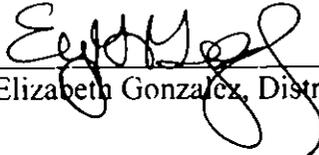
24 Charles Ergen or anyone acting on his behalf is enjoined from participation, including
25 any review, comment, or negotiations related to the release contained in the Ad Hoc LP Secured
26 Group Plan pending before the Bankruptcy Court for any conduct which was outside or beyond
27 the scope of his activities related to DISH and LBAC.

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The remainder of the motion is denied.⁴ The bond is set at \$1,000.⁵

Dated this 27th day of November, 2013.


Elizabeth Gonzalez, District Court Judge

Certificate of Service

I hereby certify that on or about the date filed, this document was copied through e-mail, or a copy of this Order was placed in the attorney's folder in the Clerk's Office or mailed to the proper party as follows:

Kirk B. Lenhard, Esq. (Brownstein Hyatt Faber Schrek)

Brian W. Boschee, Esq. (Cotton, Driggs, et al)

Mark F. Ferrario, Esq. (Greenberg Traurig)

J. Stephen Peek, Esq. (Holland & Hart)

Joshua H. Reisman, Esq. (Reisman Sorokac)


Dan Kutinac

⁴ Nothing in this ruling precludes the plaintiffs from pursuing the breach of fiduciary duty claims plead related to these transactions and the termination of the Special Committee.

⁵ The Court recognizes that a request for hearing on the amount of the bond has been made, given the limited relief that has been granted by the Court, the Court will conduct a conference call with counsel to determine if any adjustment to the amount of the bond is needed.

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

IN RE DISH NETWORK CORPORATION .
DERIVATIVE LITIGATION .

CASE NO. A-686775

DEPT. NO. XI

**Transcript of
Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTION FOR RECONSIDERATION

THURSDAY, DECEMBER 19, 2013

COURT RECORDER:

TRANSCRIPTION BY:

JILL HAWKINS
District Court

FLORENCE HOYT
Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript
produced by transcription service.

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APPEARANCES:

FOR THE PLAINTIFF:

BRIAN W. BOSCHEE, ESQ.
MARK LEBOVITCH, ESQ.
WILLIAM MILLER, ESQ.
ADAM HULLANDER, ESQ,

FOR THE DEFENDANTS:

BRIAN FRAWLEY, ESQ.
J. STEPHEN PEEK, ESQ.
ROBERT CASSITY, ESQ.
ROBERT BRADY, ESQ.
BARR FLIN, ESQ.
JOSHUA M. REISMAN, ESQ.
JEFFREY S. RUGG, ESQ.
TARIQ MUNDIYA, ESQ.
MAXIMILLIAN FETAZ, ESQ.

1 LAS VEGAS, NEVADA, THURSDAY, DECEMBER 19, 2013, 8:24 A.M.

2 (Court was called to order)

3 THE COURT: So this is page 8, Jacksonville Police
4 versus Charles Ergen. Good morning, gentlemen.

5 MR. BOSCHEE: Good morning, Your Honor. Thank you
6 for --

7 THE COURT: Happy holidays.

8 MR. BOSCHEE: Thank you for hearing us on shortened
9 time. And aft talking to Mr. Peek after I guess he talked to
10 you, said you'd call us a little early today, so we tried to
11 get over here --

12 THE COURT: It was yesterday I talked to him. I was
13 talking to him on an unrelated matter, and --

14 MR. BOSCHEE: -- as quickly as we possibly could --

15 THE COURT: -- he said, can I go first.

16 MR. BOSCHEE: -- get my little boy dropped off and
17 get over here, we did. So I appreciate you taking us out of
18 turn.

19 THE COURT: No problem. Let's talk about this
20 motion for reconsideration.

21 MR. BOSCHEE: I will, Judge. And, truthfully -- I'm
22 actually going to move to the podium for this, because I've
23 got a lot of stuff -- it's a motion for reconsideration
24 technically under Rule 2.24, but really we didn't have any
25 intention of challenging, appealing, doing anything with the

1 order until the bankruptcy hearing played out, and I think, as
2 we pointed out in paperwork and I think was pretty clear from
3 what Judge Chapman said, we were all a little bit surprised
4 when the release that we had talked about at length at the
5 hearing at this proceeding on the 27th was clarified, I guess,
6 by defense counsel, and I believe it was by Ms. Strickland,
7 arguing on behalf of Mr. Ergen in that proceeding. And it was
8 articulated and the judge articulated very specifically that
9 the release was actually a condition, the bid, the DISH bid
10 was contingent on payment in full of the preferred -- the
11 preferred stock and the debt. That was something that we had
12 not known before, that was something that was not represented
13 to this Court at the proceeding that we had. Everybody kind
14 of looked at that release, and we went through it, and I
15 believe Mr. Peek even articulated it as a boilerplate release,
16 which on its face it appears to be.

17 Well, Your Honor, I believe based on a good part of
18 your ruling and the partial injunction that you granted and
19 the most the injunction you denied on the fact that that
20 release said what it said and the representations made by
21 counsel. So when we learned that it was possible, and in fact
22 likely, that this bid was contingent on Mr. Ergen's debt being
23 paid in full and his preferred stock being paid in full,
24 that's a little bit different than what we had talked about at
25 the hearing. In fact, I would say it's a lot different. And

1 more to the point, we believe it's a changed fact and a
2 changed circumstance that regardless of what Your Honor's
3 going to do with your order we think that it would certainly
4 lend itself to expanding the injunction to not let Mr. Ergen
5 deal with any part of the bankruptcy proceeding at this point
6 given the intricate and interrelated nature of the release and
7 what the Bankruptcy Court's saying now about the bid being
8 related to the release, I felt it was my duty -- if I didn't
9 bring that to your attention on a 2.24 motion or some other
10 way, I don't think I'm doing my client justice, because it a
11 new fact, it is a changed circumstance that went forward. And
12 it's notable, I think, in the oppositions -- I don't really --
13 I didn't anything about that from any of the three oppositions
14 I read yesterday, it was all, the release has been here since
15 July, everybody's had the release, everybody knows what the
16 release says. Well, yeah, we do. We have had the release
17 since July. We read it in court, we all looked at it, Your
18 Honor was very concerned about it. It's a part of the
19 injunctive order, and now the defendants, not us, but the
20 defendants, Mr. Ergen's counsel is going to the New York
21 Bankruptcy Court and saying, actually, that release means that
22 if Mr. Ergen is not paid in full, if we don't know that in
23 advance, if we don't have an assurance of that in advance,
24 DISH is potentially going to pull its bid.

25 That's a lot different than saying, okay, we got the

1 bid, we want to take care of -- like in a lien case, we want
2 to take care of all the claimants and get this free and clear.
3 DISH and Ergen's counsel are actually going to the New York
4 Bankruptcy Court and saying, well, actually, the release is a
5 little bit -- means a little bit more than that, we need an
6 assurance that these are not going to be discharged, we need
7 an assurance that his debt is not going to be kicked out of
8 this proceeding or we may pull the bid. That is a completely
9 changed circumstance from what we talked about here on the
10 27th. In fact, Mr. Peek -- and I looked up in the transcript
11 last night -- said on a couple of occasions to Your Honor, the
12 bid is apples, the allegations in the Harbinger complaint are
13 oranges, it's complete separate things and you need to keep
14 them separate and it doesn't have anything to do with the
15 other.

16 Mr. Peek also indicated to Your Honor, both in the
17 status report filed on October 3rd and then again in the
18 hearing that the easy out here would be if the Bankruptcy
19 Court has a concern about the conflict, they'll just disallow
20 Ergen's debt claims, and the thing will go forward. But now
21 we know that that's not going to happen. If Mr. Ergen's debt
22 claims are disallowed by the Bankruptcy Court, DISH is saying,
23 again through Ergen's counsel -- and I think it's interesting,
24 Your Honor enters an injunction saying that Mr. --

25 THE COURT: But I have a question.

1 MR. BOSCHÉE: Go ahead.

2 THE COURT: How can Ergen's counsel bind DISH?

3 MR. BOSCHÉE: I don't know. I don't know why
4 Ergen's counsel is making all the representations in court, I
5 don't know why she's doing -- Rachel Strickland's doing all
6 the argument to the Bankruptcy judge. I read -- I mean,
7 again, obviously your order is what it is and you know it
8 better than I do --

9 THE COURT: Which she would seem to be someone
10 acting on Mr. Ergen's behalf.

11 MR. BOSCHÉE: But she's the only one arguing about
12 the release. She's the only one talking about the release in
13 the transcript of any substance.

14 THE COURT: And she's the one who's having the
15 discussions with Judge Chapman, who's the Bankruptcy judge.

16 MR. BOSCHÉE: Right. Which -- again, Your Honor may
17 read your order differently than I do. Mr. Ergen and his
18 people are really not supposed to be negotiating anything
19 having to do with the release.

20 THE COURT: She would seem to be one of Mr. Ergen's
21 people.

22 MR. BOSCHÉE: She would seem to be one of Mr.
23 Ergen's people. I believe that's correct, Your Honor. And
24 that was one of the things that was troubling, because it
25 appears from the dialogue going on in the Bankruptcy Court

1 that she is speaking on behalf of DISH, she is making
2 representations that DISH is going to do X, Y, and Z if Mr.
3 Ergen's debt is not -- if anything happens, if it's not paid
4 in full. Well, that then goes to the larger argument that
5 we've been here in front of Your Honor now several times of,
6 well, wait a minute, who's really calling the shots here. If
7 Mr. Ergen's counsel is going into Bankruptcy Court and making
8 representations that DISH is going to pull its bid if Mr.
9 Ergen's debt is for whatever reason disallowed, well, she
10 shouldn't be making those representations on behalf DISH.
11 DISH's counsel should be. Ms. Strickland shouldn't be doing
12 that. In fact, per your order I don't think Ms. Strickland
13 should be saying anything to the Bankruptcy Court about the
14 release at all. But there she is, and she's talking about it,
15 and the judge is clearly concerned about it. We quote it in
16 our motion, but that judge clearly comes out and says, wait a
17 minute, now the bid is conditioned on the debt release, now
18 you're telling me that the debt has to be kept in full and he
19 has to be paid 100 cents on the dollar or DISH may pull its
20 bid; and then she said it better than I possibly could later
21 on in the transcript, and we quoted it in the motion, why does
22 DISH care. I mean, if DISH made an independent business
23 judgment --

24 THE COURT: What she said was, "DISH has determined
25 that it wants to pay \$2.2 billion for the spectrum. It

1 shouldn't care what happens to that \$2.2 billion aft it gets
2 into the debtor's hand whether or not whoever's claims are
3 allowed."

4 MR. BOSCHEE: Exactly. And yet their counsel is in
5 the New York Bankruptcy saying, well, actually it does matter.

6 THE COURT: Their counsel being Ergen's counsel, not
7 DISH's counsel.

8 MR. BOSCHEE: Correct. But Ergen is making --
9 Ergen's counsel is making representations of what DISH is and
10 isn't going to do, which we think again is problematic both
11 under your order and also under the fact that the DISH board
12 and the special litigation committee, as far as we know, have
13 made no inroads, have made no attempts to talk to the
14 Bankruptcy Court or the trustee or LightSquared about this
15 release. The only person talking about the release is Rachel
16 Strickland, who's Ergen's counsel, and she's making
17 representations of what DISH is and isn't going to do.

18 So against that backdrop I agree with Judge Chapman.
19 If DISH really is independent from Ergen, if Ergen really has
20 nothing to do with this process and the spectrum and his debt
21 is a peripheral issue, then why does DISH Network care? If
22 DISH Network believes the spectrum's worth \$2.2 billion, and
23 that's what they have -- everybody here has said that this
24 asset is vital to DISH going forward, it's been in the papers,
25 it's been argued, it's been -- the table has been pounded a

1 couple times. Then why do they care? DISH Network should not
2 care if LightSquared does something different or pays Ergen
3 80 cents on the dollar or whatever it decides to do with the
4 SBSO. It shouldn't matter. It really shouldn't. If the
5 asset is worth this amount of money, then it shouldn't be a
6 contingency of the bid that Ergen is paid in full. Again, as
7 Mr. Peek said, it should be apples and oranges.

8 But what we're seeing from the Bankruptcy transcript
9 and what Judge Chapman is clearly concerned about is that it's
10 not apples and oranges. I mean, at best it's Gala apples and
11 Fuji apples. I mean, it's apples. They're talking about the
12 same thing, and they're now saying it's a contingency. Well,
13 Judge, if it's a contingency and it matters to DISH whether
14 Ergen's debt is paid off or not, then I would posit to the
15 Judge how on earth can Ergen participate in any part of this
16 bankruptcy now knowing that his debt is a contingency of DISH
17 even going forward with its bid. And if that's the case,
18 then, again, the reason that we brought a motion to
19 reconsider, or I guess clarify would be probably a better
20 word, the order is, we don't think Mr. Ergen in light of the
21 fact that his counsel is making representations on behalf of
22 DISH, his counsel has said that DISH is going to potentially
23 pull its bid if Ergen's debt isn't paid off, we don't think he
24 should be -- he or any of his people, which I would guess
25 would be Ms. Strickland, should be done anything with respect

1 to this bankruptcy. The, quote, unquote, "independent board"
2 should be going in there and basically agreeing with Judge
3 Chapman, saying, well, wait a minute, you don't have -- you
4 know, whatever happens to Mr. Ergen's debt we'd like it to be
5 paid off because he's our guy, but it's not a contingency, we
6 believe the asset is worth this, this is what we're going to
7 do, we're not going to pull it if the debtor or the trustee
8 decide to do something different with the debt downstream.

9 But that's not what's happening here. What they're
10 saying is, no, no, no, no, Ergen's debt and his preferred
11 stock is going to be paid 100 cents on the dollar or DISH
12 isn't going to do this deal.

13 THE COURT: So who's Mr. Dugan?

14 MR. BOSCHEE: I wasn't actually at the bankruptcy
15 hearing. I'm only --

16 THE COURT: He doesn't appear on the list of lawyers
17 on page 4.

18 MR. BOSCHEE: I believe it's Rachel Strickland's
19 partner.

20 MR. RUGG: He is. He's another lawyer from Wilke
21 Farr, and he's representing SBSO and Mr. Ergen.

22 THE COURT: Okay. I see. He's on page 6.

23 MR. RUGG: Ms. Strickland and Mr. Dugan are both.

24 THE COURT: I see him there. Thank you.

25 MR. BOSCHEE: I was going to say -- that was the

1 only thing I was going to say, what it says on there, as well.
2 And they also both appeared, and he appeared a couple of days
3 ago, I believe on behalf of LBAC at a second hearing that,
4 again, we don't have the transcript of in full to provide to
5 the -- to provide to the Judge. I've got a partial
6 transcript, if Your Honor wants to see it.

7 Nothing really happened at the hearing notably,
8 other than Wilke Farr appeared again on behalf of LBAC instead
9 of on behalf of Mr. Ergen personally. But Mr. Dugan and Ms.
10 Strickland have been pretty consistently doing that in this
11 bankruptcy proceeding. And that lends itself to again our
12 concern and what we believe is a changed circumstance and a
13 new fact that warranted bringing this to Your Honor's
14 attention.

15 Now, whether that means that the injunction needs to
16 be broadened, whether that means that the injunction needs to
17 be enforced with respect to Mr. Ergen and what his counsel is
18 or isn't doing, you know, again, I'll defer to Your Honor on
19 that point. But we believe that this new fact and this new
20 circumstance, which I think all the defendants ignored
21 yesterday and just said, no, the release has been there since
22 July, there's no new fact, no new circumstance here, none at
23 all, there is a new fact, there is a new circumstance. This
24 changes the landscape of what we're talking about, and I'm not
25 doing my job if I don't bring it to Your Honor's attention on

1 a motion like this.

2 So unless Your Honor has any further questions for
3 me --

4 THE COURT: No.

5 MR. BOSCHEE: Okay. Thank you, Judge.

6 THE COURT: Mr. Rugg.

7 MR. RUGG: Yes, Your Honor. Well, I think we have
8 clarified that the only issue being discussed at the December
9 10th hearing in the bankruptcy was the release. It's not some
10 separate language condition. So we have that set aside. But
11 the issue of the release --

12 THE COURT: Well, but people are saying that the
13 broad terms of the release mean a release of any claim that is
14 disallowed.

15 MR. RUGG: And I understand, Your Honor. And I
16 think --

17 THE COURT: Which didn't appear to me to be anything
18 we were talking about when we were here last time.

19 MR. RUGG: But also what plaintiff is setting aside
20 is the context of the hearing. What plaintiff is asking is
21 that Mr. Ergen shouldn't do anything in the bankruptcy. But
22 the context of the hearing was the adversary proceeding, where
23 there's claims directly against Mr. Ergen and SBSO.

24 THE COURT: Oh, I understand. I understand that.

25 MR. RUGG: But he's got to be represented. He can't

1 just give up -- he shouldn't be enjoined such that he has to
2 give up a claim against him. And the added context is what
3 inference can be drawn from the release language to allow
4 Harbinger and LightSquared to act contrary to what plaintiff
5 claims they want in this case and say that SBSO is a
6 subsidiary of DISH and therefore a disallowed purchaser.
7 That's what the context of that hearing was, and that's what
8 Judge Chapman was trying to deal with. Because Harbinger and
9 LightSquared are latching onto the release and say, if you
10 take this broad general release -- and everyone agrees it was
11 a broad general release -- can you bring this inference and
12 say, SBSO is a subsidiary? So you have Mr. Ergen and SBSO
13 being defended by Wilke Farr, trying to say that should be
14 dismissed, it's not a valid inference.

15 You also have Mr. Gufa [phonetic] who appears on
16 behalf of DISH and EchoStar. Separate counsel.

17 THE COURT: And LBAC.

18 MR. RUGG: Excuse me?

19 THE COURT: And LBAC.

20 MR. RUGG: Well, LBAC actually -- I don't believe --

21 THE COURT: It says LBAC on the transcript.

22 MR. RUGG: Yeah. But I don't believe LBAC's
23 actually a defendant any longer in the adversary proceeding.

24 THE COURT: Well, but they're listed by the court
25 reporter, whoever that is.

1 MR. RUGG: I understand. Yeah. I understand. He
2 was representing LBAC for that purpose. But I'm trying to
3 keep the context of that hearing clear, because it was just
4 that motion to dismiss of LightSquared and Harbinger's
5 complaints.

6 So the discussion -- Judge Chapman takes the counsel
7 down the road of this discussion about what the release means
8 and whether an inference can be drawn, and counsel is trying
9 to say that the inference can't be drawn. Both counsel for
10 Mr. Ergen and counsel separately for DISH and EchoStar. But
11 nothing changed. There's not a condition that changed.

12 THE COURT: I'm not concerned about whether a
13 condition changed. What I'm concerned about is in
14 contravention of my order I have someone on behalf of Mr.
15 Ergen arguing the release.

16 MR. RUGG: I can understand where Your Honor's
17 concern is on that, and I have actually several points on
18 that. Number one, counsel tried not to have that -- they kept
19 saying to Judge Chapman, if you want to discuss a change in
20 the release that's something that we can't have, that's
21 something that Mr. Dugan and Ms. Strickland both said, we
22 can't have that conversation with Your Honor, that's a
23 conversation for somebody else, because they are respecting
24 the order here in Nevada.

25 There is a technical point, as well, that the order

1 here -- they haven't even posted their bond by December 10th.
2 They posted their bond on December 12th. So technically they
3 weren't even that concerned about having the order be
4 effective. So whatever happened on December 10th was out of
5 respect for Your Honor's opinion where they said, we're not
6 going to negotiate over the release because we represent Mr.
7 Ergen and we can't do that. But plaintiff hadn't even put in
8 place the mere \$1,000 that would have made that order
9 effective at that time. They waited until two days later.

10 But beyond that what was happening was a discussion
11 of the inference. And all counsel was trying to do was defend
12 Mr. Ergen. If the order is expanded in the way that
13 plaintiffs are asking, Mr. Ergen and SBSO are going to have
14 their hands tied in the adversary proceeding and go down a
15 road that actually doesn't help what plaintiff wants here,
16 which is that -- which is the reverse, a decision that Mr.
17 Ergen acted completely separately and contrary to his
18 fiduciary duties with DISH, as opposed to what Harbinger and
19 LightSquared are trying to prove, which is that he acted as
20 essentially an agent for DISH in buying the debt.

21 So what I think we have is really just a confusion
22 of context, because in the Bankruptcy Court you have this
23 discussion of the adversary proceeding that has to happen and
24 that the parties, DISH and EchoStar, Mr. Ergen and SBSO, were
25 all trying to defend themselves and get rid of that adversary

1 proceeding.

2 What will happen -- and one other point that Counsel
3 made is that there was this threat to withdraw. Nobody's ever
4 made a threat to withdraw the bid. In fact, there's never
5 even been an opportunity to, because LightSquared has just
6 refused to deal with DISH in even trying to have a discussion
7 about the release. If LightSquared wants to have that
8 discussion, it will happen with counsel who do not represent
9 Mr. Ergen. It'll happen with counsel who represent the
10 company. That's in respect for Your Honor's order, and
11 everybody understands that. But LightSquared has to be
12 willing to have that discussion. Instead, LightSquared is
13 trying to get a bigger bidder, which is fine. They managed
14 for about a week to have a \$3.3 billion bidder, but then those
15 folks walked away. Now they're trying to find somebody else
16 who will bid up that amount as a way to get around the DISH
17 bid. Meanwhile, DISH is trying to protect its position as the
18 stalking horse bidder. And if LightSquared wants to have that
19 conversation about the release, all it has to do is approach
20 DISH's counsel and the conversation could happen. What will
21 result I can't speak to. It's not my -- it's not my
22 responsibility. But that's a conversation that'll happen in
23 respect of Your Honor's order.

24 THE COURT: Okay.

25 MR. RUGG: Lastly, because Your Honor's order

1 already covers the release, I don't think it's necessary to
2 expand it. If Your Honor is -- I'm reading that Your Honor's
3 concerned that there was a potential violation of that order,
4 but we can give --

5 THE COURT: There is that concern.

6 MR. RUGG: Yes.

7 THE COURT: You're reading correctly, Mr. Rugg.

8 MR. RUGG: I'm not as dense as I sometimes seem.

9 But --

10 THE COURT: I never said you were dense.

11 MR. RUGG: I'm sure we can address that. But if you
12 read through the transcript, you'll see that Ms. Strickland,
13 Mr. Dugan, and Mr. Gufa are all concerned about abiding with
14 it Your Honor's order and not having a conversation that was a
15 negotiation over the release, but merely trying to focus Judge
16 Chapman on the issue of the inference and whether that
17 inference is proper for the purposes of the adversary
18 proceeding.

19 THE COURT: Good morning.

20 MR. REISMAN: Your Honor, I'm not going to reiterate
21 what Mr. Rugg just said, I just want to make a couple of
22 points.

23 I want to make it absolutely clear that based upon
24 my communications with the Wilke Farr lawyers that are acting
25 in the bankruptcy that it's always been their understanding

1 that they were subject to this Court's injunction, that they
2 always intended to abide by this Court's injunction, that it
3 was irrelevant whether that bond had been posted at that point
4 or not, we were going to act in accordance with this Court's
5 injunction.

6 I also want to just -- I just want to point out what
7 Ms. Strickland says, which goes to exactly that issue. It's
8 on page of director defendants' opposition. Ms. Strickland
9 says, "Right. Your Honor, obviously you're not negotiating a
10 credit agreement with me, and were you asking me to negotiate
11 that provision I would refer you to someone else; because as a
12 result of the injunction in Nevada, I would not be the lawyer
13 having that --" and I assume she was going to say having that
14 negotiation. So she is doing the best that she can in this
15 hearing to abide by this Court's order and believes that she's
16 subject to the Court's order.

17 It's my understanding the context of this hearing is
18 that she is representing a client that's being sued in an
19 adversary proceeding, that there's a motion to dismiss pending
20 that she is defending on behalf of her client, and the court
21 is specifically asking her to interpret -- to interpret and
22 have a conversation with the court about the language in the
23 injunction and the interpretation of the injunction. And
24 there's a question on the table based upon this broad language
25 and a boilerplate injunction that, you know, includes

1 affiliates, et cetera, would this include a release of claims
2 for disallowance against SBSO. And that's just the
3 discussion, you know, that they're having at that point, and
4 based upon, you know, a broad interpretation which, you know,
5 was in front of us at the time of our injunction hearing,
6 that's always been in front of us one could interpret it that
7 way. That doesn't necessarily mean that it has to be
8 interpreted that way, enforced that way, that this was ever
9 made a condition to the DISH bid, that DISH is going to
10 withdraw its bid. She never says that in here. She never
11 said, DISH is going to withdraw its bid of the claims are
12 disallowed.

13 So this is really just someone defending their
14 client in an adversary proceeding in a motion to dismiss
15 context, you know, being questioned by the judge and doing
16 their best to answer that questions, while at the same time
17 saying, but I can't go here, you know, in terms -- I can't
18 negotiate anything, because I'm subject to an injunction and
19 if this gets to any kind of negotiation state we've got to
20 hand this off because we can't do this. So they're doing the
21 best that they can to abide by the Court's injunction here.
22 It's always been our intention to abide by the Court's
23 injunction.

24 I believe that the language in this Court's
25 injunction already covers any fears or issues that the

1 plaintiffs raise here today. The Court's enjoined Mr. Ergen
2 from participation, including any review, comment, or
3 negotiations relating to the release. So he's not -- he's not
4 trying to negotiate this release. He's stepped back. He's
5 not -- you know, he's not active in whether -- you know, how
6 they're going to deal with this release vis-a-vis the other
7 party here. This is -- this is just a defense of an adversary
8 proceeding.

9 So I think the current injunction already covers the
10 situation. We intend to abide by it, we'll continue to abide
11 by it, and I think one of the points of the Court's limited
12 injunction in the first place was a recognition that Mr. Ergen
13 at least needs to be involved like -- not in the release; I
14 agree with -- well, I don't necessarily agree with you, I
15 understand what you're saying. I don't agree with you, but I
16 understand what you're saying, that Mr. Ergen --

17 THE COURT: You don't have to agree with me. That's
18 okay. It doesn't bother me.

19 MR. REISMAN: I understand. I understand.

20 -- that Mr. Ergen -- I understand, of course, Mr.
21 Ergen should not be involved in the negotiation of the release
22 and conditions put upon with regard to the release. But
23 always think it was the Court's goal in making a very, you
24 know, limited, narrow injunction to allow Mr. Ergen who is,
25 you know, the field general for DISH and has been for

1 30 years, to be part of this crucial process that's so crucial
2 to DISH, and, you know, where so much is at stake and he has
3 so much knowledge he needs some form of participation, active
4 participation. And they're trying to exclude him from the
5 entire process.

6 THE COURT: No. I understand, Counsel. I'm just
7 concerned of the discussions that Mr. Ergen's counsel --
8 recognized Mr. Ergen's counsel are having about the release
9 and what the release means and the scope of the release. I'm
10 very concerned about that. Because it would seem to be
11 inappropriate and not helpful to the company in the bankruptcy
12 proceedings.

13 MR. REISMAN: I understand what your client's [sic]
14 saying. I'm saying the spirit of this -- the spirit and the
15 context of these discussions was motion to dismiss and
16 Bankruptcy Court saying was Mr. Ergen acting as a subsidiary
17 of DISH such that there would be disallowance. And it was in
18 that context. And wasn't we're imposing a condition, we're
19 going to withdraw the bid. You know, it had nothing to do
20 with that. And to the extent that it felt it had to do with
21 whether -- you know, whether or not they were going to
22 negotiate that issue, she said, I'm subject to an injunction,
23 I can't go there. There's always been an intent to abide by
24 the injunction, they will continue to abide by the injunction,
25 and, you know, Mr. Ergen just needs to be a part of the

1 process outside of that release, but be able to defend himself
2 in the adversary proceeding.

3 THE COURT: Well, but he's not, because his counsel
4 is there talking with the judge about what the scope of the
5 release is and how they're going to deal potential
6 disallowance of Mr. Ergen's debt.

7 MR. REISMAN: I believe -- and I do think that Mr.
8 -- sorry to put you on the spot. I believe that Mr. Ergen has
9 better sense of the nature of the hearing than I do and
10 exactly what -- you know, what was discussed. But I believe
11 the context of it was that the judge for purposes of this
12 notion is Mr. Ergen acting as a subsidiary of DISH such that,
13 you know, there should be disallowance here, the context is --

14 THE COURT: Well, and they're trying to draw
15 inferences from the context of the release that negotiated.

16 MR. REISMAN: Exactly. Exactly. And she's --

17 THE COURT: Because clearly the negotiation benefits
18 Mr. Ergen of the release.

19 MR. REISMAN: It does. But it's also my
20 understanding that that release was done prior to any claims
21 for disallowance being brought, that that release was done
22 through Mr. Ergen's -- the original language was done -- it's
23 standard language in these situations, and it was done by Mr.
24 Ergen's original company -- it was LBAC at the time before it
25 became DISH's -- you know, before DISH assumed it by -- it was

1 done by Mr. Ergen, by LBAC when Mr. Ergen solely owned it, it
2 was done before any of these claims for disallowance were
3 brought, and the concept was LBAC and its affiliates, which
4 were, you know, at that point arguably SBSO. And the spirit
5 of this is just that there -- she's being asked questions by
6 the judge, she's trying to defend her client in an adversary
7 proceeding, there's a motion to dismiss pending, there's no
8 intent and I don't think a fact of violating this Court's
9 order. And we have to -- not we. They have to be able to
10 defend their client in an adversary proceeding in their
11 position.

12 THE COURT: To her credit, she did say, if somebody
13 has to negotiate the release it's not going to be me. She did
14 tell the judge that. Whether the judge would buy it or not
15 was an entirely different issue, because the judge kept
16 pushing her because clearly the judge was not comfortable with
17 the statements she had made.

18 MR. REISMAN: In a motion to dismiss, you know,
19 context. And the context was specifically, you know, before
20 the judge.

21 THE COURT: Okay. Mr. Peek.

22 MR. PEEK: I'm going to try to be brief. Please
23 don't comment on that.

24 THE COURT: I'm trying to keep my tongue bit and my
25 mouth shut this morning.

1 MR. PEEK: And I -- Stephen Peek on behalf of the
2 special litigation committee, DISH, and Mr. Ortolf.

3 The thing that troubles me I think the most here is
4 the Court's concern. I'm troubled that the Court has concerns
5 and the presentation that was made by Mr. Boschee about the
6 fact that DISH said that it would pull its bid if the release
7 is changed. That never -- that didn't happen.

8 THE COURT: Well, I don't think it's DISH saying it.

9 MR. PEEK: Okay.

10 THE COURT: I think it's the judge saying it.

11 MR. PEEK: Well, the judge saying that that release
12 has what, the release has the effect of doing that. But
13 nobody -- nobody from DISH said that. So that's -- I want to
14 make that clear.

15 THE COURT: No. The judge said it.

16 MR. PEEK: The judge did say it.

17 THE COURT: Which I think is more problematic than
18 DISH saying it. But that's a different issue.

19 MR. PEEK: Well, it's certainly an interpretation.
20 But I think really what -- what my takeaway from the whole
21 context in which this hearing occurred on December 10th was a
22 motion to dismiss based upon the allegations that are --
23 appear within the body of the two complaints. And remember
24 there are two complaints. There's a LightSquared complaint
25 called intervention, and there's now the Harbinger complaint,

1 all of which occurred on very short notice. And the standard
2 by which one measures the issue of whether or not a motion to
3 dismiss is proper -- because what happens in a motion to
4 dismiss is the court is required -- you know this better than
5 I do, because you do it all the time -- to draw all reasonable
6 inferences that would arise from the complaint. And so, as
7 Mr. -- and I think Mr. Rugg is one probably who addressed this
8 already in his brief and I think will address it again,
9 because I think he is, as Mr. Reisman said, more attuned to
10 that, is the judge is, can I draw these inferences, Ms.
11 Strickland, can I draw this inference, can I draw that
12 inference, can I draw the other inference, all of which come
13 from the --

14 THE COURT: But the judge is going farther than
15 that. I understand -- and I do the same thing. I understand
16 it's --

17 MR. PEEK: You push people, yes, just like Judge
18 Chapman did, Your Honor.

19 THE COURT: It's a motion to dismiss claim, but the
20 judge is looking at it from a broader perspective, because
21 she's looking at the whole forest that she has to deal with
22 ultimately in this case.

23 MR. PEEK: That's right. She does have to deal with
24 it.

25 THE COURT: And so I certainly understand what

1 you're saying, that on a motion to dismiss where the judge is
2 merely dealing with -- at least supposedly dealing with
3 inferences that can be drawn in favor of the non-moving party,
4 you know, maybe it's okay for Mr. Ergen's counsel to get up
5 there and stay, judge, blah, blah, blah; but the judge keeps
6 pushing, because the judge wants the whole case to be
7 resolved, she wants a great deal, she wants to maximize the
8 value of the bankruptcy estate so she could --

9 MR. PEEK: She's your model, Your Honor.

10 THE COURT: So, you know, and she's trying to
11 multiple things at this hearing. But my concern is the way
12 that Mr. Ergen's counsel interacted with her when she was
13 pressed, rather than DISH's counsel being the one to say, you
14 know, judge, because of the injunction we've got to deal with
15 that issue, we understand you're going to draw inferences
16 because the release looks like it clearly benefits Mr. Ergen
17 and we're trying to do something and maybe you should
18 interpret him as, you know, we are all part of the same deal
19 here and if you disallow the debt, you know, that's okay.

20 MR. PEEK: No. And --

21 THE COURT: But nobody said that from DISH.

22 MR. PEEK: You are correct. Nobody said that from
23 DISH, because it really -- at the time of the exchange between
24 the judge and Ms. Strickland there wasn't an opportunity for
25 the DISH counsel to get up and really --

1 THE COURT: It's at the beginning of the transcript.
2 It was Mr. Dugan. That was when Mr. Dugan was talking. Ms.
3 Strickland didn't say, I can't talk to you about that, till
4 the very end, like four pages from the back.

5 MR. PEEK: Yeah.

6 THE COURT: I mean, there was plenty of time for
7 DISH counsel to stand up in that 100 pages or so.

8 MR. PEEK: Your Honor, you're right. I guess there
9 was an opportunity for somebody to stand up and say something.
10 But I think in that context what would that have -- what would
11 that have been and what is the need now today to expand, if
12 you will, the injunctive relief as requested? Because what I
13 also --

14 THE COURT: I'm not expanding the injunctive relief.
15 I'm not.

16 MR. PEEK: Okay.

17 THE COURT: Okay? But --

18 MR. PEEK: And I understand what you're doing is
19 you're sending a message to me and to Mr. -- well, the three
20 of us on this other side of the V is that, gentlemen, you
21 know, be careful and instruct these lawyers in New York to be
22 careful about the way they're making their presentations.

23 THE COURT: And here's the real issue. I understand
24 DISH may lose leverage on the agreement if it has to negotiate
25 off of those provisions. But you know what, that's how life

1 is.

2 MR. PEEK: I understand. And, of course, what
3 troubles me is certainly that the derivative plaintiffs seem
4 to be playing really more into the hands of those who are
5 opposing the opportunity of the company to buy valuable
6 spectrum. And every step that they take along the way
7 breaches their fiduciary duty, if you will, Your Honor, that
8 they have to the other shareholders. The shareholder
9 derivative plaintiff has a fiduciary duty, as well, Your
10 Honor.

11 THE COURT: As the representative.

12 MR. PEEK: As the representative if it claims to be
13 the representative.

14 THE COURT: If they weren't the representative, they
15 wouldn't have any fiduciary duty. But once they're the
16 representative, they are --

17 MR. PEEK: I'm not saying that they are the
18 representative, Your Honor, but they've got to be mindful of
19 their own -- as they come -- every time they come into court
20 here and things that say then get repeated back into New York
21 as, oh, my gosh, look at this bad company.

22 THE COURT: Yeah. And then apparently Nevada is an
23 entirely bad place, too, so --

24 MR. PEEK: Well, we all knew that a long time ago,
25 Your Honor. That's why, you know --

1 THE COURT: Like wow.

2 MR. PEEK: But I've lived with that curse I guess
3 for 60-some-odd years in Nevada, and I love every minute of
4 it. And so --

5 THE COURT: Okay. So let me grill Mr. Rugg for a
6 minute before you sit down.

7 MR. PEEK: Okay. Please do.

8 THE COURT: Mr. Rugg --

9 MR. RUGG: Yes, Your Honor.

10 THE COURT: -- you've got to figure out a way for
11 the lawyers for the company to be the people who are the ones
12 taking the laboring oar and the majority responsibility. You
13 cannot allow Ms. Strickland and Mr. Dugan to be the ones who
14 are taking that laboring oar, because a large part of this
15 adversary proceedings relates to the company's incestuous
16 relationship with Mr. Ergen. And while in Nevada we recognize
17 that there can be conflicted relationships, and with certain
18 disclosures it's okay. People in New York don't understand
19 that. So don't you think you'd be better served to have
20 DISH's counsel be the primary mouthpiece with the judge?

21 MR. RUGG: I understand that, and I believe that's
22 what is going to happen. I will make sure that that message
23 is delivered, that that is what's going to happen going
24 forward, and I believe it's actually already happening on the
25 bankruptcy side of the case, as opposed to the adversary side

1 where -- where both parties were being attacked and both DISH
2 and EchoStar separately from Mr. Ergen and SBSO are trying to
3 go back again to LightSquared and Harbinger. But I will
4 deliver Your Honor's message very clearly to my co-counsel
5 that it is very important that they step up and take the lead
6 role on behalf of the company.

7 THE COURT: And if there's a discussion to be had
8 about what the release means and whether changes to release
9 can or should be made, they should be the ones talking, not
10 Ms. Strickland and Mr. Dugan.

11 MR. RUGG: Okay. And that's actually a good point
12 of clarification, because I did see in the transcript that Mr.
13 Triffer [phonetic] was a little concerned about the
14 injunction, as well. He mentioned it in several places where
15 he didn't want to step on Your Honor's injunction.

16 THE COURT: He is perfectly welcome as counsel for
17 the company to negotiate that release any way he wants.

18 MR. RUGG: Okay. I appreciate that clarification.

19 THE COURT: I think my goal and the bankruptcy
20 judge's goals may be in tune. My goal is to let DISH, if it
21 has an ability to, to buy that spectrum asset because it is in
22 the benefit of the company. Her goal is to maximize the
23 return to the bankruptcy estate.

24 MR. RUGG: And I also believe --

25 THE COURT: I think we have similar goals.

1 MR. RUGG: I also believe Judge Chapman is wrestling
2 with how to do it timingwise between the fact that the auction
3 was cancelled by LightSquared, she has this adversary
4 proceeding that's set for trial on January 9th, unless she's
5 moved it and I haven't heard about it. So there's -- she's
6 wrestling with the timing of how to deal
7 with --

8 THE COURT: There's somebody who sets trials faster
9 than me?

10 MR. RUGG: Bankruptcy Court is a strange land, Your
11 Honor.

12 THE COURT: Well, that's a good thing. All right.

13 MR. RUGG: Thank you, Your Honor.

14 THE COURT: Mr. Boschee.

15 MR. BOSCHEE: I'll be very brief, Judge.

16 THE COURT: Do you understand what I have said?

17 MR. BOSCHEE: I do. I do understand what you said.

18 I had a couple of comments. And again, Mr. Peek has said a
19 lot of things much worse than that about me and my clients
20 over the years, but the one thing I would posit to the Court
21 is certainly I take great offense at the idea that are trying
22 in some way to jeopardize DISH Network from acquiring the
23 spectrum.

24 THE COURT: But you understand LightSquared and
25 Harbinger is jumping on everything you do in this case --

1 MR. BOSCHÉE: I do.

2 THE COURT: -- and using it against the company in
3 the bankruptcy proceeding.

4 MR. BOSCHÉE: I do.

5 THE COURT: Which is not to the company's best
6 interest.

7 MR. BOSCHÉE: We understand that. And we would
8 prefer not to have to bring a lot of these attentions to the
9 Court's attention. We think that the finger's being unfairly
10 pointed by the defense table at us when it really should be
11 pointed at Mr. Ergen and what has done, what he continues to
12 do, and what he has done in contravention -- I think Your
13 Honor -- I mean, even they all acknowledged it -- of your
14 order. I mean, with all due respect to Mr. Rugg, I'm sure
15 he's going to pick up the phone and call his colleagues. But
16 if they didn't comply with your order, which was clear as a
17 bell as to what they could and couldn't do, I fear that they
18 may not comply with Counsel's request. But we are --

19 THE COURT: You know what happens in this department
20 when people don't comply with orders.

21 MR. BOSCHÉE: I do.

22 THE COURT: Bad things happen.

23 MR. BOSCHÉE: I do.

24 THE COURT: Okay.

25 MR. BOSCHÉE: And obviously to the extent that you

1 can reach out and grab the lawyers that are doing this, we
2 certainly --

3 THE COURT: I don't grab the lawyers. I grab
4 parties.

5 MR. BOSCHEE: I understand. I understand that. But
6 that was the first point. I just wanted to say that we have
7 -- we want DISH to get this -- to get this asset at a
8 reasonable price that's fair to the shareholders irrespective
9 of any interest that Mr. Ergen is going to have in terms of
10 getting his personal debt paid off. We don't want to
11 jeopardize that, we're not taking any efforts to jeopardize
12 that, and any characterization that way I think is unfounded
13 and unfair. It's certainly not my intention, it's not our
14 intention on behalf of these shareholders.

15 And also and lastly, we have a concern going
16 forward, because this is an easy fix, right, and Your Honor
17 said it. All these lawyers had to do at any point in the 140
18 pages before Ms. Strickland, you know, maybe I shouldn't be
19 talking about this, was just defer to DISH counsel. I mean,
20 if I'm representing Charles Ergen in front of Your Honor and
21 Mr. Peek and Mr. Rugg are sitting here, that would have been
22 the first thing I said, is that, you know, I can't talk about
23 that release at all, I can't do it, I'm going to defer to
24 counsel, let them stand up at that point and say it. But she
25 hasn't done that, and she hasn't done that apparently at two

1 different hearings, and this judge is really, really concerned
2 about it. So we think something needs to be done.

3 THE COURT: I'm concerned about it, too.

4 MR. BOSCHÉE: And we think that at this --

5 THE COURT: And just for the record, there may be a
6 disgorgement issue that we talk about later, but we're not
7 there.

8 MR. BOSCHÉE: I understand that.

9 THE COURT: Okay.

10 MR. BOSCHÉE: That was my -- but my last point was
11 we think something needs to be done at this point to really
12 hammer them, and I don't --

13 THE COURT: I think I've delivered the message --

14 MR. BOSCHÉE: I think you have, too, Your Honor.

15 THE COURT: -- very firmly and thoroughly. But does
16 not require any modification of my order.

17 MR. BOSCHÉE: Okay. That's fair. Thank you, Your
18 Honor.

19 MR. PEEK: Thank you, Your Honor.

20 THE COURT: Have a lovely day. 'Bye.

21 THE PROCEEDINGS CONCLUDED AT 9:03 A.M.

22 * * * * *

23

24

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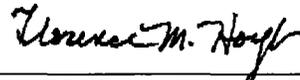
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I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

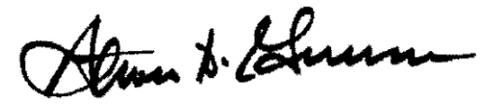
AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
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DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE DISH NETWORK CORPORATION
DERIVATIVE LITIGATION

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

STATUS REPORT

Pursuant to this Court's Minute Order on April 25, 2014, Plaintiff Jacksonville Police and Fire Pension Fund ("Plaintiff"), by and through its undersigned counsel of record, respectfully submits its Status Report. This Status Report is made and based upon the papers and pleadings on file, the below Memorandum of Points and Authorities, the exhibits attached to the Appendix to this Status Report (the "Appendix") filed concurrently with the Status Report and incorporated by reference, together with such other evidence and argument as may be presented and considered by this Court at any hearing regarding the Status Report.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Throughout this Action, Dish's controlling shareholder and Chairman, Charles W. Ergen,
4 its Board, and the SLC created in response to Plaintiff's efforts, have vociferously argued before
5 this Court that: (1) LightSquared's spectrum assets are critically important for Dish's future; (2)
6 Dish's and Ergen's interests in connection with the LightSquared bankruptcy were at all times
7 aligned; and (3) the moment that the interests of Mr. Ergen potentially conflicted with that of
8 Dish and its public investors, the Board would act to protect the interests of Dish. Moreover,
9 Defendants and the SLC consistently accused Plaintiff and its counsel of acting against Dish's
10 and its shareholders' interests by (supposedly) taking actions that could interfere with Dish's
11 acquisition of LightSquared's much-coveted spectrum.

12 With this history in mind, we write to update the Court regarding several remarkable
13 developments in the LightSquared bankruptcy proceeding since the parties' last appearance
14 before the Court. As set forth below, neither the Board nor any special committee has protected
15 Dish's interests throughout these developments.

16 *First*, the day before the LightSquared auction was set to conclude, Dish was on track to
17 be its winner. As LightSquared's special committee explained to Judge Chapman, however, they
18 were prepared to sell the spectrum to Dish but could not rationalize releasing LightSquared's
19 pending claims against Mr. Ergen as a condition to that sale. When LBAC (Dish's 100% owned
20 acquisition vehicle for the spectrum) inexplicably refused to proceed with the purchase unless all
21 claims against Ergen were released, the LightSquared special committee cancelled the auction,
22 citing the dispute about the release as a "very big factor" in its decision.¹ This situation was
23 entirely avoidable. The day before the auction, Judge Chapman emphasized to counsel for all
24 parties – including Dish's counsel – that it made no sense for Dish not to carve out
25 LightSquared's claims against SPSO and Ergen from the release so that the sale of
26

27
28 ¹ January 22, 2014 Transcript at 66:22-69:11, *In re LightSquared Inc.*, No. 1:12-bk-12080, ECF No. 1278 (Bankr. S.D.N.Y.). A true and complete copy of the January 22, 2014 transcript is attached to the Appendix as **Exhibit 1**.

1 LightSquared's spectrum to Dish could proceed.²

2 Dish's counsel was in the room when Judge Chapman said this. Dish's counsel did not
3 offer to carve out LightSquared's claims against SPSO. Dish was the only bidder and had its
4 counsel simply spoken up, Dish could have acquired LightSquared's spectrum for \$2.2 billion.
5 Incredibly, discovery in the bankruptcy revealed that Mr. Ergen estimated the value to Dish of
6 LightSquared's spectrum as *\$7.085 billion*.³ The harm to Dish of Ergen's and the Board's
7 refusal to place Dish's interests ahead of Ergen's is staggering.

8 **Second**, based on the extensive trial record, Judge Chapman has concluded that Mr.
9 Ergen used his control over Dish to protect his personal investment in almost \$1 billion of
10 LightSquared debt. Judge Chapman found that "[g]iven the control Mr. Ergen exercised over the
11 DISH board, as evidenced, in particular, by his bullying of the special committee, it is clear that
12 Mr. Ergen believed that after making the LBAC bid he could and would get DISH to step in as
13 purchaser."⁴ The Bankruptcy Court found that Mr. Ergen "creat[ed] a path where DISH, through
14 LBAC, could take over as purchaser while still protecting Mr. Ergen from any down side on his
15 substantial investment."⁵

16 **Third**, Mr. Ergen, Dish and the SLC have ignored this Court's admonition on December
17 19, 2013 that counsel for Dish should take the "laboring oar" and "majority of the responsibility"
18 in representing LBAC in the adversary proceedings. In fact, Mr. Ergen's personal lawyers at
19 Willkie Farr & Gallagher LLP ("Willkie Farr") have been the only counsel of record to appear
20 for LBAC in the adversary proceedings between December 30, 2013 and March 31, 2014.⁶

21 Moreover, it was Mr. Ergen's personal lawyers at Willkie Farr – not counsel for Dish or
22 the SLC – who actually withdrew LBAC's bid for the LightSquared spectrum assets in the

23 ² December 10, 2014 Bankruptcy Transcript at 140:14-23, *In re LightSquared Inc.*, No. 1:12-bk-12080, ECF No.
24 1278 (Bankr. S.D.N.Y.). A true and complete copy of the December 10, 2014 transcript is attached to the Appendix
as **Exhibit 2**.

25 ³ May 8, 2014 Bankruptcy Transcript at 37:3-5, *In re LightSquared Inc.*, No. 1:12-bk-12080, ECF No. 1278 (Bankr.
26 S.D.N.Y.). A true and complete copy of the May 8, 2014 transcript is attached to the Appendix as **Exhibit 3**.
Following extensive briefing and after hearing weeks of live testimony, Judge Chapman read part of the Bankruptcy
Court's findings and conclusions into the record on May 8, 2014, making clear that formal opinions will follow in
27 June 2014.

⁴ Ex. 3 (May 8, 2014 Tr.) at 43:12-16.

⁵ Ex. 3 (May 8, 2014 Tr.) at 38:25-39:3.

28 ⁶ See Court Appearances for LBAC, attached to the Appendix as **Exhibit 7**.

1 context of the adversary proceedings challenging Mr. Ergen's personal debt purchases. On
2 January 22, 2014, Rachel Strickland of Willkie Farr informed Judge Chapman: "*The stalking*
3 *horse bidder hereby withdraws its bid.*"⁷ Mr. Ergen claimed that an unspecified "technical
4 issue" was the reason for withdrawing LBAC's bid. But after hearing extensive testimony
5 during weeks of trial, Judge Chapman made clear that she did not believe Mr. Ergen, noting that
6 LightSquared's expert "provided credible and compelling testimony that the technical issue is
7 unlikely to exist at all" while "Mr. Ergen's testimony on this point was not credible."⁸

8 *Fourth*, again undermining the Defendants' repeated representation to this Court, the
9 Bankruptcy Court found that for the very same reason that Mr. Ergen was allowed to purchase
10 almost \$1 billion in LightSquared debt for his personal benefit, Dish could also have purchased
11 this debt through an affiliate, just like Mr. Ergen. As Judge Chapman noted on May 8, 2014,
12 "[w]hen asked by the Court if an affiliate of DISH could have purchased [LightSquared] debt
13 without running afoul of the credit agreement, counsel for DISH agreed 'based on the words of
14 the contract'."⁹ Thus, as Plaintiffs and the long-disbanded special transaction committee had
15 previously argued, Dish could have purchased \$1 billion in LightSquared debt through an
16 affiliate, a corporate opportunity that Ergen stole. Moreover, Judge Chapman found that
17 "members of the DISH board, who from press reports had more than an inkling of Mr. Ergen's
18 purchases, were tacitly acquiescing to Mr. Ergen's foray into LightSquared's capital structure
19 and they did not see fit to double-check the corporate opportunity questions it obviously
20 raised."¹⁰

21 . . .

22
23 ⁷ Ex. 1 (Jan. 22, 2014 Tr.) at 14:2-3.

24 ⁸ Ex. 3 (May 8, 2014 Tr.) at 109:5-6; 111:24-25. This was not the only issue where Judge Chapman did not believe
25 Mr. Ergen's testimony. Citing a "troubling pattern of noncredible testimony," the Bankruptcy Court also found that
26 Mr. Ergen and Dish's treasurer, Jason Kiser, "failed to testify truthfully" about Mr. Ergen's refusal to authorize an
27 amendment to the credit agreement that potentially could have avoided LightSquared's bankruptcy filing. *See id.* at
28 20:11-14. *See also id.* at 24:3-6 ("Mr. Kiser's testimony that the reason for again checking the credit agreement was
to confirm that there was no corporate opportunity for DISH, was not credible and is not consistent with the precise
words of Mr. Ergen's directive. . ."); *id.* at 19:23-20:1 ("[Mr. Ergen's] testimony that he voted not because he had
been unable to review the proposed amendment was not credible, as the evidence reveals that the amendment
documents could have been obtained").

⁹ Ex. 3 (May 8, 2014 Tr.) at 52:11-14.

¹⁰ Ex. 3 (May 8, 2014 Tr.) at 21:15-19, 22:23-25.

1 The Bankruptcy Court findings confirm Plaintiff's allegations throughout this Action.
2 Judge Chapman has indicated that a formal 170-page opinion with detailed factual findings on
3 the adversary proceeding as well as a separate, detailed decision on plan confirmation will be
4 filed as soon as the court can write the opinions. The parties previously agreed that Plaintiff can
5 file an amended complaint. Plaintiff has proposed to file the complaint within 20 days after
6 Judge Chapman's written opinions are issued, followed by the same (lengthy) briefing schedule
7 that was previously agreed among the parties and approved by the Court. Defendants' motions
8 to dismiss (if any) would be due 28 days after the complaint is served with opposition and reply
9 briefs due pursuant to EDCR 2.20((e) and (h)).¹¹ Defendants do not oppose Plaintiff filing the
10 complaint, but refuse to commit to any briefing schedule until they receive it. There is no reason
11 for this delay tactic; parties agree on briefing schedules in advance of receiving pleadings all the
12 time. The parties have already done so here. Plaintiff respectfully requests that, at the June 19,
13 2014 status conference, the Court set the previously-agreed, Court-approved briefing schedule,
14 so as to allow this case to promptly proceed to trial.

15 **II. PERTINENT DEVELOPMENTS SINCE THE INJUNCTION**

16 **A. Defendants Ignore This Court's Clear Instructions**

17 **i. Dish and the SLC do not Carve out LightSquared's Claims against Mr.** 18 **Ergen from the Release, Prompting LightSquared to Cancel the Auction** 19 **for its Assets.**

20 After the November 25, 2013 preliminary injunction hearing, this Court enjoined Mr.
21 Ergen and anyone working on his behalf from negotiating the release that would extinguish
22 LightSquared's claims against Mr. Ergen in the event of a successful sale of LightSquared's
23 assets to Dish. By narrowly tailoring the injunction to only apply to Mr. Ergen and his
24 representatives, this Court ensured that Dish and the SLC could contact deal with LightSquared
25 to restructure the release and carve out LightSquared's claims against Mr. Ergen. This made
26 sense. As Judge Chapman noted on December 10, 2013:

27 ¹¹ Defendants may not file a motion to dismiss given the Court's clear warning, even before the latest developments,
28 that "you've got loyalty issues that you're going to be able to allege and get past a motion to dismiss and probably a
motion for summary judgment based on what I've seen." November 25, 2013 Hr. Tr. at 148:7-10.

1 The question is why is a bid of DISH, which is a separate entity
2 from SPSO – say, the defendants -- why does the bid of DISH care
3 about whether or not SPSO gets its claims in full? DISH has
4 determined that it wants to pay 2.2 billion dollars for the spectrum.
5 It shouldn't care what happens to that 2.2 billion dollars after it
6 gets into the debtors' hands, whether nor not -- whoever's claims
7 are allowed.¹²

8 Counsel for Dish and LightSquared's special committee were present when Judge
9 Chapman explained why it made sense for Dish to carve out LightSquared's claims against
10 SPSO from the release so that Dish could acquire LightSquared's spectrum assets. Dish was the
11 only known bidder for LightSquared spectrum and had a Court-approved stalking horse bid to
12 purchase these assets for \$2.2 billion at the auction the next day. Yet, after Judge Chapman
13 refused to dismiss LightSquared's claims against SPSO during the same hearing, no one
14 representing Dish or the SLC walked across the room or otherwise contacted LightSquared's
15 special committee to resolve this issue so that Dish could acquire the strategically important
16 spectrum assets with an estimated valued for Dish of \$7.085 billion.

17 On December 11, 2013, no other potential bidder had emerged and Dish was poised to
18 win the auction and acquire LightSquared's spectrum assets. Counsel for Dish knew that the
19 main impediment to LightSquared's special committee allowing the auction to close with Dish as
20 its winner was the concurrent release of LightSquared's pending claims against SPSO and Mr.
21 Ergen. As LightSquared's special committee explained, "you're going into the auction and it's
22 up to the special committee to decide whether to conduct the auction and to designate the
23 winning bidder at the auction, a bid that releases the conduct that is the topic of the complaint
24 that the special committee has authorized."¹³ LightSquared's special committee complained that
25 LBAC insisted on conditioning its bid for LightSquared spectrum on the committee pursuing
26 LightSquared's claims against SPSO (*i.e.*, Ergen):
27

28 ...

...

...

¹² Ex. 2 (Dec. 10, 2013 Tr.) at 140:14-23.

¹³ Ex. 1 (Jan. 22, 2014 Tr.) at 60:19-23.

1 “It was as if there was intentionally a foot kept behind the line and
2 you went to the special committee and said you’ve got to turn your
3 back on the topic of the lawsuit. You have to turn your back on
4 what your concerns are with this bid or we have the right to pull.
5 *In other words, you don’t have the option of keeping the bid and*
6 *digging on the litigation.”*¹⁴

7 LightSquared’s special committee canceled the auction. As counsel for LightSquared’s special
8 committee explained to Judge Chapman, the threatened release of LightSquared claims against
9 SPSO was a “very big factor” in the cancelation of the auction.¹⁵ Had Dish simply carved out
10 LightSquared’s claims against SPSO from the release, Dish could have acquired the
11 LightSquared spectrum for \$2.2 billion. But Dish’s Board does not cross Mr. Ergen.

12 **ii. Mr. Ergen’s Personal Lawyers Represent LBAC during the Adversary**
13 **Proceedings and Pull LBAC’s Bid.**

14 When counsel last appeared before the Court, on December 19, 2013, defense counsel
15 represented – as they had several times before – that Mr. Ergen and Dish’s 100%-owned
16 subsidiary LBAC both had a compelling interest in the opportunity to acquire LightSquared’s
17 spectrum assets. At that time, Plaintiff had raised a concern that Mr. Ergen’s personal lawyers at
18 Willkie Farr & Gallagher LLP (“Willkie Farr”) informed the Bankruptcy Court that *LBAC* would
19 withdraw its \$2.2 billion stalking horse bid for LightSquared spectrum if *Mr. Ergen* did not
20 receive payment in full on his personal claims for \$1 billion of LightSquared debt. Dish’s
21 counsel derided this concern, representing to this Court that “[n]obody’s ever made a threat to
22 withdraw the bid.”¹⁶ Rather than expressing concern that Mr. Ergen’s conduct in connection
23 with the bankruptcy could harm Dish, the SLC’s counsel went so far as to accuse Plaintiff “to be
24 playing really more into the hands of those who are opposing the opportunity of the company to
25 buy valuable spectrum.”¹⁷

26 These representations and personal attacks were misguided. While counsel was telling
27 this Court that LBAC’s bid for LightSquared spectrum was unaffected by Ergen’s personal
28

¹⁴ Ex. 1 (Jan. 22, 2014 Tr.) at 63:12-18 (emphasis added).

¹⁵ Ex. 1 (Jan. 22, 2014 Tr.) at 66:22-69:11.

¹⁶ December 19, 2013 Transcript for the Motion for Reconsideration in this Court at 17:3-4, a true and complete copy of this transcript is attached hereto as **Exhibit 4**.

¹⁷ Ex. 4 (Dec. 19, 2014 Tr.) at 29:4-6.

1 interests and on track to succeed, Defense counsel were anticipating that LBAC would, in fact,
2 withdraw its bid for LightSquared spectrum if Mr. Ergen did not receive full payment on his
3 personal investment in LightSquared debt. For example, the threat to withdraw LBAC's bid
4 caused Judge Chapman to schedule a two-phase trial, starting with the "adversary proceedings"
5 to determine whether Mr. Ergen's personal claims (through his wholly-owned entity SPSO)
6 would be subordinated or disallowed before a second "plan confirmation" phase to determine
7 which bankruptcy plan, if any, would be confirmed. As Judge Chapman explained on January
8 22, 2014:

9 "it was clearly conveyed to me that we had to resolve the adversary
10 in order to be able to tee up confirmation of the plan and the bid
11 *because we had to deal with the release*. So in a case where no
one can agree on anything everybody seemed to agree that we had
to deal with the SPSO litigation first."¹⁸

12 During the December 19, 2013 hearing in this Court, the Court understood that Mr.
13 Ergen's acute personal interest in the release of LightSquared's claims at issue in the adversary
14 proceedings conflicted with Dish's interest in purchasing the LightSquared spectrum assets
15 through LBAC. The Court made clear that Mr. Ergen and his personal counsel at Willkie Farr
16 should therefore not be managing LBAC's conduct in the adversary proceedings:

17 The Court: you've got to figure out a way for the lawyers for the company to be the people who
18 are the ones taking the laboring oar and the majority responsibility. *You cannot*
19 *allow Ms. Strickland and Mr. Dugan to be the ones who are taking the laboring*
oar, because a large part of this adversary proceeding relates to the company's
incestuous relationship with Mr. Ergen . . .

20 Mr. Rugg: I understand that, and I believe that's what's going to happen. *I will make sure that*
21 *that message is delivered*, that that is what's going to happen going forward, and I
22 believe it's actually already happening on the bankruptcy side of the case . . .¹⁹

23 . . .

24 . . .

25 . . .

26 . . .

27 . . .

28 ¹⁸ Ex. 1 (Jan. 22, 2014 Tr.) at 68:17-69:5 (emphasis added).

¹⁹ Ex. 4 (Dec. 19, 2014 Tr.) at 30:10-16; 21-25 (emphasis added).

1 Mr. Peek assured the Court that the SLC understood the importance of the Court's clear
2 instructions, stating "I understand what you are doing is you're sending a message to me and to
3 Mr. – well, the three of us on this side of the V is that, gentlemen, you know, be careful and
4 instruct these lawyers in New York to be careful about the way they're making their
5 presentations."²⁰

6 Notwithstanding the Court's clear warnings and counsel's solemn promises to this Court,
7 Willkie Farr took the "laboring oar" in representing LBAC throughout the adversary
8 proceedings. Indeed, Willkie Farr – *not* counsel for Dish or the SLC – appeared for LBAC
9 throughout the adversary proceedings from January 9, 2014 through March 31 2014. *See* Ex. 7.
10 Thus, when the Ad Hoc Secured Group informed Judge Chapman that it would sue LBAC for
11 specific performance of the plan support agreement (the "PSA"), *Willkie Farr* filed a declaratory
12 judgment action requesting a finding that LBAC "could not be compelled to proceed with
13 funding and consummation of the LBAC bid."²¹ Willkie Farr also filed the reply brief in further
14 support of a declaration that LBAC had properly terminated the PSA.²²

15 Moreover, Mr. Ergen's personal lawyers at Willkie Farr – *not* counsel for Dish or the
16 SLC – withdrew LBAC's bid for LightSquared's spectrum assets during the adversary
17 proceedings. On January 7, 2014 LBAC gave notice of termination of the PSA. The notice itself
18 did not terminate LBAC's bid for LightSquared. As Judge Chapman explained on January 22,
19 2014, "all I have is this [notice] that terminates the PSA. I have nothing that is evidence of the
20 withdrawal of the bid by the stalking-horse bidder."²³ In response, Mr. Ergen's personal lawyers
21 at Willkie Farr withdrew LBAC's bid, stating: "***The stalking horse bidder hereby withdraws its***
22 ***bid.***"²⁴ Dish's counsel was present, yet said nothing.²⁵

23
24 ²⁰ Ex. 4 (Dec. 19, 2014 Tr.) at 28:18-22.

25 ²¹ *See* Objection of L-Band Acquisition LLC, dated January 16, 2014 at ¶4, attached to the Appendix of Exhibits to
26 Motion for Entry of Scheduling Order on an Order Shortening Time filed with this Court on January 28, 2014.
27 While Sullivan & Cromwell's firm name also appeared on the papers, they were signed by Willkie Farr's Ms.
28 Strickland and no one other than Willkie Farr presented any argument regarding LBAC's actions.

²² *See* Reply In Further Support of Objection of L-Band Acquisition LLC, dated January 16, 2014, attached to the
Appendix of Exhibits to Motion for Entry of Scheduling Order on an Order Shortening Time filed with this Court on
January 28, 2014.

²³ Ex. 1 (Jan. 22, 2014 Tr.) at 12:13-15.

²⁴ Ex. 1 (Jan. 22, 2014 Tr.) at 14:2-3 (emphasis added).

1 Mr. Ergen claimed that LBAC's bid was withdrawn because of a "technical issue" with
2 the spectrum. The Bankruptcy Court did not believe him, finding that "Mr. Ergen's testimony on
3 this point was not credible."²⁶ Judge Chapman noted, for example, that the purported importance
4 of the technical issue was undermined by Mr. Ergen's own testimony that "there was no
5 meaningful effort made to identify a solution [for the technical issue] that would preserve the
6 billions of dollars in value that DISH would realize by a consummation of the LBAC bid." As
7 Judge Chapman explained, this "defies common sense."²⁷ By contrast, LightSquared's expert,
8 John Rasweiler, "provided credible and compelling testimony that the technical issue is unlikely
9 to exist at all and that even if it did exist today, technology is available today that can eliminate
10 the problem rendering it a nonissue."²⁸

11 **B. The May 8, 2014 Bankruptcy Court Findings**

12 Following extensive briefings and after hearing weeks of live testimony, Judge Chapman
13 read part of the Bankruptcy Court's findings and conclusions into the record on May 8, 2014,
14 making clear that a formal 170-page opinion in the adversary proceeding and a detailed opinion
15 on plan confirmation will follow later this month. The Bankruptcy Court made numerous
16 findings that are highly relevant for this Action.

17 **i. LightSquared's Spectrum is Worth Billions of Dollars to Dish.**

18 Plaintiff's goal in this litigation has been to ensure that Ergen's personal interest did not
19 interfere with or injure Dish's ability to acquire LightSquared's spectrum. As Plaintiff believed
20 (and as Defendants vociferously insisted to this Court), that spectrum has enormous value for
21 Dish. A July 8, 2013 presentation by Mr. Ergen to the Board described the total value of
22 LightSquared's assets to Dish as between \$5.174 billion and \$8.996 billion, with a midpoint of
23 **\$7.085 billion.**²⁹ As Judge Chapman found, "[t]he implied supplemental asset value was Mr.

24 (continued)

25 ²⁵ Plaintiff believes that counsel for the SLC attended the bankruptcy hearings without appearing on the record. No
26 one representing the SLC objected when Mr. Ergen's counsel terminated LBAC's bid in the middle of the adversary
27 proceeding challenging Mr. Ergen's personal debt purchases. Indeed, despite this Court's instructions, the SLC did
28 nothing to reign in the representation of LBAC by Mr. Ergen's personal lawyers.

²⁶ Ex. 3 (May 8, 2014 Tr.) at 109:5-16.

²⁷ Ex. 3 (May 8, 2014 Tr.) at 109:5.

²⁸ Ex. 3 (May 8, 2014 Tr.) at 111:24-112:3.

²⁹ Ex. 3 (May 8, 2014 Tr.) at 36-37.

1 Ergen's estimate of: (a) the increase in value of DISH's existing spectrum that would flow from
2 DISH's acquisition of LightSquared spectrum, which would permit unusable and impaired uplink
3 AWS-4 spectrum to be converted to downlink; and (b) his range of values for 20 megahertz of
4 LightSquared's downlink spectrum."³⁰

5 Indeed, Mr. Ergen estimated that simply acquiring LightSquared's spectrum would
6 increase the value of Dish's *pre-existing* spectrum by \$1.833 billion to \$3.783 billion, with a
7 midpoint of \$2.308 billion. As Judge Chapman observed that the value to Dish's existing
8 spectrum exceeded the LBAC bid amount of 2.2 billion dollars. Moreover, Judge Chapman
9 reported that Mr. Ergen estimated the total aggregate value of the spectrum to DISH at between
10 5.174 and 8.996 billion."³¹ Put differently, "in DISH's hands this was a freebie, that there was so
11 much value here that this was a freebie . . . there was so much value that DISH was not even
12 going to feel that 2.2 billion dollars walk out its door."³²

13 The special transaction committee's financial advisor, Perella Weinberg, also concluded
14 that the LightSquared spectrum is extremely valuable to Dish. Specifically, Perella Weinberg
15 concluded that the value of acquiring LightSquared spectrum to Dish would be between \$4.4
16 billion and \$13.3 billion, with a midpoint of \$8.85 billion. This range included the standalone
17 value of LightSquared's spectrum as well as an estimate of the magnitude of the ways in which
18 LightSquared's spectrum would enhance the value of Dish's existing spectrum.³³ Put simply,
19 Dish's inability to acquire the spectrum because of Mr. Ergen's refusal to allow Dish to
20 restructure the release (as Judge Chapman had suggested), or even to permit Dish's counsel to
21 take action on the issue (as this Court's Order and December 19 warnings mandated) has resulted
22 in massive harm to the corporation and its public shareholders.

23 . . .

24 . . .

25 _____
26 ³⁰ Ex. 3 (May 8, 2014 Tr.) at 36:17-23.

27 ³¹ Ex. 3 (May 8, 2014 Tr.) at 41:11-17.

28 ³² May 6, 2014 Tr. at 177:15-20, *In re LightSquared Inc.*, No. 1:12-bk-12080, ECF No. 1278 (Bankr. S.D.N.Y.).
Excerpts of the May 6, 2014 transcript are attached to the Appendix as **Exhibit 5**. Plaintiff will file the complete
transcript upon request.

³³ Ex. 3 (May 8, 2014 Tr.) at 141:18-25.

1 **ii. Mr. Ergen Used His Control over Dish to Protect his Personal Investment**
2 **in LightSquared Debt.**

3 The Bankruptcy Court made extensive findings detailing Mr. Ergen's control over Dish's
4 bid.³⁴ Moreover, the Bankruptcy Court found that the Dish Board consciously allowed Ergen to
5 maintain this control at all relevant times, noting "the apparent attitude of members of the DISH
6 board and senior management that where Mr. Ergen was concerned, *it was better not to ask a lot*
7 *of questions and to let him conduct his business as he saw fit.*"³⁵

8 Mr. Ergen's unchecked control over Dish and the Board manifested itself in the treatment
9 of the special transaction committee. After reviewing the May 8, 2013 resolutions creating the
10 special committee, including resolutions vesting in the committee the power and authority to
11 review and evaluate any potential conflicts of interest arising out of Mr. Ergen's personal debt
12 purchases, and to negotiate definitive agreements with the parties concerning the terms and
13 conditions of the potential bid, Judge Chapman observed:

14 As it turned out, such *resolutions were not worth the paper they*
15 *were written on.* The evidence reveals that these board resolutions
16 were quickly and flagrantly disregarded. Despite being in
17 existence for three months, the special committee was forced to
18 work under a compressed timetable because of Mr. Ergen's
19 interference with their ability to begin their task. . . .

20 Furthermore, although the role of the special committee included
21 evaluating any potential conflicts of interest, the repeated requests
22 of the committee to Mr. Ergen for information regarding his
23 [LightSquared] trade debts were ignored, and *Mr. Ergen never*
24 *provided the committee with the requested schedule of his trades.*
25 ³⁶

26 The Board supported Mr. Ergen's stonewalling of the special committee and abruptly
27 voted to disband the committee before it obtained information regarding Mr. Ergen's
28 investments in LightSquared debt, "[e]ven though the Dish board resolutions permitted
disbandment of the special committee only upon the special committee's own decision, so long

34 Judge Chapman made these findings in the context of determining whether Mr. Ergen and Dish breached the covenant of good faith and fair dealing implied in LightSquared's credit agreement. The Bankruptcy Court was careful to acknowledge that matters of Dish's corporate governance were not specifically before the court. *See, e.g.,* Ex. 3 (May 8, 2014 Tr.) at 21:12-14.

35 Ex. 3 (May 8, 2014 Tr.) at 21:20-23 (emphasis added).

36 Ex. 3 (May 8, 2014 Tr.) at 32:11-17; 34:19 (emphasis added).

1 as a bid for LightSquared remained viable.”³⁷ As the Bankruptcy Court noted, “*the message is*
2 *loud and clear. No one crosses or even questions the actions of the chairman.* Charles Ergen
3 is, in every sense, the controlling shareholder of DISH and wields that control as he sees fit.”³⁸

4 Based on these findings, Judge Chapman concluded that Mr. Ergen was at all relevant
5 times “the driving force behind each step DISH took on the path towards DISH’s LightSquared
6 bid, including the actions taken in connection with his evolving acquisition strategy in the spring
7 and summer of 2013.”³⁹ As the Bankruptcy Court noted, “[g]iven the control Mr. Ergen
8 exercised over the DISH board, as evidenced, in particular, by his bullying of the special
9 committee, it is clear that Mr. Ergen believed that after making the LBAC bid he could and
10 would get DISH to step in as purchaser.”⁴⁰

11 Mr. Ergen used his control over Dish to protect his investment in LightSquared debt.
12 First, Mr. Ergen made a \$2 billion bid for LightSquared assets to ensure that he would get a
13 return on his investment and potentially make a significant profit.⁴¹ As Judge Chapman found,
14 “Mr. Ergen had . . . staked out the territory with a bid that would ensure that he, as a substantial
15 holder of [LightSquared] debt, would be paid in full, and no one was interested in making him
16 unhappy by altering that.”⁴²

17 Mr. Ergen did not seek approval from the Board or the special committee before making
18 the personal \$2 billion bid for LightSquared. Indeed, the record of the trial before the
19 Bankruptcy Court reveals that, upon learning of the bid, “no member of the boards of directors or
20 management of DISH or EchoStar formally objected to Mr. Ergen’s having made a personal bid
21 for LightSquared’s assets.”⁴³ Then, Mr. Ergen and his lawyers prepared a draft asset purchase
22 agreement for LightSquared assets with a release of all claims against Mr. Ergen, Dish and
23 SPSO. Critically, the special transaction committee was unceremoniously disbanded before it
24

25 ³⁷ Ex. 3 (May 8, 2014 Tr.) at 37:24-38:2.

26 ³⁸ Ex. 3 (May 8, 2014 Tr.) at 52:1-4 (emphasis added).

27 ³⁹ Ex. 3 (May 8, 2014 Tr.) at 39:12-16.

28 ⁴⁰ Ex. 3 (May 8, 2014 Tr.) at 43:12-16.

⁴¹ Ex. 3 (May 8, 2014 Tr.) at 29:17-24; 42:14-43:6.

⁴² Ex. 3 (May 8, 2014 Tr.) at 34:10-13.

⁴³ Ex. 3 (May 8, 2014 Tr.) at 30:24-31:1.

1 could assess this agreement.⁴⁴

2 Given this record, Judge Chapman concluded that “Mr. Ergen and SPSO were acting for
3 DISH in creating a path where DISH, through LBAC, could take over as purchaser *while still*
4 *protecting Mr. Ergen from any downside on his substantial investment.*”⁴⁵ This is exactly what
5 happened. Dish’s later refusal to carve out claims against Mr. Ergen and SPSO from the release
6 when doing so was necessary to acquire critical spectrum assets further demonstrates that Mr.
7 Ergen’s use of Dish to protect his personal interests regardless of the interests of Dish itself was
8 deliberate and by design. Moreover, the complete absence of the Board and the SLC after Judge
9 Chapman implored Dish to carve out LightSquared’s claims against Mr. Ergen from the release
10 so that the sale of LightSquared spectrum assets to Dish could proceed as planned shows their
11 complicity and wilful acquiescence in Mr. Ergen’s disloyal conduct.

12 **iii. Dish could have Purchased LighstSquared Debt through an Affiliate, just**
13 **like Mr. Ergen.**

14 The LightSquared credit agreement barred “natural persons” like Mr. Ergen and certain
15 competitors, like Dish, as well as their subsidiaries from acquiring LightSquared debt. To avoid
16 this limitation, Mr. Ergen purchased almost \$1 billion in LightSquared debt through a wholly-
17 owned entity, SPSO. Mr. Ergen successfully argued in the adversary proceedings that SPSO was
18 an affiliate but not a subsidiary of Dish, and therefore not barred from acquiring LightSquared
19 debt.⁴⁶ However, and in direct conflict with Defendants’ insistence that any assertion that Dish
20 had an expectancy in the opportunity to buy LightSquared’s debt was frivolous, the basis on
21 which Mr. Ergen bought the debt meant that Dish could also have bought the debt.⁴⁷

22 ⁴⁴ Ex. 3 (May 8, 2014 Tr.) at 38:13-17.

23 ⁴⁵ Ex. 3 (May 8, 2014 Tr.) at 38:24-39:3 (emphasis added).

24 ⁴⁶ The Bankruptcy Court has concluded that Mr. Ergen’s claims with respect to his purchases of almost \$1 billion in
25 LightSquared debt will not be disallowed, but subordinated. At this time, it is not clear what profits, if any, Mr.
26 Ergen will reap from his LightSquared debt purchases. As alleged in Plaintiff’s complaint dated September 12,
27 2013, any such profits properly belong to Dish.

28 ⁴⁷ Mr. Ergen implemented his scheme with the assistance of Dish’s treasurer, Jason Kiser. As a senior executive
officer of Dish, Mr. Kiser owed fiduciary duties to Dish and Dish’s shareholders. Yet, Mr. Kiser never informed the
Board that he was assisting Mr. Ergen with purchasing LightSquared debt. Making clear his loyalty to Mr. Ergen
rather than Dish – the employer who pays his salary – Mr. Kiser testified that the LightSquared debt purchases were
“Charlie’s personal business and I wouldn’t comment on that to anyone other than Charlie, not a board member or
anyone else.” January 10, 2014 Transcript at 37:12- 38:9. Excerpts of the January 10, 2014 transcript are attached
to the Appendix as **Exhibit 6**. Plaintiff will file the complete transcript upon request.

1 Judge Chapman noted that “[w]hen asked by the Court if an affiliate of DISH could have
2 purchased [LightSquared] debt without running afoul of the credit agreement, counsel for DISH
3 agreed ‘based on the words of the contract.’”⁴⁸ Dish was represented in this hearing by its
4 outside counsel at Sullivan & Cromwell.

5 The possible acquisition of LightSquared debt was a corporate opportunity for Dish. As
6 the special transaction committee explained when it requested Mr. Ergen’s trades, such
7 information was, among other things, relevant “[t]o assess whether Dish should have been
8 entitled to pursue the corporate opportunity of buying LightSquared debt before permitting Mr.
9 Ergen to do so for his personal account.”⁴⁹

10 Mr. Ergen has asserted in this Court and in the Bankruptcy Court that he asked his long-
11 time friend and Dish treasurer, Jason Kiser, to check with Dish’s counsel at Sullivan & Cromwell
12 whether Dish could buy LightSquared debt. While that legal advice was withheld in this action
13 on the basis of privilege, Plaintiff now knows its substance, given Sullivan & Cromwell’s
14 express representation in the Bankruptcy Court that, “based on the words in the credit
15 agreement,” Dish *could* buy LightSquared debt through an affiliate. This evidently did not stop
16 Mr. Ergen from buying LightSquared debt through an affiliate for his own personal gain.

17 Meanwhile, the bankruptcy record reveals that the Board simply looked the other way
18 while Mr. Ergen was usurping an opportunity that belonged to Dish. As noted, while the Board
19 “had more than an inkling” about Mr. Ergen’s purchases, Judge Chapman concluded that “they
20 did not see fit to double-check the corporate opportunity questions it obviously raised.”⁵⁰
21 Similarly, after Dish’s general counsel informed the entire Board that Mr. Ergen was possibly
22 buying LightSquared debt, there simply is “no evidence that any member of the DISH board
23 followed up in order to receive a clear response to this question, consistent with the fiduciary
24 duties owed by the DISH directors to examine whether the purchases may have been a corporate
25 opportunity.”⁵¹

26
27 ⁴⁸ Ex. 3 (May 8, 2014 Tr.) at 52:11-14.

⁴⁹ Ex. 3 (May 8, 2014 Tr.) at 34:21-35:1.

⁵⁰ Ex. 3 (May 8, 2014 Tr.) at 21:14-19 (emphasis added).

⁵¹ Ex. 3 (May 8, 2014 Tr.) at 21:7-11.

1 **III. THE SCHEDULE GOING FORWARD**

2 Plaintiff intends to file an amended complaint incorporating the developments in the
3 bankruptcy within 20 days after Judge Chapman issues the written opinions that are expected
4 later this month. Plaintiff has proposed that Defendants honor the same briefing schedule that
5 was previously agreed among the parties and approved by the Court. Defendants' motions to
6 dismiss (if any) would be due 28 days after the complaint is served with opposition and reply
7 briefs would be due pursuant to EDCR 2.20((e) and (h).

8 Defendants do not oppose Plaintiff's proposal to file an amended complaint within 20
9 days after the Bankruptcy Court docket Judge Chapman's opinions. However, Defendants
10 refuse to commit to any briefing schedule until they receive the complaint. This is patently
11 unreasonable. Plaintiff respectfully requests that at the June 19, 2014 status conference, the
12 Court set the same briefing schedule as previously agreed among the parties and approved by the
13 Court, or that the Court enter a schedule contemplating a shorter briefing period, so as to let this
14 case proceed promptly.

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IV. CONCLUSION

As discussed above, there have been significant developments in the LightSquared bankruptcy proceedings. Plaintiff intends to incorporate these developments in an amended complaint and seek prompt relief on behalf of Dish and Dish's shareholders.

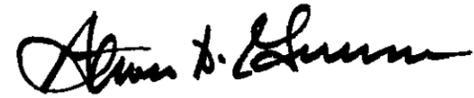
Dated this 6th day of June, 2014.

**COTTON, DRIGGS, WALCH,
HOLLEY, WOLOSON & THOMPSON**

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DISTRICT COURT

CLARK COUNTY, NEVADA

18 **IN RE DISH NETWORK CORPORATION**
19 **DERIVATIVE LITIGATION**

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

APPENDIX OF EXHIBITS TO STATUS REPORT

[Filed concurrently with Plaintiff's Status Report]

TABLE OF CONTENTS

EXHIBIT	DOCUMENT
1	Bankruptcy Hearing Transcript, <i>In re LightSquared Inc., et al.</i> , No. 1:12-bk-12080 dated January 22, 2014 (Pages 1-115)
2	Bankruptcy Hearing Transcript, <i>In re LightSquared Inc., et al.</i> , No. 1:12-bk-12080 dated December 10, 2013 (Pages 116-269)

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3	Bankruptcy Hearing Transcript, <i>In re LightSquared Inc., et al.</i> , No. 1:12-bk-12080, Adv. Proc. No. 13-01390 dated May 8, 2014 (Pages 270-432)
4	Hearing Transcript on the Hearing on Motion for Reconsideration for December 19, 2013 and filed on January 8, 2014 (Pages 433-469)
5	Bankruptcy Hearing Transcript, <i>In re LightSquared Inc., et al.</i> , No. 1:12-bk-12080 dated May 6, 2014 (Pages 470-481)
6	Bankruptcy Hearing Transcript, <i>In re LightSquared Inc., et al.</i> , No. 1:12-bk-12080, Adv. Proc. No. 13-01390 dated January 10, 2014 (Pages 482-497)
7	Court Appearances for LBAC (Pages 498-564)

EXHIBIT 1

EXHIBIT 1

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

January 22, 2014

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 12-12080-scc

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In the Matter of:

LIGHTSQUARED INC., et al.,

Debtors.

- - - - -x

United States Bankruptcy Court
One Bowling Green
New York, New York

January 22, 2014
10:02 AM

B E F O R E:
HON. SHELLEY C. CHAPMAN
U.S. BANKRUPTCY JUDGE

1
2 Doc#120 Statement of the Ad Hoc Secured Group of LightSquared
3 LP Lenders and Notice of Intent to Proceed with Confirmation of
4 the First Amended Joint Chapter 11 Plan for LightSquared LP,
5 ATC Technologies, LLC, LightSquared Corp., LightSquared Inc. of
6 Virginia, LightSquared Subsidiary LLC, LightSquared Finance
7 Co., LightSquared Network LLC, LightSquared Bermuda Ltd.,
8 SkyTerra Holdings (Canada) Inc., and SkyTerra (Canada) Inc.,
9 Proposed by the Ad Hoc Secured Group of LightSquared LP Lenders
10 (related document(s) 917) filed by Glenn M. Kurtz on behalf of
11 Ad Hoc Group of LightSquared LP Lenders.

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ROBERT J. GIUFFRA, ESQ.

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

2 THE COURT: Good morning. Please have a seat.

3 Good morning everyone. I hope everyone stayed safe in
4 the snow.

5 Before we get started on the matter that's before the
6 Court today, we've gotten a number of inquiries/requests/
7 concerns about -- somebody's assistant just arrived looking
8 for -- bearing a folder.

9 UNIDENTIFIED SPEAKER: Thank you.

10 THE COURT: Sure. To talk about scheduling and some
11 other matters. And I'm just wondering what the parties'
12 collective preference is in terms of the order of things that
13 we consider today. I'm indifferent. I have an American
14 College conference call at 1 o'clock. So I'll need to take a
15 break -- I would like you -- everyone to be out of here by 1
16 o'clock, but I'll need to stop at 1 o'clock today, for at least
17 about twenty minutes for that call.

18 So what does everyone want to do?

19 Good morning, Mr. Kurtz.

20 MR. KURTZ: Good morning, Your Honor. Glenn Kurtz of
21 White & Case on behalf of the ad hoc secured group. I think it
22 makes most sense to start with the motion that we originally
23 scheduled, and then move into scheduling --

24 THE COURT: Okay.

25 MR. KURTZ: -- after that.

1 THE COURT: All right. There's no violent objection,
2 so why don't we do that. All right?

3 I have read everything, though I did not print out, or
4 I think, this morning, get the back-up to the filing that was
5 made at 4 o'clock last evening. And that was not your fault.
6 That was just because it was snowing and we were closed. So if
7 you have that, that would be great.

8 MS. STRICKLAND: May I approach?

9 THE COURT: Yes, please. Great, thanks.

10 So what I have is, just so we're clear, the first
11 thing I have was entered at docket 1220, and that was the
12 statement of the ad hoc secured group. That was filed,
13 followed by the objection of L-Band. And I don't have the
14 docket number on that one. That was filed followed by docket
15 1238, which was the ad hoc secured group's further response.
16 And finally, docket 1246, which was the reply in further
17 support of the objection of L-Band Acquisitions.

18 So I've read all of that. And I guess, first, I'll
19 ask you if there's anything you want to tell me in addition to
20 what's been set forth in the papers? Either party? Okay.
21 Good.

22 So let me walk you through, step-by-step, what my
23 thinking is. So the first place that we have to start is with
24 the PSA. That's where you start. And I think the most
25 important -- you're going to have to give me a minute or two

1 while I shuffle to get to the right document.

2 I think that the -- page 9 of the PSA, section 6,
3 which governs termination, is the place that you start. The
4 one piece of paper I can't seem to put my hands on is the
5 letter that was sent on the 7th terminating the PSA. I know it
6 was on Sullivan & Cromwell letterhead, but I just don't have a
7 copy of it. Could -- Mr. Lauria? Thanks.

8 MS. STRICKLAND: It's Exhibit B.

9 THE COURT: I'm sorry, which exhibit?

10 MS. STRICKLAND: It's Exhibit B.

11 THE COURT: B as in boy?

12 MS. STRICKLAND: Yes.

13 THE COURT: To which pleading?

14 MS. STRICKLAND: To docket 1238, which is the
15 statement. Their reply.

16 MR. GIUFFRA: The reply brief, Your Honor.

17 THE COURT: I have it now. So I'm not going to fish
18 for exhibits. Okay.

19 So just give me a moment, sorry.

20 So this notice is sent on behalf of LBAC, and it is
21 terminating pursuant to 6.1(f), on the basis, I believe, that a
22 milestone has not been met. Correct?

23 MS. STRICKLAND: Correct.

24 THE COURT: Okay. Then my question is -- and I think
25 that there is an attempt at an answer to this in the papers,

1 but it's not entirely satisfactory to me -- that termination in
2 and of itself, does not withdraw the LBAC bid. The argument
3 was made that because the agreement terminates and because the
4 way "agreement" is defined in the documents, that this
5 termination, when effective, has the effect of terminating the
6 bid. And on that piece, I'm just not sure I'm there.

7 Rather, I believe that the next place to look is
8 section 1.2 of the PSA, which sets forth the stalking-horse
9 bidder's commitments. And the stalking-horse bidder's
10 commitments include that "so long as this agreement shall not
11 have been terminated, in accordance with section 6 hereof, the
12 stalking-horse bidders agrees," among other things, but in
13 1.2(f), that "it shall not withdraw the offer made pursuant to
14 the stalking-horse agreement."

15 Those are the first two steps. I'm putting aside for
16 the moment the APA in its various versions, and I'm putting
17 aside for the moment, the bid procedures order. I'll get to
18 that. But those are the first two steps.

19 So I've never seen a piece of paper, other than
20 recitations of it in pleadings, that the stalking-horse bid has
21 been terminated. And I want to clarify that, because to me,
22 the way this should have gone, according to the documents, was
23 that one of the parties to the PSA had the right to terminate
24 the bid because the milestone hadn't been met. Step one. That
25 occurred.

1 The next thing that should have happened is that the
2 stalking-horse bidder should then have invoked 1.2(f) and
3 withdrawn its bid. It -- and I'd like confirmation that that
4 is what has occurred. Because I'm not going to -- I don't
5 think it's appropriate for me to be in the position to
6 effectuate or effect the withdrawal or the termination of the
7 bid. That's something that the bidder has to do under the
8 operative agreements. I don't think you're going to disagree
9 with me, right, Ms. Strickland?

10 MS. STRICKLAND: I'm not disagreeing with you.

11 THE COURT: Okay.

12 MS. STRICKLAND: There is -- the operative agreement
13 and the agreement to which LBAC, and for credit support
14 purposes only, DISH, was bound, is the plan support agreement.

15 THE COURT: Okay.

16 MS. STRICKLAND: So at such time as the plan support
17 agreement is formally and properly terminated through the
18 6.1(f), LBAC is free to withdraw its bid at any time.

19 THE COURT: Yes.

20 MS. STRICKLAND: And there's no contractual or other
21 requirement as to how that withdrawal has to take place.

22 THE COURT: Okay.

23 MS. STRICKLAND: Because the only contract is this
24 one.

25 THE COURT: Okay. I'm with you so far.

1 MS. STRICKLAND: So --

2 THE COURT: But tell me -- so --

3 MS. STRICKLAND: So you're right that there isn't a
4 separate letter that says they withdraw the bid, because a
5 separate letter isn't required.

6 THE COURT: Okay.

7 MS. STRICKLAND: We can do that by handing them a
8 Post-it note or --

9 THE COURT: Well, I guess --

10 MS. STRICKLAND: -- et cetera, right now.

11 THE COURT: -- I don't have --

12 MS. STRICKLAND: But there's no --

13 THE COURT: -- I don't have any -- all I have is this
14 that terminates the PSA. I have nothing that is evidence of
15 the withdrawal of the bid by the stalking-horse bidder. If
16 that's what the stalking-horse bidder wishes to do, I need
17 something that indicates that that has occurred. I don't have
18 that, now. That's been my confusion from the very beginning.

19 And I don't want to suggest that there's anything
20 untoward about this, but I'm not going to -- I'm not going to
21 be in the position of directing, finding, ordering, or anything
22 else, that by dint of the termination of the plan support
23 agreement, which just to preview, I'm going to tell you, I
24 believe you had -- was properly effected. The milestones
25 weren't met; you terminated the plan support agreement. I

1 mean, that's the easy one for today.

2 But now, I am -- it's a head scratcher as to why I
3 don't have a clear -- granted, there's nothing here that says
4 you have to file a notice, you have to file a piece of paper,
5 but it says that if it's been terminated, the stalking-horse
6 bidder shall not withdraw its offer.

7 So now it's been terminated. Now we have a situation
8 where the stalking-horse agreement -- the stalking-horse
9 bidder, was free to withdraw its offer.

10 MS. STRICKLAND: And it did, Your Honor. It did so
11 orally on several occasions. It also did so in these
12 pleadings. If a --

13 THE COURT: That's just a little --

14 MS. STRICKLAND: -- T-crossing --

15 THE COURT: -- it's a little odd.

16 MS. STRICKLAND: -- exercise is necessary -- and I
17 don't mean that in a flippant way -- we can send a letter in
18 fourteen minutes.

19 THE COURT: Okay. All I have is that the next thing
20 that happened was that in response to the pleading that was
21 filed by the ad hoc group, was the request by -- was kind of
22 the assumption of the fact that the bid had been withdrawn and
23 the request for the Court to basically bless it. And I just
24 think we missed a step, that I want it to be crystal clear that
25 if that's what the stalking-horse bidder wishes to do, that

1 that stalking-horse bidder has withdrawn its bid.

2 MS. STRICKLAND: The stalking-horse bidder hereby
3 withdraws its bid.

4 THE COURT: All right. Before I --

5 MS. STRICKLAND: Which is an action that has been duly
6 authorized by a public company board of directors.

7 THE COURT: That's fine. I just think that there --
8 that every single I should be dotted and every single T should
9 be crossed.

10 So does anyone want to say anything with respect to
11 that kind of preliminary set of observations?

12 MR. KURTZ: Your Honor, the bulk of my argument goes
13 specifically to issues that -- concerns, including the
14 difference between terminating the PSA --

15 THE COURT: Right.

16 MR. KURTZ: -- which included obligations to the ad
17 hoc secured group, and the reason I think you're not seeing a
18 termination of the bid, is because the bid was made in a bid
19 procedures order, not to the ad hoc group, but instead to the
20 estates.

21 That happened subsequently. That doesn't include
22 termination rights. That doesn't include milestones. That is
23 irrevocable. That's why they're a stalking-horse. And I think
24 if you ask the debtors and the special committee, they'll both
25 confirm that they afforded those stalking-horse protections in

1 September 30, October 1, months after the PSA, specifically to
2 lock in the bid.

3 And so I think we're just -- we're not, today, asking
4 Your Honor to make a ruling with respect to any defense of the
5 termination of the PSA, because we think the termination of the
6 PSA is totally irrelevant. The PSA -- the debtors are a party
7 to the PSA. The PSA is not mentioned in the subsequent bid
8 procedures order. It's not -- the bid procedures order
9 qualifies the APA. The APA didn't include milestones. The APA
10 didn't include a termination right. And that's why they got
11 stalking-horse protections. That's what a stalking-horse
12 bidder is. A stalking-horse bi --

13 THE COURT: Well, a stalking-horse bidder -- and this
14 is where this gets to be very interesting and it kind of raises
15 a lot of questions about the way we all -- you all -- courts
16 get used to proceeding in these stalking-horse situations,
17 because the bid procedures order, the bid, as it was defined in
18 the bid procedures order, refers to the 7/23 draft agreement.

19 MR. KURTZ: Correct.

20 THE COURT: Right?

21 MR. KURTZ: Correct.

22 THE COURT: But the 7/23 draft agreement actually is,
23 at least based on my now rather intense review of the
24 subsequent versions that have come in, is quite different from
25 the version of the APA that was included in the solicitation

1 materials for the ad hoc secured group's plan.

2 MR. KURTZ: That --

3 THE COURT: Right? It is?

4 MR. KURTZ: It's different.

5 THE COURT: It is different. Okay. And, so you're
6 thinking, well, what's wrong with that? Of course it's
7 different, because the parties had an obligation to negotiate
8 in good faith and get to a form of agreement that was
9 acceptable to them that they then wished to present for
10 confirmation and more or less force the estates, through a
11 confirmation order, to engage in and implement. I'm going to
12 come back to the -- what I view as the quite material changes
13 from the 7/23 to the solicitation version.

14 But if you focus on the bid procedures order, what
15 does it mean that that was the LBAC bid? It was a draft
16 agreement? It's not -- hold on.

17 It's not enforceable. It had blanks. It had notes
18 to, come this, we're going to negotiate that. It couldn't have
19 been clearer that it was just basically the barest outlines of
20 a bid. And what was significant about it was it presented the
21 economics. That's whatever -- it presented the economics, and
22 it also presented a lot of the important non-cash components:
23 contracts, assumption of liabilities, et cetera.

24 And at least in my mind, and I think this is the way
25 most courts approach it, that's what you're approving as a

1 stalking-horse bid in a situation where you don't have an APA
2 that's been fully negotiated by the parties to the table. So,
3 therefore, the subsequent insertion into the still draft APA of
4 a termination date -- you folks agree on that, that's very
5 nice -- that's got nothing to do with me.

6 MR. KURTZ: Correct.

7 THE COURT: That's got nothing to do with me. That
8 did not modify the milestones that were in the PSA, because you
9 folks agreed to that separately. And when we got -- missed
10 those milestones and they were extended, we did so with eyes
11 wide open. Okay.

12 So then we get to the bid procedures order. Now,
13 remember, what am I approving? I'm approving a stalking-horse
14 bid. The PSA is already in place. I think it was Mr. Barr, I
15 can't remember, who stood up and was presenting the stalking-
16 horse bid. And it became clear that the stalking-horse bidder
17 had not agreed to hang around if -- after the auction. And
18 that was of concern to me. And I said, in not so many words,
19 wait a minute, you mean if somebody outbids the stalking-horse
20 bidder, and then we pay the stalking-horse bidder the breakup
21 fee, and then the winning bidder doesn't get FCC approval the
22 stalking-horse bidder is not available, is not being held and
23 be available. And I think it was Mr. Barr said they won't
24 agree to that. And I said well, why is that okay. And I
25 think -- and maybe Mr. Sussberg was involved at this point, I'm

1 sorry, I just can't remember. And you came back in and it was
2 placed on the record that, all right, they're going to hang
3 around for sixty days.

4 Now, here comes the really interesting part, because
5 ironically, if I were to enforce the nine words of the proviso
6 it says the bid's irrevocable. Those are what the words say.
7 But now this side of the room is telling me don't just look at
8 the words, look at the context. Because the context is crystal
9 clear that a bunch of tired lawyers wrote down words that
10 didn't precisely reflect what the deal was.

11 MR. KURTZ: I don't think that's right, Your Honor.
12 Let me --

13 THE COURT: Mr. Kurtz, remember, I was actually --

14 MR. KURTZ: I know.

15 THE COURT: -- I was right here.

16 MR. KURTZ: I know you were.

17 THE COURT: So --

18 MR. KURTZ: Can I respond to a few of those points?

19 THE COURT: Sure.

20 MR. KURTZ: Initially, Your Honor, the APA contains
21 all the essential terms. We're talking about --

22 THE COURT: But what --

23 MR. KURTZ: But let --

24 THE COURT: You better be careful, because the APA so
25 dramatically changed --

1 MR. KURTZ: Correct.

2 THE COURT: -- from 7/23 to the time you sent it out
3 for solicitation, that that's going to be a whole other can of
4 worms. But go ahead.

5 MR. KURTZ: But, Your Honor, you qualified the bid
6 under the bid procedures order --

7 THE COURT: Correct.

8 MR. KURTZ: -- out of 7/23. And no one but you and
9 the debtors could have changed that. So we were trying to get
10 an agreement that we would proffer for you or the debtors to
11 accept at confirmation, but had no ability to change the terms
12 that were deemed a qualified stalking-horse bid that the
13 parties relied on in extending very substantial stalking-horse
14 protections. Which, again, I think the debtors and the special
15 committee will confirm. Context, they will confirm in their
16 context, they offered that because they were locking in a
17 floor.

18 THE COURT: Right.

19 MR. KURTZ: I think we all understood we were locking
20 in a floor, we said it. I have a whole bunch of record that I
21 can show you where we talked about --

22 THE COURT: Right.

23 MR. KURTZ: -- locking in the floor. The essential
24 terms of an agreement, as a matter of black letter law, is just
25 that you know what the parties were trying to accomplish, which

1 in this case, is the sale of the spectrum at a particular price
2 without conditionality on FCC approval.

3 THE COURT: Agreed.

4 MR. KURTZ: All done. In fact, we had Mr. Cullen here
5 last week saying it was all substantially agreed to. And we
6 have a lot of other comments about them --

7 THE COURT: Well, don't -- I'm not going to get ahead
8 of myself and --

9 MR. KURTZ: Sure.

10 THE COURT: -- comment on Mr. Cullen's testimony.

11 MR. KURTZ: Okay.

12 THE COURT: But let me just stop you.

13 MR. KURTZ: Sure.

14 THE COURT: Because we then staggered through the
15 fall, and we continued the auction, and we didn't have the
16 auction, and the auction was terminated. The special committee
17 asked for more time. The ad hoc group urged, in the strongest
18 possible terms, don't give them more time, don't give them more
19 time, we have milestone issues. There was never one word to
20 the effect that we don't have to worry about the milestones,
21 the bid's irrevocable until February 14th. Never once was that
22 said. It was at every single turn, I was reminded mostly by
23 Mr. Lauria, that we're in jeopardy; we have run through the
24 milestones. And I heard it, and my view was that from the get-
25 go, I am not a fan to the gun to the head.

1 And interestingly enough, Judge Gross in the Fisker
2 case in Delaware, very recently handed down a decision in which
3 he limited the ability of a creditor to submit a stalking-horse
4 bid and in a footnote in that decision cites what he viewed as
5 the completely false artificial deadline. So that's just an
6 interesting aside.

7 But the point is that I'm with you. I knew that those
8 deadlines were out there. I wasn't going to allow the estate's
9 hand to be forced by the deadlines. But Ms. Strickland made it
10 clear at every turn that we were blowing through the
11 milestones.

12 Now, it gets more complicated and more interesting,
13 because then the specter of we think they're not really bound,
14 that emerged at a certain point. And when that emerged I said
15 well, what do you mean you think you're not really bound. I
16 was reassured that you were really bound.

17 Then there were certain other issues that emerged, as
18 to why and whether LBAC would proceed with the bid. But the
19 one thing that remained clear throughout was on the LBAC side
20 of the room, the statements that we've gone through the
21 milestones, we're continuing to extend, we were basically on a
22 day-to-day basis. And on the ad hoc secured group side of the
23 room was out-loud concern about look, we've gotten through the
24 milestones, but never, ever, a statement you don't have to
25 worry about that, Judge, because the bid's irrevocable until

1 February 15th.

2 So, again, I think the irony in the situation is that
3 if I -- and I agree with you, that the bid procedures order
4 trumps. I mean, that's the reflection of what we agreed to.
5 But -- so if I were to just look at those nine words, without
6 looking at the context, it would be irrevocable, because that's
7 what it says.

8 MR. KURTZ: You --

9 THE COURT: But the context is equally clear.

10 MR. KURTZ: And that --

11 THE COURT: And the lawyers were either too tired to
12 catch it, but it's clear that that phrase, that proviso, was
13 intended to capture the fact that on the record of the hearing,
14 LBAC had agreed to serve as the backup bidder for sixty days.
15 And I recall the exchange that well, there's no outside date,
16 because the confir -- because the sixty days keyed off of the
17 entry of a confirmation order, and it didn't have a hard date.
18 And there was some back-and-forth, and we came up with February
19 of 2014. And that's the way it is.

20 MR. KURTZ: Well, Your Honor, let me offer a few
21 remarks on that, because I think the context was a little
22 different.

23 I think that when we -- we sat with LBAC as a partner.
24 We tried not to stand up and tell them when we disagreed with
25 them. But we were always pretty clear, I think, in our remarks

1 about the termination of the PSA, which was their obligations
2 to us, and which we wanted to keep live.

3 We never spoke about the termination of the bid
4 because that was governed by the bid procedures order, and that
5 was a bid to the estates that was irrevocable. We never talked
6 about -- we talked about the PSA; we never talked about the bid
7 procedures order.

8 THE COURT: But, Mr. Kurtz, I'm sorry to interrupt
9 you, but in the PSA where you set forth the obligations of the
10 stalking-horse bidder, the only thing that it says with respect
11 to irrevocability or withdrawal rights was that they --
12 stalking-horse bidder undertook not to withdraw the bid so long
13 as the PSA was not terminated.

14 MR. KURTZ: Your Honor, could I hand up a few excerpts
15 from the record?

16 THE COURT: Yeah, can you give me one second, because
17 I'm just having a problem with my computer.

18 (Pause)

19 THE COURT: Sorry, we just couldn't -- I couldn't get
20 it to log in.

21 MR. KURTZ: May I approach, Your Honor?

22 THE COURT: Yes. Oh, I didn't realize you had a whole
23 preparation, a whole binder here.

24 MR. KURTZ: Well, I was sort --

25 THE COURT: Sorry.

1 MR. KURTZ: -- of wondering about those -- do you have
2 anything to add, what that was picking up. And -- but let
3 me --

4 THE COURT: But, by the way, I got to tell you,
5 because -- the interesting part of this all to me is that the
6 pleading that was submitted a 4 o'clock yesterday was the first
7 time that this series of breadcrumbs was put out in a paper.
8 But I was already there. But before that pleading, I kept all
9 the other pleadings we're talking about: the APA, and the
10 termination provision. It's not -- that's not -- it's just not
11 relevant. The APA for the purpose of what we're doing today is
12 just not relevant. It's relevant for a different reason, which
13 I'll get to, and I think you'll be equally unhappy with me at
14 that point. But since you went to the trouble of preparing --

15 MR. KURTZ: Yeah. Well, let --

16 THE COURT: -- we can go through it.

17 MR. KURTZ: Let me try, because I have a very
18 different view about what we thought we were doing. And,
19 again, the fundamental issue here is there was an agreement
20 reached on July 23rd, on -- and before with the plan support
21 agreement, APAs and the like. And that was an agreement where
22 there were obligations from LBAC running to us, and nobody
23 else. And we had our own provisions, and they had termination
24 rights.

25 THE COURT: Right.

1 MR. KURTZ: And they were keyed to milestones. That
2 changed, the world changed, when we got the debtors on board.
3 Because at that point in time, we got an order which qualified
4 a bid that wasn't the PSA, it was a July 23rd APA. And I'll go
5 back and talk about the essential terms again.

6 THE COURT: Okay.

7 MR. KURTZ: And that became the new -- or the debtors
8 agreed, and there was dispute. So let me go back to what we
9 were doing at the time. And if could ask you to turn to slide
10 number 3.

11 THE COURT: Sure.

12 MR. KURTZ: We were submitting papers, Your Honor, on
13 behalf -- and in accordance with the PSA, frankly -- on behalf
14 of LBAC to help them get the stalking-horse protections which
15 they needed to get to stay as a party to the PSA. And we were
16 very clear in distinguishing between when they were bound to us
17 and when they became bound to the estate. So we said, because
18 the debtors were opposing us, "It appears the debtors are
19 really trying to keep the stalking-horse protections from the
20 existing stalking horse, LBAC, even though, or more accurately,
21 because LBAC can terminate its bid if it does not receive such
22 protections."

23 THE COURT: Right.

24 MR. KURTZ: Right. If you turn a page, Mr. Zelin
25 spoke to this issue. "I do know that the failure to approve

1 the bid protections" --

2 THE COURT: Right.

3 MR. KURTZ: -- "will provide LBAC an option to
4 terminate."

5 THE COURT: Right.

6 MR. KURTZ: "So without the approval of the bid
7 protection LBAC's willingness to maintain" --

8 THE COURT: Correct.

9 MR. KURTZ: -- "its purchase price at any auction is
10 uncertain." So what we're --

11 THE COURT: Absolutely true.

12 MR. KURTZ: That's pursuant --

13 THE COURT: At that point in time -- at that point in
14 time, everyone was urging -- your group was urging we got to
15 give them the bid protections, because they're not locked it
16 until --

17 MR. KURTZ: That's right. And we were looking to
18 lock them in.

19 THE COURT: Agreed.

20 MR. KURTZ: Right. So if you turn to page 5 you see
21 LBAC's quote in the submission last night where they say, "LBAC
22 can terminate its stalking-horse bid," which is precisely what
23 Harbinger desires, "under the PSA." They argued that that's
24 what we said.

25 But if you look down to what we actually said, and you

1 can see they simply omitted the relevant language, without
2 ellipses or other indication. We said "without the stalking-
3 horse protections, LBAC can terminate."

4 THE COURT: Right. But, again --

5 MR. KURTZ: We all understood --

6 THE COURT: -- the con -- the context there -- that
7 was pre-bid procedures order. And the --

8 MR. KURTZ: Correct. Correct.

9 THE COURT: -- context there was because I -- it was
10 anticipated that I was going to -- in other words if you
11 pretend this is a normal case, right, and one could make the
12 argument that when somebody shows up with 2.2 billion dollars
13 of cash, the classic reason for giving stalking-horse
14 protections doesn't pertain, because they were already at the
15 table, they were volunteers. So the context of these
16 particular quotes is pre-bid procedures they wanted breakup
17 fee, they wanted expense reimbursement, et cetera. And I think
18 the concern was that well, of course, Harbinger's going to
19 oppose this because if I don't approve that gating piece, LBAC
20 was going to walk.

21 MR. KURTZ: Correct.

22 THE COURT: Maybe they wouldn't, but at that point I
23 wasn't willing to blink. And there is something to the fact
24 that when somebody shows up with 2.2 billion in cash you should
25 pay attention.

1 MR. KURTZ: And what we all said, and what we all
2 understood, and I think I just heard you say, Your Honor, is we
3 had to lock them in with bid protections to lock them in,
4 otherwise they could walk.

5 So now we're getting to the subject of how do you lock
6 them in. We were crystal clear you lock them in with bid
7 protections.

8 THE COURT: Um-hum.

9 MR. KURTZ: That results in the bid procedures order
10 the next week, the next day, in fact, after the hearing.

11 The bid procedures order, for context, is totally
12 clear that everything's irrevocable. And the reason you wanted
13 it ir -- the reason you give someone stalking-horse protections
14 is so they set a floor. I've never heard of a stalking horse
15 that could walk away the way LBAC is saying they can do now.
16 In fact, this position I think even speaks to other proceedings
17 with equitable subordination. You made a bid here.

18 THE COURT: Right. They made a bid and the --

19 MR. KURTZ: And here's how the bid procedures work.

20 THE COURT: They made a bid and -- but if you -- if
21 somebody has a draft of the bid procedures order, the draft
22 before the one that I entered --

23 MR. KURTZ: Yeah.

24 THE COURT: -- then I think that that would be
25 interesting to look at, because it doesn't have the proviso,

1 right?

2 MR. KURTZ: Correct. And here's --

3 THE COURT: And it wouldn't have the proviso in it
4 unless I had stuck my nose into it and said what do you mean
5 they're not hanging around af -- for sixty day -- for a period
6 of time after the auction. I'm not going to pay them fifty
7 million dollars and then have the winning bidder not get FCC
8 approval and they've walked off with fifty million dollars.

9 MR. KURTZ: Correct.

10 THE COURT: So your theory breaks down --

11 MR. KURTZ: No, no, Your Honor.

12 THE COURT: No?

13 MR. KURTZ: Let me explain. Let me explain how this
14 works. And I think this is really fairly clear in context.

15 So if you can turn to page 1, this is actually the
16 Section J we're talking about.

17 THE COURT: Page 1 of your book here?

18 MR. KURTZ: Of the slides.

19 THE COURT: Okay.

20 MR. KURTZ: Here's how it works. Scenario number 1 is
21 LBAC is a successful bidder, it's the highest bidder, it is the
22 bidder that is selected under the plan. Under those
23 circumstances, consistent with the way stalking-horse
24 agreements work and bid procedures orders work, it was
25 irrevocable in accordance with the qualified bid, which was the

1 APA that was attached.

2 THE COURT: But see, here's where we get into this
3 interesting moment that has caused me to rethink everything
4 that we do when we're approving bid procedures. Because just
5 focus on that first sentence. "The successful bid shall remain
6 irrevocable in accordance with the terms of the purchase
7 agreement executed by the successful bidder." I don't have a
8 purchase agreement executed by the successful bidder.

9 MR. KURTZ: You have what is deemed a qualified bid,
10 which is a sixty-something page APA which has all the essential
11 terms. And, Your Honor, there's two issues. And I'll put
12 you -- before we go back, I'll just give you some cases so you
13 can see them and know I'm not misstating them.

14 It's black letter law that, one, you only need
15 essential terms. We all probably remember from our genre, the
16 Pennzoil Texaco case, which was a one-page term sheet that was
17 unsigned and the subject of --

18 THE COURT: Okay, so let me agree -- so for the sake
19 of argument --

20 MR. KURTZ: Okay.

21 THE COURT: -- let me agree with you that that's true,
22 that --

23 MR. KURTZ: Okay.

24 THE COURT: -- first -- so the purchase agreement
25 executed by the successful bidder did not speak to -- did not

1 have any terms that spoke to irrevocability, there was a blank
2 for the termination date.

3 MR. KURTZ: Exactly. In other words, it's irrevocable
4 unless you have a termination right, and they had no
5 terminat -- it would be like any -- if I had a contract and it
6 said I will buy spectrum for 2.2 billion dollars, it won't be
7 subject to regulatory approval, and it doesn't have a
8 termination right, then they don't have a termination right
9 they can rely on. This did not import the PSA termination
10 rights. That's not what the debtors would have agreed to, and
11 that's not what the Court agreed to. It's not included.

12 So we have the affirmative provisions on which we seek
13 to -- performance effectively.

14 THE COURT: Well, there's two -- I mean, there's two
15 things. One, it's not clear to me that the defined term
16 "successful bid" includes the LBAC bid, that's number one.

17 MR. KURTZ: That includes, Your Honor, whatever's
18 selected. And we are trying to get Your Honor to select that
19 at the confirmation hearing, so that that is the "successful
20 bid". But that's step one. Step one is who wins.

21 Now it can't be, Your Honor, that if LBAC comes out of
22 an auction, the debtors say you're the successful bidder, we
23 say you're the successful bid, it says it's irrevocable in
24 accordance with the bid pro --

25 THE COURT: Then the language in the -- to the extent

1 that your position is that I should be strictly construing the
2 words in the bid procedures order, then the second phrase in
3 the proviso is completely superfluous because if the LBAC bid
4 is the successful bid, then it's irrevocable.

5 MR. KURTZ: This -- no, it's not, Your Honor. It's
6 steps. So let's -- that's the first step. First step is LBAC
7 wins. LBAC wins, they're covered under the first part of (j),
8 they're the successful bid, it's irrevocable, we're done with
9 our equity. We don't get the backup bid situations. They're
10 not a backup bid, they're a winner.

11 THE COURT: But where does it -- so if they're --
12 assuming that, for the purpose of argument, that they're the
13 successful bid --

14 MR. KURTZ: That's right.

15 THE COURT: -- what are the words "shall remain
16 irrevocable in accordance with the terms of the purchase
17 agreement" mean? What --

18 MR. KURTZ: It --

19 THE COURT: -- what do the term --

20 MR. KURTZ: -- it means that the APA that's attached
21 as the qualified bid is irrevocable in accordance with its
22 terms, and there's no terms that allow a termination because we
23 couldn't agree to those terminations, and they weren't
24 approved. And if we had put something in, somebody might have
25 objected. It -- termination isn't a --

1 THE COURT: Well, what did you think you were doing
2 when you agreed with LBAC to insert the December 11th date in
3 that --

4 MR. KURTZ: We were protecting ourselves. This is
5 another piece of context I want to make sure Your Honor's aware
6 of. This is not a time of the essence. Spectrum is, according
7 to Mr. Ergen, is a great valuable resource that's going up in
8 value. It's going to take two --

9 THE COURT: Beachfront property according to Mr.
10 Falcone.

11 MR. KURTZ: Beachfront property, right?

12 THE COURT: Right.

13 MR. KURTZ: Two to three years to clean it up. DISH
14 needs it to compete with AT&T.

15 THE COURT: Right.

16 MR. KURTZ: This is not a time is of the essence.
17 You're not flipping the switch on December 11, February 15, or
18 any other time. So why was there provisions on milestones?
19 Were they material to DISH? Of course not. They were material
20 to us, Your Honor, because we were waiving our interest, which
21 was thirty million dollars a month to us, and because we wanted
22 to preserve, and we said this to you in court, we wanted to
23 preserve the value at the LP preferred so there was a recovery
24 below us in connection with our plan.

25 So we selected those dates. They didn't care about

1 those dates, and that's why they didn't put it in, because it's
2 not a material term to them. And the reason we find ourselves
3 here today, has nothing to do with the lapse of time has
4 devalued it, it's their effort to get out based on due
5 diligence when they specifically agreed there'd be no due
6 diligence out. They'll agree that's why they're trying to get
7 out.

8 THE COURT: But, Mr. Kurtz, that is -- there's what
9 your argument would be as to what "really is going on" versus
10 what the plan support agreement said. And the plan support
11 agreement has milestones which reflected that the
12 counterparties, SPSO and the stalking-horse bidder, wanted and
13 bargained for rights with respect to timing.

14 MR. KURTZ: And -- but we don't --

15 THE COURT: So --

16 MR. KURTZ: -- seek to enforce the PSA or otherwise
17 rely on it anyway. We are seeking to enforce the later issued
18 court order which includes these provisions as all stalking
19 horses do.

20 So, Your Honor, so the first piece is you win. That's
21 a scenario that you had to deal with in the bid procedures.
22 What happens if they win? It's irrevocable. For them to take
23 the position it's not irrevocable because the APA had blanks --

24 THE COURT: Could we look in the -- could we take a
25 moment and look in the bid procedures order and let's look at

1 the definition of the successful bid?

2 MR. KURTZ: Sure.

3 THE COURT: You also are going to have to address my
4 observation not to -- that I'm trying to pit you against your
5 partner, Mr. Lauria. But the fact remains that --

6 MR. KURTZ: That would not be unusual, Your Honor.

7 THE COURT: The fact remains that at hearing after
8 hearing after hearing no one representing the ad hoc group ever
9 said don't worry about what Ms. Strickland's saying about the
10 milestones because the bid's irrevocable.

11 MR. KURTZ: But, Your Honor --

12 THE COURT: No one ever -- no one ever said that. So
13 that --

14 MR. KURTZ: But I'm pretty sure that Ms. Strickland
15 kept saying the PSA was terminable, which would be right, but
16 did not say the bid was terminable and we did want this to
17 move. We stood here and said Your Honor, I want to make sure
18 there's money for the LP preferreds, and I think you said you
19 mean the very same people who came up and asked for the
20 extension. So we were pretty upfront --

21 THE COURT: Right.

22 MR. KURTZ: -- with why we were trying to maintain the
23 dates and it was to preserve value, Your Honor. But page 14 of
24 the bid procedures order --

25 THE COURT: Page 14? Okay. Let's see.

1 MR. KURTZ: -- is it's in "Acceptance of qualified
2 bids" and that's where you -- the successful bid is defined as
3 what LightSquared picks--

4 THE COURT: Page --

5 MR. KURTZ: -- either itself or because --

6 THE COURT: -- page 14 of the order?

7 MR. KURTZ: Of the order establishing bid procedures.

8 I'm sorry; it's the attachment, Your Honor. Right above --

9 yes.

10 THE COURT: In the bid procedures, not in the order?

11 MR. KURTZ: Correct.

12 THE COURT: Okay. Sorry; give me a minute. Oh,

13 right.

14 (Pause)

15 THE COURT: So is your argument that notwith -- that,
16 in effect, that what the debtor should have done was had an
17 auction -- if the debtor had had an auction and somebody showed
18 up and bid one bit coin and said that's higher and better than
19 the LBAC bid, right --

20 MR. KURTZ: Within the bid protections.

21 THE COURT: -- and the debtor had then said -- the
22 special committee had then said that we reject that offer and
23 we declare LBAC to be the winner of the auction, right, then
24 what you're saying is that then they would then have become the
25 successful bid.

1 MR. KURTZ: They would become the successful bid if
2 they were the highest and best bid period, whether they were
3 the only bidder or the highest bidder. That's the -- that's
4 who gets selected. That comes out -- we go through a procedure
5 that brings in qualified bids and then allows, in the context
6 of an auction, for the debtor to make a selection. And so we
7 had that. People put in whatever bids they could put in and
8 the debtors concluded they didn't have enough to pit each other
9 in a -- in an auction environment. And at that point, they
10 could have selected LBAC as the highest bidder, the successful
11 bidder, and we still get to pursue that by having Your Honor
12 accept that, which is something we've been pretty clear about
13 from the beginning that we think the debtors can select it and
14 own it, or we can have the Court select it for them and compel
15 them to sell their assets pursuant to a plan of reorganization.
16 And that gets you the successful bid. So that's the first
17 scenario. There's a winner.

18 The second scenario that's picked up --

19 THE COURT: Can you give me just one moment --

20 MR. KURTZ: Sure. Sure, Your Honor.

21 THE COURT: -- to just look at this language again?

22 MR. KURTZ: Sure.

23 (Pause)

24 THE COURT: Can you just walk me through the way
25 paragraph (j), in your mind, works?

1 MR. KURTZ: Yes. So the first part of (j) addresses
2 what happens when you choose a successful bidder, either the
3 debtor chooses it or the Court chooses it. And in that case,
4 it's irrevocable unless you have a term that allows you to
5 terminate which doesn't apply here. And that's what we're
6 pursuing. So we don't actually need to get to the next
7 sections. In our view, it's a successful bid, and we're going
8 to pursue that at plan confirmation.

9 THE COURT: But -- all right. But then you got to go
10 into -- there's a first provi --

11 MR. KURTZ: Then --

12 THE COURT: -- there's a bunch of provisos.

13 MR. KURTZ: -- then I'm going to walk you through all
14 the provisos.

15 THE COURT: I'm sorry?

16 MR. KURTZ: I'll walk you now through all the
17 provisos.

18 THE COURT: Okay. Go ahead.

19 MR. KURTZ: So that's the first part. Now, you got a
20 proviso.

21 The first proviso, subsection (1)(i) addresses what
22 happens to the other bidders? Well, this one addresses what
23 happens to the second highest bidder. The second highest
24 bidder, which for the avoidance of a doubt, includes LBAC, then
25 is irrevocable until the earlier of sixty days after entry of

1 the confirmation order, or some other -- or whatever they put
2 in their agreement, or the date where they receive the purchase
3 price. So what's that accomplishing?

4 In context, Your Honor, that's ensuring that if the
5 first successful bidder goes away, doesn't get FCC approval or
6 otherwise, that we're not left starting over, we have a bid.

7 THE COURT: Um-hum.

8 MR. KURTZ: So this is another way -- so this one's
9 irrevocable.

10 The second proviso, (2)(i) then confirms that LBAC may
11 have a walk at an earlier right, at an earlier time but it has
12 to remain open until February 15th. So LBAC is still there in
13 case we need LBAC to get a -- to get a deal closed if they
14 weren't the successful bidder.

15 And then if you go to the earlier section, (e)(x),
16 this deals with -- which is page 11 of the procedures -- this
17 deals with everyone else in the world. The people that weren't
18 successful and the people who weren't the second highest bids.
19 And those people have to remain irrevocable --

20 THE COURT: Where are you now, Mr. Kurtz?

21 MR. KURTZ: Page 11.

22 THE COURT: Right.

23 MR. KURTZ: Section (x), subsection (x), (e)(x).

24 THE COURT: Okay.

25 MR. KURTZ: "Qualified bids must be irrevocable until

1 entry of the bankruptcy court of the confirmation orders and
2 recognition by the Canadian court, as defined below, of the
3 confirmation order unless they're either successful or the
4 second highest."

5 So altogether, like most of these procedures orders,
6 it ensures everyone's around. The successful one's around
7 until confirmation. The second one's around so we can get them
8 back in if we need them and everyone else is around for the
9 same reasons. Because why wouldn't they be able to go home?
10 They're not going home because we may need them and they'll be
11 declared successful or second highest.

12 So what was clear is that everybody was bound. Now,
13 why were people talking about backup bids? Because there was
14 never a question that LBAC was going to stand as a successful
15 bidder for us or for the debtor. The question was if someone
16 outbids him, is he going to sit around in the proceedings
17 anymore? And he wanted to leave, and that's what the other bid
18 procedures order showed, that he didn't have that extra
19 proviso. And nobody would agree.

20 THE COURT: But if everything that you've said is
21 true --

22 MR. KURTZ: Yes.

23 THE COURT: -- then the answer to my concern would
24 have been you don't need that because it's irrevocable. It's
25 the rest of this lan --

1 MR. KURTZ: But the PSA --

2 THE COURT: -- or the --

3 MR. KURTZ: -- has its own obligations --

4 THE COURT: No, no, no. Not the PSA. If -- when I
5 made the inquiry, again, you have the benefit of --

6 MR. KURTZ: Sure.

7 THE COURT: -- crafting these documents and studying
8 them -- when I made the inquiry as to whether or not LBAC was
9 committing to hang around, I was told no. And that --

10 MR. KURTZ: At what point --

11 THE COURT: -- that's just completely at odds with
12 what you're saying the rest of this whole thing, how it worked.

13 MR. KURTZ: At what point are you referring to, Your
14 Honor?

15 THE COURT: When we were --

16 MR. KURTZ: Which inquiry?

17 THE COURT: -- when we were right at the point of
18 okay, I'm going to grant bid protections --

19 MR. KURTZ: Correct.

20 THE COURT: -- breakup fee, et cetera.

21 MR. KURTZ: Exactly. Okay.

22 THE COURT: And then at that moment, when it appeared
23 to me that we would be in the position of having the high class
24 problem of LBAC being topped, right, with more cash or
25 consideration, and then we pay LBAC the breakup fee, and then

1 the winning bidder doesn't get FCC approval or just doesn't
2 succeed. And then it was clarified to me, well, don't worry
3 because they're not going to get paid the breakup fee unless
4 the -- the outbidding party actually closes. That was number
5 one.

6 And number two, I said well, what do you mean? They
7 have to hang around. And then it was agreed that they would
8 hang around for sixty days --

9 MR. KURTZ: Correct.

10 THE COURT: -- after the confirmation order with
11 respect to the winning bid.

12 MR. KURTZ: That's right.

13 THE COURT: With an outside date of February 15th.

14 MR. KURTZ: That's right.

15 THE COURT: But now, we have no other winning bid.

16 MR. KURTZ: Well, they are, in our minds, the
17 successful bidder, and that's how we're proceeding. They were
18 also required to stay around.

19 Now, if we didn't have proviso three, Your Honor, they
20 would be stuck until sixty days after entry of a confirmation
21 order. That's where they would be, because they would be -- as
22 a second highest bidder which says, "For the avoidance of
23 doubt, the stalking-horse bidders," it includes the stalking-
24 horse bidders, that's where they would have been. But they
25 negotiated a second proviso which allowed them an early out.

1 So they're only around until February 15th unless there's --
2 unless they prevent us from consummating by then and there's
3 some basis for stopping them or enjoining it. But that's what
4 they negotiated for.

5 Everyone else, Your Honor, is around for sixty days
6 post-confirmation which is going to be well past February 15.
7 They got a little more. But one, they're the successful bidder
8 so there should be no question they have to go forward on that
9 basis. And two --

10 THE COURT: Well, can I --

11 MR. KURTZ: -- they have to sit here anyway.

12 THE COURT: -- can I -- so now, this is now turning on
13 the definition of the successful bid.

14 MR. KURTZ: There are two sections. It involves that
15 section as well as the proviso.

16 THE COURT: Right. But you still aren't providing me
17 with an explanation of the conduct that occurred time and time
18 again which was never once before LBAC terminated, never once
19 did anyone say don't worry about those milestones. They're --
20 the bid's irrevocable.

21 MR. KURTZ: But I think --

22 THE COURT: No one ever said that.

23 MR. KURTZ: -- but I think, Your Honor, what we did
24 say was that we were specific the milestones were to the PSA
25 and they would terminate the PSA which had a lot of value to

1 us. They have to support our plan -- they're obviously not
2 doing that now -- and they have to vote in favor of the plan.
3 There's a lot of things they have to do under the PSA that they
4 don't have to do now as evidenced by the fact that we're
5 arguing about whether they even have to sit as the stalking
6 horse. It meant a lot to us to keep them locked into the PSA,
7 and we lost that subject to any defenses we have to the
8 termination.

9 It also meant a lot to us, and we said it at the time,
10 Your Honor, because every month that went by, we were losing
11 thirty million dollars in interest, and that only went through
12 year end. It only went through the -- so that meant all the
13 dollars that were burning in this estate were coming out --

14 THE COURT: All right. But that's why you care --

15 MR. KURTZ: -- of the LP preferred recoveries.

16 THE COURT: -- that's why, as you told me before,
17 that's why you cared about that timing.

18 MR. KURTZ: That's why we -- that's why we imposed it.
19 That's why we cared.

20 THE COURT: Okay.

21 MR. KURTZ: Now, the only other point I think I
22 want --

23 THE COURT: Go ahead --

24 MR. KURTZ: -- there's actually two points, Your
25 Honor, I want to make. One is, and I would just sort of direct

1 you to a couple of the cases that I have reproduced in part on
2 the slides at page 13 and 14. But even if they were missing
3 essential terms, and they weren't, and I'll go back and just
4 note that the Texaco Pennzoil case, which must have been late
5 '80's, I -- was -- I mean it was multibillion dollar verdict
6 which at the time would be about a multitrillion dollar
7 verdict. It was sort of unheard of. It was a one-page term
8 sheet subject to board approval unsigned and it was
9 enforceable. And this is a seventy-page which is already
10 qualified by the Court, so it's absolutely enforceable.

11 But in any case, if you have to fill in the terms,
12 it's pretty easy. Most of them are schedules and
13 informational. You don't need them. But it's black letter
14 law, and there're cases that we've cited here that where the
15 parties failed to state --

16 THE COURT: But when you -- again, when you -- the
17 termination provision was blank.

18 MR. KURTZ: Correct.

19 THE COURT: It was blank.

20 MR. KURTZ: Correct.

21 THE COURT: And I think that --

22 MR. KURTZ: They had no termination right. It's as if
23 it didn't exist.

24 THE COURT: Right.

25 MR. KURTZ: There's nothing for them to -- we don't

1 need a termination right. We need a dollar, a time to fund and
2 the assets and liabilities that are being assumed. That's what
3 we need. If they want to terminate, they have to have a
4 termination right. Contracts don't need termination rights.
5 Most contracts don't have termination rights. Those that do
6 have to be clear about them. We don't rely on the termination
7 rights. They can't impose one now.

8 What they're effectively trying to do is say let me
9 take milestones and termination rights in the PSA and impose
10 them over the bid procedures order in the APA. They're not in
11 there.

12 THE COURT: The APA for this -- purpose of this
13 discussion in my mind is completely irrelevant. It's just
14 irrelevant. It's the PSA and how it relates to the bid
15 procedures order.

16 MR. KURTZ: I think you're right except to the extent,
17 Your Honor, the APA is the qualified bid.

18 THE COURT: Agreed.

19 MR. KURTZ: That is irrevocable.

20 THE COURT: That's --

21 MR. KURTZ: So it's the irrevocable bid. That's all.

22 THE COURT: Well, but you say that, but that's the big
23 leap. Because the APA itself has a blank termination date.

24 The APA --

25 MR. KURTZ: Meaning they don't have it.

1 THE COURT: Well, they say the exact opposite, though.
2 I mean they --

3 MR. KURTZ: But the document doesn't have it. It's a
4 blank. How could Your Honor enforce that? You'd have to make
5 an agreement, right. You can't enforce a blank. It can be
6 terminable on blank. Right? The parties can't ask the --

7 THE COURT: Are you saying that I cannot -- that a
8 Court could not approve a stalking-horse bidder who has the
9 right to withdraw its bid?

10 MR. KURTZ: Oh, of course, you could but you'd have to
11 be presented with a term, everybody would have to agree to it
12 and then it would have to be attached. You can't -- you can't
13 get an agreement, an attachment to a court order that has no
14 termination right and then later say yeah, but I'm going to
15 fill it in in a way that helps me. The debtors haven't agreed
16 to a termination.

17 THE COURT: But that's the way the events unfolded
18 with respect to the last proviso in the bid procedures order,
19 because it appeared at the time that that was actually true,
20 that LBAC was free to withdraw its bid, and that we had to take
21 the affirmative step of saying you're going to hang around if
22 you want these bid protections. If you want these bid
23 protections, this fifty million dollars in expense
24 reimbursement, you need to hang around after the auction to be
25 the backup bidder. We had no auction. We had no successful

1 bid. We blew through the milestones. No one ever, two months
2 ago, said no worries. Sure, they can terminate the PSA, that
3 would be bad, but we're good because the bid's irrevocable.
4 See the order. That --

5 MR. KURTZ: But that's addressing, Your Honor, where
6 they're outbid. And everybody wanted to be clear that when
7 they were outbid, they still had to stick around. There was
8 never a question that they had to stick around if they were the
9 highest bid. This would have been an exercise in futility if
10 they could walk away without closing.

11 We made it very clear we were locking them in.
12 Everyone understood they were being locked in. To accept that
13 position would mean --

14 THE COURT: I think it's too strong a statement to say
15 everybody understood that they --

16 MR. KURTZ: Well, I think the debtors and the special
17 committee and the ad hocs would all confirm that.

18 THE COURT: Well, let me hear -- I know Ms. Strickland
19 is dying to speak. So why don't I give you that opportunity
20 and then I would like to hear from the debtors.

21 MR. KURTZ: Thank you, Your Honor.

22 THE COURT: Okay. Thank you, Mr. Kurtz. This was
23 very helpful.

24 MR. KURTZ: Thank you.

25 MS. STRICKLAND: I have too much paper to move, if

1 that's all right.

2 THE COURT: That's fine. You can stay there; just
3 you've got to pull the microphone closer.

4 MS. STRICKLAND: Certainly. I'm not going to go
5 through everything that I had intended to discuss because I
6 think that --

7 THE COURT: You absolutely can.

8 MS. STRICKLAND: No, I think most of it Your Honor
9 already covered. The --

10 THE COURT: You can say whatever you want, but could
11 you zero in on the -- I think the key point that Mr. Kurtz is
12 trying to make which is the keying this off of the definition
13 of successful bid.

14 MS. STRICKLAND: Sure. So let me just -- I will
15 answer that but I just want to put a little bit of context
16 around it --

17 THE COURT: Go ahead.

18 MS. STRICKLAND: -- and explain what the PSA did and
19 what it didn't do. So one of the provisions of the plan
20 support agreement, which I wanted to point out, is the
21 provision in 3(g) of the plan support agreement.

22 THE COURT: Okay.

23 MS. STRICKLAND: What that says is --

24 THE COURT: Give me a minute to get there, if you
25 would.

1 MS. STRICKLAND: Sure.

2 THE COURT: 3(g)?

3 MS. STRICKLAND: Um-hum.

4 THE COURT: The reps and warranties?

5 MS. STRICKLAND: 3(g) -- LBAC has no claim against
6 LightSquared; neither does DISH. So the reason why those two
7 entities are a party to the plan support agreement is to lock
8 them into the bid. There would be no other reason to have a
9 plan support agreement with a party that has no claim to vote.
10 So all of the things that Mr. Kurtz said about the reason why
11 the PSA was important to them, the limited purpose because they
12 needed the parties to the PSA to support the plan and vote for
13 the plan and do all those things, those don't apply to LBAC or
14 to DISH.

15 THE COURT: No, they don't. They apply -- but they
16 apply to SPSO.

17 MS. STRICKLAND: Right.

18 THE COURT: Right?

19 MS. STRICKLAND: But what he's talking about is the
20 importance of the PSA. He's talking about how -- why the PSA
21 was important. The PSA is the only executed contract that
22 binds LBAC and DISH to the bid. They have no other reason.

23 There is also plan support milestones that go beyond
24 the bid procedures. So if the bid procedures was the end of
25 the chapter and there was nothing after that, there would be no

1 reason to have subsequent bid procedures. There would also be
2 no reason for Mr. Lauria, at the conclusion of the bid
3 procedures hearing, on into October, into November, into
4 December, into January to be talking about the plan milestones,
5 which he does at every turn. And I do refer to not just the
6 plan milestones but also that we are likely to exit the
7 opportunity. I'm talking about the bid in that excerpt which
8 was in our brief.

9 The thing that Mr. Kurtz is explaining, in terms of
10 the way that it would work, if the plan support agreement
11 wasn't terminated, they were going to propose a plan. They
12 were entitled to do so after the termination of exclusivity.
13 They were going to say our plan is confirmable. This is the
14 contract that we would like to put forward. We solicited. We
15 got votes. Please confirm it.

16 THE COURT: Right.

17 MS. STRICKLAND: That was a separate process which the
18 plan support agreement, had it not been terminated, would have
19 enabled them to do because all of the relevant parties would
20 have remained locked in.

21 THE COURT: Right.

22 MS. STRICKLAND: They would have been able to come to
23 Your Honor and ask you that question in connection with
24 confirmation of their plan. But what the bid procedures talks
25 about, and it's very clear throughout all of the defined terms

1 that you were discussing with Mr. Kurtz, it wasn't about, oh,
2 well, forget the words on this paper, words like auction and
3 LightSquared, in LightSquared's discretion and words like
4 second highest bidder. This is what's happening in the
5 auction, the rules of the action.

6 THE COURT: Right.

7 MS. STRICKLAND: So the auction never occurred. So
8 when you look at the defined term "successful bid", it says,
9 "The successful bid shall be the bids made in accord" -- I'm
10 sorry, I need to start earlier -- "Subject to the terms of the
11 approval order, at the conclusion of the auction" --

12 THE COURT: Right.

13 MS. STRICKLAND: -- "the successful bidder shall be
14 the bids made in accordance with the order of the Court that
15 represent, in LightSquared's discretion, after consultation
16 with the stakeholder parties, the highest and otherwise best
17 offer for the applicable assets."

18 You don't get to this definition without auction and
19 LightSquared's discretion. You also, if you go into (j), all
20 of that lead-in also talks about -- there are words like
21 "executed by the successful bidder" , referring to their
22 purchase agreement, the last bid at the auction. And then it
23 also talks about LightSquared's discretion.

24 So, you know, throughout this whole auction bid
25 process, it contemplates an auction. It contemplates bidding.

1 So I just don't think that these defined terms work the way
2 that Mr. Kurtz thinks that they work. It's a separate process
3 from what, if we were all still linked arm and arm, marching
4 with the plan support agreement not terminated, he may have
5 asked you in connection with a confirmation hearing, but that's
6 not what these defined terms and it's not what these procedures
7 are about. These procedures, as every lead-in suggests,
8 relates to an auction occurring, bids being submitted, the
9 debtor picking winners and second winners, because those --
10 that LightSquared discretion is not just in the successful bid
11 but also in the second highest bid.

12 These defined terms just don't mean what he says, and
13 there's a lot of context in here and you know, people cannot
14 possibly say that this was a hidden issue. I think I --

15 THE COURT: Well, I think that that -- I mean, you
16 have to understand that kind of the irony of talking about
17 words in context is pretty acute here, but context -- the
18 context is very significant. It speaks to what everybody, in
19 this common endeavor we thought we were doing, and not until
20 there was the termination of the APA, pursuant to the January
21 7th letter, did anything like this come up. And I think it's
22 very clever and I think that if you didn't have the context,
23 you maybe would get there. I think the most that can be said
24 is that despite teams of very talented people's best efforts,
25 you can always find an argument over the words in an order.

1 But I think that the bid procedures, the whole point
2 of them was that the ad hoc secured group wanted to proceed
3 with the LBAC bid; no doubt about it. It was a cash bid. It
4 had other aspects of it. That's what they wanted to do. And
5 when the special committee came into being and we established
6 this other process, the bid procedures order was designed, in
7 my mind, to accomplish two things; was to enable us to have a
8 "real auction" to see if somebody else was willing to outbid
9 Mr. Ergen and LBAC, and at the same time, to keep LBAC as --
10 Mr. Kurtz, you're absolutely right; we wanted them to be a
11 floor. We absolutely wanted them to be a floor. They said
12 fine, we'll be the floor; we want breakup fees and we want
13 expense reimbursement. And then there was the concern that
14 they get outbid by a dollar and they take the breakup fee and
15 walk away, or after the successful bid, then they walk away.
16 And that was not part of the bundle of things that was
17 appropriate to -- it wasn't appropriate to give them those bid
18 protections without having the estate be assured that if we're
19 going to pay them out that money, they need to -- I think Ms.
20 Strickland's words were hang around the hoop. But we were only
21 going to get them to hang around the hoop if they were going to
22 serve as a backup bidder. Backup bidder implies that they're
23 backing up another bid.

24 I don't think Mr. Kurtz -- I hear you, your argument
25 is forget about backup bidder; just look at successful bid.

1 But successful bid implies that there was an auction in which
2 the debtor picked someone. And now Mr. Lauria is shaking his
3 head.

4 MS. STRICKLAND: Just two other points, and I'm going
5 to --

6 THE COURT: And -- --there's the context that no one
7 ever stood up and said don't worry about everything that they
8 keep saying about milestones because it doesn't matter; we're
9 good. The bid is irrevocable. No one ever said that. And I
10 think that's probative of what everybody thought what was going
11 on until the unthinkable happened, which was that despite the
12 day-to-day extension of the milestones, LBAC pulled the bid,
13 which I think because of certain of the embedded economics and
14 the relationship between the -- Mr. Ergen's interests, both in
15 LBAC and in SPSO, I think that that was a surprise and I think
16 that's just the way it is.

17 Can I hear from --

18 MS. STRICKLAND: The only other thing I was going to
19 say --

20 THE COURT: -- I'd love to hear from Mr. Basta.

21 MS. STRICKLAND: Okay.

22 THE COURT: Ms. Strickland, if you have more you
23 wanted to say, we'll go back to you.

24 MR. BASTA: Mr. Barr is going to follow up on a couple
25 of points. Your Honor, I think that when you asked the

1 question as what were people thinking, you have to look at it
2 from the perspective of when --

3 THE COURT: Absolutely.

4 MR. BASTA: -- when, because you're looking at a
5 several month period of time --

6 THE COURT: Right.

7 MR. BASTA: So you know, the special committee gets
8 appointed in September --

9 THE COURT: Um-hum.

10 MR. BASTA: -- and quickly finds itself in the bidding
11 procedures.

12 THE COURT: Right.

13 MR. BASTA: And the first time I sat up here and I
14 looked at the Court and I looked at Your Honor and Your Honor
15 said, it basically was, we're locking in LBAC. We were looking
16 to try to get more time, more time on the bidding procedures.

17 THE COURT: Right.

18 MR. BASTA: We wanted to figure out the situation, and
19 Your Honor said, we're locking in LBAC. And Mr. Lauria said,
20 we've negotiated this recovery for ourselves.

21 And so at the bidding procedures hearing, at September
22 30th --

23 THE COURT: Right.

24 MR. BASTA: -- if Your Honor asked us what we thought
25 we were doing, we thought the deal that we cut was to give the

1 breakup fee and the stalking-horse protections to lock in LBAC.
2 Okay?

3 The bidding procedure language that people are relying
4 on and the proviso is the embodiment of that discussion. The
5 language in the order is -- perhaps -- makes LBAC less able to
6 get out of the bid than maybe what the discussion was when Your
7 Honor said, wow, I want to make sure that they're a backup
8 bidder if they're getting breakup protection. But the order is
9 broader than that context.

10 Now what happens? Now we're starting the marketing
11 process.

12 THE COURT: So wait. So drill down farther.

13 MR. BASTA: Yes.

14 THE COURT: So when we entered the bid procedures
15 order --

16 MR. BASTA: Right.

17 THE COURT: -- how irrevocable is the bid, in your
18 mind?

19 MR. BASTA: At that point, Your Honor, we had not
20 dived into the detailed and language between the LBAC
21 arrangement with the LP lenders. We got in. We knew they had
22 a deal.

23 THE COURT: Right.

24 MR. BASTA: And it was our job to see whether to
25 recommend to the Court to do that deal or to recommend to the

1 Court something else. So then what happened?

2 THE COURT: Right. I mean, they were going to be paid
3 in full in full --

4 MR. BASTA: And that --

5 THE COURT: -- as I always said.

6 MR. BASTA: -- and we knew that was --

7 THE COURT: And they were happy campers, right?

8 MR. BASTA: And we knew it was --

9 THE COURT: And your task was to find more money
10 because there were others in the capital structure who were not
11 getting paid in full.

12 MR. BASTA: But not jeopardize --

13 THE COURT: Correct.

14 MR. BASTA: -- them, if possible.

15 THE COURT: Exactly.

16 MR. BASTA: Okay. That was the job. Now what
17 happened? While the marketing is happening, Your Honor hears
18 Harbinger's complaint on SPSO. And the company, I think, had
19 joined one count of it, and Your Honor --

20 THE COURT: This is the motions to dismiss.

21 MR. BASTA: Motion to dismiss.

22 THE COURT: Right?

23 MR. BASTA: And Your Honor looks at it and says, you
24 know, I don't know why this is a --

25 THE COURT: If you're going to turn this into this all

1 my fault, I'm not going to be happy.

2 MR. BASTA: No, it's all my fault. Okay. Okay. I'll
3 take responsibility, Your Honor. So if you're --

4 THE COURT: Okay. So we're in the --

5 MR. BASTA: -- so you go to the motion --

6 THE COURT: -- we're on the motions to dismiss.

7 MR. BASTA: -- to dismiss, and at the motion to
8 dismiss Your Honor basically says, I don't think the right
9 plaintiff is here. This isn't Harbinger. This is like
10 LightSquared.

11 THE COURT: Right.

12 MR. BASTA: And I think it's something that the
13 special committee should look at.

14 THE COURT: Right.

15 MR. BASTA: And so the special committee looks at it
16 and they were given access to some -- it had been represented
17 that SPSO was completely separately from DISH. And in that
18 time period, e-mails came out and documents came out that
19 showed maybe that wasn't exactly the case.

20 And we, after looking at it, the special committee
21 spent a lot of time with the company, and after a lot of
22 consideration, authorized the company to commence the SPSO
23 litigation. And we did it knowing that it wasn't an easy
24 decision because --

25 THE COURT: Because you're going to start taking

1 target practice at the --

2 MR. BASTA: At, potentially, the bid.

3 THE COURT: -- at the bidder; right.

4 MR. BASTA: At the bid. But at the same time, we're,
5 like, we can't turn our heads from something that could be
6 significant. So we authorized the commencement of the lawsuit,
7 and it's more like the more you keep digging on that, the more
8 it doesn't look so good.

9 THE COURT: Okay. Well, we can't --

10 MR. BASTA: So let me --

11 THE COURT: At that point, let's --

12 MR. BASTA: So then --

13 THE COURT: -- stay away from the --

14 MR. BASTA: -- we get --

15 THE COURT: But let's stay away from the record of the
16 trial.

17 MR. BASTA: No, but it gets to the auction.

18 THE COURT: Okay.

19 MR. BASTA: Because now you're going into the auction
20 and it's up to the special committee to decide whether to
21 conduct the auction and to designate the winning bidder at the
22 auction, a bid that releases the conduct that is the topic of
23 the complaint that the special committee has authorized.

24 So the special committee felt that what it needed to
25 do is to say we got to get to the bottom of the conduct and we

1 have to develop alternatives for this company, because if there
2 are no alternatives for this company, and this transaction
3 doesn't go forward, there has to be an alternative for the
4 company that maximizes value.

5 And so there was a statement filed by the special
6 committee in November, when it authorized the commencement of
7 the lawsuit, and there's a footnote in that statement that says
8 that we're not so sure that LBAC is bound to the LP lenders.

9 Until we had filed that statement, when we were
10 considering, at that point in time, whether to commence the
11 lawsuit, and we were in consultation with all of the other
12 parties, parties were, like, you know, they may not be totally
13 bound; if you file the lawsuit, they --

14 THE COURT: What was the intent of your -- so that's
15 when the anxiety first surfaced.

16 MR. BASTA: That's the anxiety in which we said --

17 THE COURT: And --

18 MR. BASTA: -- it's not a free option in the sense
19 that if we go -- even though SPSO is separate from LBAC,
20 according to the statement, the more we pick at this thing, the
21 more it could be that we run the risk of them terminating it.

22 THE COURT: Is that what the statement meant, that
23 they weren't really bound? What was behind the initial anxiety
24 over --

25 MR. BASTA: Yeah, the way it was described is that

1 there were, like, a couple of -- the way that I understood
2 it -- and Mr. Barr and Mr. Sussberg should jump up if they
3 don't -- is that there were, like, a couple of little open
4 things on the contract that needed to be squared away. That
5 was our understanding, but --

6 THE COURT: But there's a difference -- but this goes
7 back to what I was saying to you, kind of philosophically,
8 about an hour ago, which was that what does it mean to
9 designate something as a stalking-horse bid pursuant to a draft
10 APA, right, as opposed to a fully executed APA that's subject
11 only to the Court's approval, right? That APA was really a
12 draft, and if you had any doubts about that, all you have to do
13 is look at the subsequent version of the APA to see how much
14 farther it got developed before it was sent out for
15 solicitation. So I don't know what it means to say, well, they
16 were still talking. Of course they were still talking --

17 MR. BASTA: Right.

18 THE COURT: -- because it was a draft APA that was
19 presented to the Court as the basis of the stalking-horse bid.
20 So the mere fact that they were continuing to negotiate terms,
21 that --

22 MR. BASTA: It --

23 THE COURT: -- in and of itself, wouldn't give a
24 suggestion or a concern of uh-oh, they're not really bound.

25 MR. BASTA: Right. And the footnote didn't say

1 they're not really bound. The footnote said we're not sure
2 that they're bound. Okay? And even in the latest statement by
3 us, by the special committee it said, "It isn't clear to us
4 that LBAC is bound," and when Your Honor started the next
5 hearing you said was --

6 THE COURT: I said, what does that mean?

7 MR. BASTA: -- something --

8 THE COURT: Right.

9 MR. BASTA: -- you said, what does that mean? And you
10 asked the parties as to whether they'd been bound.

11 But why it's relevant to us -- I don't know how to try
12 to articulate this. It was as if there was intentionally a
13 foot kept behind the line, and you went to the special
14 committee and said you've got to turn your back on the topic of
15 the lawsuit. You have to turn your back on what your concerns
16 are with this bid or we have the right to pull.

17 In other words, you don't have the option of keeping
18 the bid and digging on the litigation. And if you asked the
19 special committee at the time it faced the decision, and if you
20 ask the committee today, we think that 2.2 billion in cash,
21 that boat load of money that everybody talks about, that's
22 really important, but we don't think it's appropriate to put a
23 string on that that you can't look at the things in the bid
24 that give you the problem.

25 And so Mr. Lauria looks at this and Mr. Kurtz -- I

1 don't mean to offend Mr. Kurtz -- but they are looking at this
2 as an offer and acceptance case.

3 THE COURT: And it's not.

4 MR. BASTA: And the problem for the special committee
5 is that if the acceptance means you can't look at the topic of
6 the adversary proceeding, that's not something we want to
7 accept, nor do we think it's appropriate for the judicial
8 process for the Court to accept.

9 But does this relate to the adversary proceeding? And
10 I know you don't want me to talk about that, but that's the way
11 we look at it. We would look at it more in that light.

12 But to get back to the specific thing that the Court
13 asked, which is, so these topics -- like, when Your Honor asked
14 Mr. Kurtz or Mr. Lauria, you never got up and said that they
15 were bound, I don't know how relevant that really is, just to
16 be fair about it, because nobody had terminated yet. When
17 somebody terminates --

18 THE COURT: No, but Mr. --

19 MR. BASTA: -- you go back and you look at the bidding
20 procedures and you go back and you look at the order and you go
21 back and you look at everything as to what was done in the
22 record.

23 THE COURT: But I have to disagree with you because
24 when the special committee was appointed, not surprisingly, you
25 said, we've got to slow this down.

1 MR. BASTA: Right.

2 THE COURT: We've been given a job to do and we need
3 to figure out what's going on --

4 MR. BASTA: Right.

5 THE COURT: -- and how to do our job.

6 MR. BASTA: Right.

7 THE COURT: And the response to that by the ad hoc
8 secured group was this is a problem. And the reason this was a
9 problem is because that bid was going to go away. I think it's
10 creative recreation of history to say that no, what we really
11 meant was the support for the plan was going to go away.

12 MR. BASTA: Um-hum.

13 THE COURT: Because you can -- if the bid was good --

14 MR. BASTA: Um-hum.

15 THE COURT: -- and the special committee came up with
16 nothing else --

17 MR. BASTA: Right.

18 THE COURT: And this is not intended as a commentary
19 on --

20 MR. BASTA: Right.

21 THE COURT: -- what's before me now --

22 MR. BASTA: Right.

23 THE COURT: -- then that would have been a confirmable
24 plan. That might have been -- might have been -- a confirmable
25 plan.

1 MR. BASTA: Um-hum.

2 THE COURT: It's 2.2 billion in cash.

3 MR. BASTA: Um-hum.

4 THE COURT: So the sense that pervaded the months and
5 months and months was you've got to hurry up.

6 MR. BASTA: Um-hum.

7 THE COURT: You can't give them more time.

8 MR. BASTA: Right.

9 THE COURT: That's Harbinger's game.

10 MR. BASTA: Right.

11 THE COURT: They want to run out the clock.

12 MR. BASTA: Right.

13 THE COURT: You've got to keep going because LBAC's
14 going to walk away. And I think it's just a creative
15 retrospective look to say that that was all about the plan
16 support agreement and not about the bid.

17 Now, I mean there's ironies and ironies here because
18 what you appear to be saying is that you think that perhaps the
19 right view is that they in fact were locked in and yet that was
20 a plan that the special committee didn't want to support.

21 MR. BASTA: It's an ironic view because -- and I want
22 to explain the irony. You're just asking me what I think or
23 what the special committee was thinking at the time. At the
24 time in which the bidding procedures order was entered, we
25 thought we were locking in LBAC. Exclusivity had been

1 terminated.

2 THE COURT: Correct.

3 MR. BASTA: Exclusivity had been terminated. The
4 secured creditors had reached an agreement which basically pays
5 their constituency.

6 THE COURT: Right.

7 MR. BASTA: Okay? And the job of the special
8 committee is to come in and see is there an alternative? We
9 thought we were paying the breakup fee to lock in that
10 constituency and to develop other alternatives that we could
11 compare. After that occurred, we ran into the -- we evaluated
12 certain problems with the LBAC bid and we evaluated the
13 litigation.

14 THE COURT: So are you saying that there's almost a
15 kind of a force majeure event or an impossibility event that
16 because of the special committee's obligation to look at the
17 litigation relating to the SPSO debt purchases and because of
18 the relationship of that set of facts and circumstances to the
19 bid and the bidder, that's what prevented the special committee
20 from proceeding with the auction.

21 MR. BASTA: There are three --

22 THE COURT: Is that kind of what -- like there's a
23 failure of a --

24 MR. BASTA: When we --

25 THE COURT: -- there's a failure of a premise here?

1 MR. BASTA: When we were talking about schedule
2 earlier in this case, I said, Your Honor, it would be better if
3 we dealt with the adversary before we have to select the
4 bidder. And Your Honor said, no, we're not going to do that.
5 The special --

6 THE COURT: Well, because you know why?

7 MR. BASTA: Right, right.

8 THE COURT: Because you know why?

9 MR. BASTA: Right.

10 THE COURT: Because I thought the bid was going to
11 terminate.

12 MR. BASTA: Right.

13 THE COURT: So we didn't have the luxury of waiting.

14 MR. BASTA: So we didn't have the luxury.

15 THE COURT: And then because of what -- and I might
16 have been on a different page from the rest of you on a lot of
17 things, but then it was clearly conveyed to me that we had to
18 resolve the adversary in order to be able to tee up
19 confirmation --

20 MR. BASTA: Of --

21 THE COURT: -- of the plan and the bid because we had
22 to deal with the release. So in a case where no one can agree
23 on anything --

24 MR. BASTA: Right.

25 THE COURT: -- everybody --

1 MR. BASTA: Right.

2 THE COURT: -- seemed to agree that we had to deal
3 with the SPSO --

4 MR. BASTA: Right.

5 THE COURT: -- litigation first.

6 MR. BASTA: Right. But to answer your question, it
7 would be misleading for me to tell the Court that the only
8 factor that resulted in the termination of the auction was the
9 litigation.

10 THE COURT: Okay.

11 MR. BASTA: It was a very big factor. The two other
12 factors, and we've identified them in our papers and they're no
13 news to anybody in this room because we've been perfectly clear
14 about it, is that we didn't feel like the bid provided any
15 affirmative recovery for the GPS litigation held by the LP
16 estate, okay? And we wanted some consideration --

17 THE COURT: Well, just to drill down on that, the GPS
18 litigation -- the claims were held by not just the LP estates;
19 right?

20 MR. BASTA: There's two issues with the GPS
21 litigation. And Your Honor --

22 THE COURT: Yes.

23 MR. BASTA: -- it's very important that we keep them
24 separate. LP has an affirmative claim against --

25 THE COURT: Correct.

1 MR. BASTA: -- the GPS industry.

2 THE COURT: Right.

3 MR. BASTA: That could result in affirmative dollars
4 to LP.

5 THE COURT: Yup, right.

6 MR. BASTA: A bidder wants to pay so that those claims
7 do not interfere with their getting clear.

8 THE COURT: Right, agreed.

9 MR. BASTA: That doesn't mean that the bid shouldn't
10 compensate the estate for the value of those litigation claims
11 to the estate --

12 THE COURT: The estate, but the --

13 MR. BASTA: -- being LP.

14 THE COURT: -- the LP estate, but then you have to
15 talk about the other estates, too.

16 MR. BASTA: Now the second piece of it on the GPS
17 litigation was it looked like the LP plan was seeking to cause
18 Inc. to release Inc.'s claims --

19 THE COURT: Right.

20 MR. BASTA: -- against the GPS industry. So when we
21 determined to let the LP -- the LP lenders, because
22 exclusivity had terminated, had the ability to present their
23 own plan. When the special committee determined not to endorse
24 that plan, it was for those package -- it was because of those
25 package of considerations.

1 THE COURT: All right. Thank you.

2 MS. STRICKLAND: Your Honor, I just want to address
3 one thing while we have Mr. Basta.

4 THE COURT: Sure.

5 MS. STRICKLAND: Your Honor and Mr. Basta had this
6 conversation once before. You had it on 11/25. And there was
7 a discussion where again there was a request to delay, and Mr.
8 Lauria said, well, I can't agree to a date past the 12th
9 without breaching the PSA. We're way past the bid procedures
10 hearing.

11 And then Your Honor --

12 THE COURT: But now Mr. Lauria, just to keep up with
13 you -- but now Mr. Lauria and Mr. Kurtz are saying, you see,
14 they said PSA; they didn't say bid. That's what he is going to
15 say."

16 MS. STRICKLAND: I heard it. I agree.

17 THE COURT: Okay.

18 MS. STRICKLAND: He's going to say all kinds of
19 things.

20 MR. LAURIA: You just read the words.

21 MS. STRICKLAND: Yes, those were the words.

22 THE COURT: Okay.

23 MS. STRICKLAND: I don't want to mis --

24 MR. LAURIA: So it's not what I'm saying today.

25 THE COURT: Hold --

1 MS. STRICKLAND: I don't want to mis-cite anyone.

2 MR. LAURIA: It's what I said then.

3 THE COURT: Hold on. Hold on.

4 MS. STRICKLAND: So then Your Honor said, "There's a
5 risk for the special committee to evaluate." I mean, we're
6 back to the same issue. I'm not cutting out anything that's
7 pertinent. But then that's a risk the special committee to be
8 evaluating, which is a risk that we've always been concerned
9 about, and that's keeping LBAC bounded at the table. So that
10 has nothing to do with anything other than the bid.

11 And Mr. Basta gets up and says right now the LBAC bid
12 requires that -- the PSA between Mr. Lauria's client and LBAC
13 requires that a plan of reorganization be consummated by the
14 end of this year. And then he goes on to say he doesn't view
15 it as a bird in the hand anyway, because of the HSR timing.

16 So he's not coming in and giving, you know, the
17 machinations of the --

18 THE COURT: Well, what he was saying at that point
19 was -- and this gets into --

20 MS. STRICKLAND: We don't think we can make it by the
21 deadline anyway.

22 THE COURT: Exactly.

23 MS. STRICKLAND: Yes, that's what he says.

24 THE COURT: That's exactly right. That's exactly
25 right. But now we're going to get into a whole different

1 layer.

2 MS. STRICKLAND: Right. And whether or not -- look,
3 there are various timetables that moved throughout this whole
4 thing. So we started out with dates that were not met from the
5 get-go: the bid procedures --

6 THE COURT: Well, but be careful -- be careful here,
7 because --

8 MS. STRICKLAND: But we made a written -- we made a
9 written amendment in accordance with the plan support
10 agreement.

11 THE COURT: That's true.

12 MS. STRICKLAND: So it was not, eh, dates don't
13 matter, we'll just --

14 THE COURT: Well, it wasn't that the date --

15 MS. STRICKLAND: -- we'll just ride along. There's no
16 waiver and estoppel.

17 THE COURT: It wasn't -- and here --

18 MR. LAURIA: Your Honor --

19 THE COURT: Hold on.

20 MR. LAURIA: -- I've got to -- I've just got to
21 clarify something. Unilaterally, we got e-mails from counsel
22 repeatedly purporting to extend deadlines. Deadlines don't get
23 extended unilaterally; you get it extended, under the PSA, by
24 agreement. And counsel will be unable to show you a single
25 time that we agreed to a single one of those --

1 THE COURT: But this gets --

2 MR. LAURIA: -- purported extensions.

3 MS. STRICKLAND: Well --

4 THE COURT: You know, I've got -- there's --

5 MS. STRICKLAND: -- that is untrue.

6 THE COURT: Okay. Hold on. But this --

7 MS. STRICKLAND: But it doesn't matter.

8 MR. LAURIA: Just one.

9 THE COURT: Mr. Lauria --

10 MS. STRICKLAND: Please, just one.

11 THE COURT: Mr. Lauria, Mr. Lauria, please. Look.

12 Look. You know, it's always easier in retrospect to do the,
13 you know, "woulda, shoulda, coulda" thing. And now there're
14 going to be two sides to the story of whether or not there were
15 agreed extensions. And I think Ms. Strickland or someone on
16 behalf of LBAC has argued that the failure to acknowledge those
17 in writing was to preserve optionality on the other side.

18 This is about as complicated -- this is like a three-
19 dimensional chess game. I get it. And I'm trying my best to
20 keep up with all of the moves. I don't -- I will tell you, in
21 all honesty, I'm not sure I fully understand what's behind all
22 the moves. But what emerges from the fog of all this, on this
23 narrow point, is that when you combine the bid procedures order
24 with the plan support agreement, the LBAC bid was only going to
25 stay in place if those milestones were met. That was the way

1 that it was.

2 And whether or not there is some other level of
3 argument that LBAC really was never bound, never intended to be
4 bound, somehow didn't act in bad faith with respect to the
5 progress of getting to a deal, that's not what we're talking
6 about today. We're just talking simply about whether or not
7 they've withdrawn the bid and whether in essence we're going to
8 give effect to that in the context of the ad hoc secured
9 group's right -- desire and right to proceed with confirmation
10 of its plan, which -- and I can't believe we're going to run
11 out of time but we are, because that's a whole separate layer
12 of complexity that we're going to have to deal with.

13 If I tell you -- and procedurally, I think the way
14 that we have to do this is -- and I'll hear you on this too --
15 is that the way this issue is before me, despite your efforts
16 to make it neater, is really messy and sloppy. This is not a
17 criticism; it's just an observation, okay? There was a notice
18 of an intent to proceed to confirmation. That provoked a
19 response and a motion for a declaratory judgment. Then we
20 agreed on kind of an agreed set of issues, and that's what
21 we're talking about here today. But it's still very squirrely
22 in terms of somebody not in this room looking at, well, what
23 exactly are they doing there today?

24 And I think the way to go, I would suggest to you, is
25 that when we're done, for me to give you a tentative ruling

1 that I would then tell you that, to the extent that we are
2 going to formally have a confirmation hearing on the ad hoc
3 secured group plan, would be the first thing that we do, would
4 be then that -- and I'm a little bit making this up, because
5 this is not in any of the books, this situation that we're
6 in -- is that Mr. Lauria, hypothetically -- although we've got
7 to get through a lot more before we would even get to this
8 point -- would stand up and say, Your Honor, I present the ad
9 hoc secured group's plan for confirmation, based on the LBAC
10 bid. And then we would make part of the record of the
11 confirmation hearing the determination, which is where I think
12 I'm headed to at this moment, that the LBAC bid has been
13 withdrawn. So therefore, to the extent that the plan is
14 premised on the LBAC bid, confirmation of that plan cannot
15 occur, because the bid has been withdrawn.

16 So, procedurally what I'm trying to do is to preserve
17 everybody's appeal rights, because I don't know what this is
18 today in terms of preserving your rights to appeal and any
19 rights that you think you have with respect to claims and
20 specific performance and the like. I mean, I will tell you now
21 just to -- I'm going to get ahead of myself a little bit. We
22 also have to talk about -- maybe we could take a little break
23 after Mr. Barr speaks. We also have to talk about the ability
24 of the ad hoc secured group to proceed with the alternative
25 transaction, about which I have a lot of questions. That's

1 number one.

2 And number two, even if I were to go the other way and
3 say, okay, proceed to confirmation on the LBAC plan, this side
4 of the room's going to stand up and say, we're not performing,
5 we withdrew that bid, we're not performing. Then there could
6 be no showing of feasibility with respect to that toggle of the
7 ad hoc secured group plan. And then we'd have to get to a
8 hypothetical confirmation hearing on the LBAC plan, I'll call
9 it. I'd have to hypothetically go through what that
10 confirmation hearing would look like, and explore all the
11 issues that I may have had with respect to confirmation of the
12 LBAC plan. And trust me, there were going to be issues.

13 Did you just follow what I said?

14 MR. BARR: I did.

15 THE COURT: So I kind of don't know what the next step
16 is, so maybe Mr. Barr's going to tell me what the answer is.

17 MR. BARR: Well, Your Honor, I -- and I apologize,
18 because you did go through some of your thinking here. But I
19 actually was going to help and answer a question that you asked
20 before, which was, context.

21 THE COURT: Right.

22 MR. BARR: And I apologize for going back a little
23 bit. And then you actually asked a question that we thought
24 about, which was, the blackline of the prior order.

25 THE COURT: Right. In other words, the -- but Mr.

1 Kurtz's argument today was -- forget about the proviso.
2 Everything we need is in the two words "successful bid".

3 MR. BARR: But it works together.

4 If I can walk up --

5 THE COURT: Okay.

6 MR. BARR: -- with the blackline, Your Honor. Thank
7 you. May I approach?

8 THE COURT: Yes.

9 MR. BARR: Thank you. And we're going to put irony
10 aside as well, if that's okay, Your Honor --

11 THE COURT: Sure.

12 MR. BARR: -- and just try to provide to you, at least
13 from the company's perspective, and management -- Mr. Basta
14 already told you the special committee -- what the context was
15 that they believed was going on.

16 So if you turn to page 14, paragraph J, that's the --
17 of the attachment to the bidding procedures, so the bid
18 order -- the bidding procedures themselves -- this is
19 irrevocability of certain bids. Your Honor is exactly correct
20 that there was a back-and-forth where I highlighted the fact
21 that LBAC would not act as a backup bidder if we held an
22 auction. And you were very concerned with that, as we were
23 You asked why, and I said we couldn't negotiate it, we tried
24 really hard, and we had our break.

25 If you go back and look at the blackline, the original

1 bidding procedures provided, in the proviso that we've been
2 focused on today, that "LBAC shall have no obligation to serve
3 as the backup bidder and its bid shall not be irrevocable under
4 this paragraph J. But LBAC may serve as the second highest
5 bid, at its option."

6 So we went in the back and we talked about what's
7 going to happen next. But if you read this language, it says
8 that LBAC was not revocable, before we made these changes.

9 THE COURT: No, "shall not" -- "its bid shall not be
10 irrevocable".

11 MR. BARR: Right. So they can't terminate the bid --

12 THE COURT: Wait, wait, wait. Wait, wait, wait, wait.

13 MR. BARR: -- subject to this paragraph J.

14 THE COURT: Whoa, whoa, whoa. It says that LBAC --

15 MR. BARR: Shall not --

16 THE COURT: -- shall not -- "have no obligation to
17 serve as the second highest bidder" --

18 MR. BARR: And its bid is irrevocable.

19 UNIDENTIFIED SPEAKER: Is not.

20 THE COURT: Is not irrevocable.

21 MR. BARR: Is not -- I'm sorry; is not irrevocable.

22 They took it out.

23 THE COURT: Hold on.

24 MR. BARR: The point here, Your Honor, is -- and let
25 me make a point; then we could read the language. The point is

1 that the whole purpose of negotiating the bidding procedures
2 was Your Honor was saying, estate, estate, protect downside,
3 protect downside, protect downside. We were trying to do that.
4 We talked to the special committee. Special committee said,
5 protect downside. We negotiated these provisions. They said
6 they would not act as the backup bid. We said, but your bid is
7 there, because we're trying to protect downside. Then we had
8 this back-and-forth. Ms. Strickland said, I'm not acting as
9 the backup bid. We went into the back room; we negotiated.

10 What I thought the context was, was that she
11 negotiated to be a backup bidder if there was an auction --

12 THE COURT: Right.

13 MR. BARR: -- and that her bid was still out there
14 until February 15th, because before this language was changed,
15 she couldn't revoke her bid.

16 UNIDENTIFIED SPEAKER: She could.

17 UNIDENTIFIED SPEAKER: No.

18 THE COURT: No, she could. It's the opp --

19 MR. BARR: I'm sorry. I'm sorry. I'm sorry.

20 THE COURT: It's the --

21 MR. BARR: You're right. She could. She could --

22 THE COURT: It's the opposite.

23 MR. BARR: -- revoke her bid. I'm sorry.

24 THE COURT: She --

25 MR. BARR: You're right.

1 THE COURT: Right.

2 MR. BARR: She could --

3 THE COURT: When --

4 MR. BARR: -- revoke her bid.

5 THE COURT: Before we came into the hearing, the deal
6 was LBAC is going to serve as the stalking-horse bidder --

7 MR. BARR: Yes.

8 THE COURT: -- but it's got no obligation to serve as
9 the second highest bidder and its bid is not irrevocable under
10 this section J --

11 MR. BARR: Correct.

12 THE COURT: -- meaning that that first sentence that
13 says the successful bid shall remain irrevocable, her bid is
14 not the LBAC bid -- I'm sorry -- is not irrevocable. So
15 then --

16 MR. BARR: Right. Correct.

17 THE COURT: Right?

18 MR. LAURIA: She took it out.

19 THE COURT: So, meaning you agree with LBAC?

20 MR. BARR: Before this was renegotiated.

21 MR. LAURIA: She took it out.

22 UNIDENTIFIED SPEAKER: That's the old version, Your
23 Honor.

24 THE COURT: But --

25 MR. LAURIA: She took the language out.

1 THE COURT: Hold on. Hold on.

2 MR. BARR: So I apologize. I was getting confused
3 when we were talking about with the "not", okay?

4 THE COURT: With the "not".

5 MR. BARR: Before --

6 THE COURT: Right.

7 MR. BARR: -- this was negotiated --

8 THE COURT: Yes?

9 MR. BARR: -- we were trying to get her to be bound
10 for the -- what we call the safety net, right? We were trying
11 to protect the estates. Okay? She had the right to walk. She
12 would not act as the backup bidder and she had the right to
13 walk. Your Honor was very concerned with that --

14 THE COURT: Let's not say "she".

15 MR. BARR: -- as were we. I'm sorry. LBAC had the
16 right to walk. We were concerned with that, as were you.

17 This is renegotiated language after we had a
18 conversation after a break, when Your Honor expressed concern
19 about a fifty-one million dollar breakup fee going to LBAC.
20 You wanted to make sure that they were, as did we all. This is
21 renegotiated language that says what I thought, that they're
22 out there until February 15th and that they would act as a
23 backup bid until February 15th as well. And again, the irony
24 aside, we were trying to protect the downside, because if Your
25 Honor was going to confirm their plan, we wanted to make sure

1 that the estates were protected.

2 Your Honor, I'd also add that, just to remind you, the
3 breakup fee was not only paid if there was an auction; it was
4 payable if we confirmed a Chapter 11 plan. So we could have
5 entered into a Chapter 11 plan, we could have had it confirmed,
6 and we still had to pay the breakup fee, irrespective of an
7 auction or no auction.

8 THE COURT: So if I had said nothing about this issue
9 of hanging around, this order would have gone in the way it is
10 and LBAC's bid -- this section J would not have had the effect
11 of making LBAC's bid irrevocable, right?

12 MR. BARR: Correct.

13 THE COURT: Right? Just your view, Ms. Strickland, on
14 what the order meant, what the blackline language here, the
15 draft before --

16 MS. STRICKLAND: Sure.

17 THE COURT: -- the draft, meant.

18 MS. STRICKLAND: This proviso at all times relates to
19 what other people are going to do under the procedures that
20 LBAC is not going to do. The entire proviso relates to being
21 the -- serving as the second highest bidder, and what that
22 means. And when we came in, we said what that meant, which
23 was, we're not going to be a backup bidder. And Your Honor had
24 trouble with that, and I don't know that you requested us to
25 reconsider, but indicated that you were going to have

1 difficulty approving the buyer protections with that status
2 quo, and sent us into the hallway and back we came.

3 But it's all in the context of this section J. It's
4 all in the context of this language relating to the second
5 highest bidder -- serving as the second highest bidder, in the
6 context of this paragraph, which implies an auction, somebody
7 wins, somebody is the second runner-up. That's the entire
8 context for this.

9 THE COURT: And when you --

10 MS. STRICKLAND: And the record on that day --

11 THE COURT: Right.

12 MS. STRICKLAND: -- is very, very --

13 THE COURT: When you add that with -- when you add
14 that together with -- I think it was Mr. Sussberg who came back
15 to report on what had occurred, that what the language should
16 have said was that LBAC has agreed to serve as the second
17 highest bidder and, in that capacity, the LBAC bid will remain
18 the bid.

19 MS. STRICKLAND: Exactly, Your Honor.

20 THE COURT: That's what the lawyers should have
21 drafted.

22 MS. STRICKLAND: Well, there's a lead-in here --

23 THE COURT: And -- no, I know.

24 MS. STRICKLAND: -- that refers to --

25 THE COURT: Mr. Lauria, I know your --

1 MS. STRICKLAND: -- the second highest bidder.

2 THE COURT: -- I know your frustration is great, and I
3 know that -- but if you ultimately -- if you disagree with what
4 I'll say about this, at the end of the day I'm going to try my
5 best to preserve your appeal rights. But you have to -- and
6 again, this side of the room may regret this at some later
7 point -- but you cannot just look at the words without looking
8 at the context.

9 MS. STRICKLAND: Judge --

10 THE COURT: You just --

11 MR. BARR: Right.

12 THE COURT: You just can't.

13 MR. BARR: But the lead-in --

14 THE COURT: Hold on.

15 MS. STRICKLAND: But, Judge, the lead-in says --

16 THE COURT: Hold on. Let Ms. Strickland --

17 MS. STRICKLAND: -- the second highest bidder.

18 UNIDENTIFIED SPEAKER: No.

19 MR. BARR: No, no, no.

20 UNIDENTIFIED SPEAKER: It says "the successful bid".

21 MR. BARR: The lead-in says, Your Honor -- and this is
22 important at least -- again, context from --

23 MS. STRICKLAND: I'm talking about the lead-in --

24 THE COURT: Hold on.

25 MS. STRICKLAND: -- to the proviso.

1 MR. BARR: -- our --

2 THE COURT: Too many people standing up.

3 Mr. Kurtz, you're on the double -- you're on double-
4 deck, so sit, please.

5 MR. KURTZ: Okay.

6 THE COURT: Please. Thank you.

7 Go ahead.

8 MR. BARR: So again, from context of the company and
9 the debtors -- and what we were trying to do was to preserve
10 their bid -- the lead-in language -- and I'm not going to
11 regurgitate what Mr. Kurtz is saying -- it says, "The
12 successful bid shall remain irrevocable in accordance with the
13 terms of the purchase agreement executed by the successful
14 bidder." All we knew at that point in time was that they were
15 binding them to a deal so that they can get to confirmation
16 with LBAC's deal in the context of their plan. Right? So when
17 this all started to become an issue because we said they would
18 not agree to be the backup bidder, we wanted to make sure that
19 they were the backup bidder and that their bid was there.

20 MS. STRICKLAND: And it would have been there as the
21 backup bidder, but there wasn't an auction and there wasn't a
22 successful bid. And if you go to the transcript of that
23 hearing, it's not just Mr. Sussberg. Mr. Basta, on page 57,
24 says, "I think this is" -- "it would be better for the estate
25 if they were locked in as the backup." Then Mr. Lauria says on

1 page 97, "I just wanted to confirm -- I'm sure the Court is
2 interested to know -- that the milestone in our plan support
3 agreement is being satisfied by the approval of these bid
4 procedures, as discussed on the record. So we're hanging
5 onto -- all this effort is to hang onto the proposal and keep
6 it open, and we're doing that."

7 Then he goes on, not about the bid procedures; and in
8 his mind he's all done, right? On page 98, Mr. Lauria says, "I
9 think I can represent that the bid procedures satisfy the
10 milestone, subject to the Court entering the order." I say,
11 "Yes." Then Mr. Lauria says, "Good. And we have one other
12 thing we have to do. We had a date for finalizing the form of
13 the agreement for the purposes of our separate deal." Your
14 Honor says, "Right." Mr. Lauria: "And we're going to have to
15 kick that out a little bit, because the schedules are being
16 delivered over the next few days." He's going to the next
17 milestone in the PSA. The Court says, "Right." And he says,
18 "We have every understanding that we'll get that worked out."
19 He wants me to confirm on the record that I'm -- that we're
20 going to be -- the bid is still going to be live under the plan
21 support agreement, under the milestones. All of this stuff
22 with respect to paragraph J already happened.

23 So he's talking about the deal. He's not talking
24 about support of a plan. He uses the words "implement the
25 deal". That's what we were doing. This entire paragraph J and

1 all the back-and-forth about J was backup, backup, backup,
2 backup. Everybody said it --

3 THE COURT: But here's another interesting --

4 MS. STRICKLAND: -- on all fronts.

5 THE COURT: -- little thing about the language in the
6 penultimate draft is that if, by its terms, "successful bid"
7 did not include LBAC as a backup bidder, the language -- the
8 stricken language, "and its bid shall not be irrevocable under
9 this section J", you could make the argument that that was
10 completely superfluous, that you didn't need that, because why
11 did you put that in when by its terms the LBAC bid was never
12 going to be the successful bid? And if irrevocability, as
13 you're saying, was only addressed by the plan support
14 agreement, why did that need to address the irrevocability of
15 the LBAC bid?

16 MS. STRICKLAND: Because the entire proviso was
17 intended to say -- we've got a general statement in here about
18 bidders serving as a backup bidder and pursuant to these
19 procedures; it's a cross-reference. It says, you know,
20 everybody's -- the rules for everybody in this game are,
21 provided, however, please be reminded, LBAC doesn't do that
22 rule.

23 So that's the reason it's here. It's here for the
24 avoidance of doubt, because the general rule of what bidders
25 are agreeing to do as a backup did not apply to us. And the

1 only reason we made a change to this language is because Your
2 Honor said, I don't want you to not be a backup. Mr. Basta
3 stood up and said, it'd be great if they were a backup. Mr.
4 Sussberg said it. We went into the hallway.

5 And in fact, when you look at how he memorializes the
6 agreement, which Mr. Sussberg --

7 THE COURT: On the record?

8 MS. STRICKLAND: -- says -- on the record, he says
9 they were still not comfortable with the sixty days, they
10 wanted an outside date for when they would have to serve as the
11 backup bidder. That was the entire thing.

12 So this is --

13 THE COURT: Right. It was an outside date --

14 MS. STRICKLAND: -- really revisionist history.

15 THE COURT: It was an outside date, because you had to
16 have -- because the sixty days keyed off of the entry of the
17 confirmation order, and that was open-ended; that didn't have
18 an ultimate outside date.

19 MS. STRICKLAND: And what Your Honor awarded was not
20 illusory. LBAC as the bidder, DISH as the credit support, was
21 bound, through the plan support agreement, from a date in July
22 through a date in January. They were locked up contractually
23 for that entire period of time. This was not a game.

24 And because we didn't want anyone to be confused about
25 exactly what our contract says, we stood, at every point in

1 time when the time was shifting on, and said, we have a
2 contract, we have a contract, we have a contract, here are our
3 milestones, and so did Mr. Lauria.

4 MR. BARR: Let me just add to that, Your Honor. As
5 you know, we're not a party to the PSA. And what I believe --

6 THE COURT: Right.

7 MR. BARR: -- the company and the estates thought they
8 were doing, when they agreed to a fifty-one million dollar
9 breakup fee, was locking in the downside protection in a bid.

10 THE COURT: Thank you.

11 Could we keep going just a little bit more? I want to
12 ask about the -- can you go back to the version of the APA
13 that -- the 7/23 version? Which I think everyone agrees is the
14 one that was the reference version for the purposes of the bid
15 procedures order, right? Is that right --

16 UNIDENTIFIED SPEAKER: Yeah.

17 THE COURT: -- everyone?

18 MR. BARR: Yes, it's right.

19 THE COURT: Yes. Okay. So can we go to that version?
20 And can someone show me in that version what it says about the
21 alternative transaction?

22 MS. STRICKLAND: Your Honor, alternative transaction,
23 in this document, is not a -- I do not believe is relevant
24 to --

25 THE COURT: It's not relevant to determination. I --

1 MS. STRICKLAND: Right, but even to the plan that the
2 ad hoc --

3 THE COURT: Well, can you --

4 MS. STRICKLAND: -- committee is proposing --

5 THE COURT: -- can you just --

6 MS. STRICKLAND: -- they have an alternative --

7 THE COURT: Can I ask you to stop?

8 MS. STRICKLAND: Sure.

9 THE COURT: Can you just answer my question first and
10 then I'll get to where -- what -- I just want --

11 MS. STRICKLAND: What the alternative sale is?

12 THE COURT: Yeah. Just --

13 MS. STRICKLAND: Yeah.

14 THE COURT: There's --

15 MS. STRICKLAND: So --

16 THE COURT: There's a footnote in that draft, I think,
17 that says, we're going to talk about this later. Right?

18 MS. STRICKLAND: Right. So the alternative-sale
19 construct is in 3.5, which is on page 12 --

20 THE COURT: Okay.

21 MS. STRICKLAND: -- of the form of asset purchase
22 agreement, and it's premised, and the lead-on is "if the
23 funding shall have occurred".

24 THE COURT: Right, "if the funding shall have
25 occurred".

1 MS. STRICKLAND: So --

2 THE COURT: Right.

3 MS. STRICKLAND: -- what proceeds this paragraph
4 kicking in is Your Honor has approved the plan and the --

5 THE COURT: Okay.

6 MS. STRICKLAND: -- sale, and the early funding has
7 occurred.

8 THE COURT: Right.

9 MS. STRICKLAND: So the LightSquared estates have
10 received the 2.22 billion dollars and are free to distribute it
11 however they're going to distribute it. And then because the
12 bid was not conditioned on FCC approval, the notion was, well,
13 if there's an issue with regulatory approval or it takes too
14 long or something else, as the economic beneficiaries of the
15 spectrum at that point, in the event that the regulatory
16 approval doesn't work out -- I'm using shorthand; there's a lot
17 of bells and whistles to this -- it can effectively be done as
18 a designation sale where LBAC can say, hey, Verizon, would you
19 like to purchase this spectrum. Verizon gets its FCC approval,
20 because obviously nothing can be done without the regulatory
21 approval, which is a gating item for any change of control.
22 They would get that approval. If Verizon said, you know, too
23 bad, so sad, I'm only paying a billion, then that billion
24 dollars would go to LBAC, and LBAC would be out a billion-22.
25 If Verizon said, you know, gee, a lot has changed, I'll pay

1 three billion, all three billion would have gone to the bidder.
2 And that's a construct that was contemplated here, and that's a
3 construct that was also in another transaction that DISH
4 Network did with TerreStar where that similar situation was
5 employed.

6 THE COURT: Okay. That's helpful. Thank you.

7 All right, is there anything else that anyone wants to
8 say on the issue of the termination and the withdrawal of the
9 bid?

10 MR. LAURIA: Your Honor, Tom Lauria with White & Case,
11 for the ad hoc group of LP secured lenders.

12 I thought that because of the history here, it was
13 best for Mr. Kurtz to lead the argument; he's kind of a little
14 bit more removed from it than I am, and he's a better arguer
15 than I am, also. But there're a couple of points that I think
16 are somehow just not getting made clearly here. And the first
17 thing I wanted to address is the Court's concern about the
18 statements that I made along the way, or didn't make along the
19 way --

20 THE COURT: I mean, I hope you folks know that it's
21 not personal. I mean, it just -- you know, I rely on you to
22 tell me what your positions are. So it's not personal, and I
23 hope you're not taking my observations that way.

24 MR. LAURIA: Not at all, Your Honor. I appreciate the
25 Court's comment in that regard.

1 But what I do want to say is that we tried to be very
2 clear and careful with our words -- I tried to be very clear
3 and careful with my words, that I was focusing on the plan
4 support agreement. And the plan support agreement has been
5 very important to us all along the way, among other things.
6 Although counsel for LBAC and/or SPSO pointed out that we
7 didn't need LBAC's support for the plan, we did need SPSO's
8 support. They're more than half of our debt. And if they're
9 not voting to accept our plan, we have a fundamental threshold
10 issue that we can't get over to confirm our plan, unless we
11 initiate litigation to designate their vote, and all of that
12 kind of thing.

13 THE COURT: But let's stop with that one. So --

14 MR. LAURIA: Right.

15 THE COURT: -- so suppose that LBAC had never
16 withdrawn the bid, right? It's irrevocable, hypothetically.
17 They still had the right to terminate the PSA, and they did.
18 So then if you get -- follow me down the rabbit hole here,
19 right -- then you stand up for confirmation of a plan; they're
20 going to vote no.

21 MR. LAURIA: Well, Your Honor, they already -- the
22 point is --

23 THE COURT: They already voted, and they can't change
24 it?

25 MR. LAURIA: Your Honor, they point is, we've tried to

1 hold this together to get their yes vote --

2 THE COURT: Right.

3 MR. LAURIA: -- okay, so they would then be required
4 to come in and move for permission to change their vote to a
5 no. And if their reason for changing -- SPSO's reason for
6 changing its vote to a no is that LBAC no longer wanted to go
7 forward with the deal, I think that we would have some issues
8 that would go to whether or not that motion would be granted.

9 Now, I'm being forced to bare my legal strategy in
10 this courtroom to defend the outcome that I, in my heart,
11 believe is the correct answer. And it's not with any great
12 pleasure or comfort that I do that. But I've got to do that to
13 try to help get to the truth, to the right answer here. We
14 were -- we recognized that we were in a difficult spot. And we
15 were trying to hold that PSA together to make sure that we had
16 the things we needed in the first instance and that it would
17 very difficult for SPSO to try to change its vote based on LBAC
18 pulling its bid or trying to pull its bid or saying it didn't
19 like --

20 THE COURT: But that doesn't --

21 MR. LAURIA: -- the transaction.

22 THE COURT: -- that doesn't address the entirety of
23 the record in which their -- the focus clearly seemed to be
24 that LBAC was going to walk.

25 MR. LAURIA: May I try to address that?

1 THE COURT: Yeah, um-hum.

2 MR. LAURIA: We didn't feel that we needed to address
3 that. And these issues, as the Court can tell, are very
4 complicated issues. And we didn't want to start playing our
5 litigation card on the record before we had to. I felt that it
6 would put us at a great disadvantage to do so. So we said what
7 we said to protect what we needed to protect and to keep the
8 process moving forward. But I didn't feel that it was my duty
9 to say, now Your Honor, I want to tell you that if they, at
10 some point in time, decide they're going to try to walk away
11 from the bid, here's going to be our legal argument as to why
12 they can't.

13 THE COURT: Well you had the -- so what you're saying
14 is you were in the same difficult bind that the special
15 committee was in, in needing to preserve potential litigation
16 positions but also keep them at the table.

17 MR. LAURIA: Right.

18 THE COURT: So let me ask you the next series of
19 questions, which is that if I were to agree with your position,
20 that the bid has not been properly withdrawn, or terminated,
21 however you want to say that, and you say -- and I say, okay,
22 we're good to go to confirmation, at confirmation, LBAC, and/or
23 SPSO, are going to maintain their position that you can do
24 whatever you want, we've terminated; we're not performing.
25 That 2.2 billion dollars of cash is no longer available, okay?

1 And then, I can't find that the plan -- that that
2 aspect of the plan -- is feasible, because they're not going to
3 perform. And then you'd have to tell -- you'd have to then
4 convince me that you're going to -- that you're right; I'm
5 wrong; they're wrong. You're going to be able to convince an
6 appellate court, or do it in some separate lawsuit, that you
7 could force the LBAC bid to fund, or you could get an
8 injunction. I don't think you'll get -- I mean I'm getting
9 into advisory stuff here, but it's -- after all, it's just
10 about money, okay?

11 So putting to one side what the litigators could do
12 with the whole specific performance thing, where do I go with
13 that? If nothing is clear but this, it is that right now the
14 bid is gone; they're not going to perform. And I reserve my
15 rights to come back to that point, because right now, at 12:03,
16 on January 22nd, the bid is terminated; it's no longer
17 available. That seems clear. So if we go to confirmation,
18 right, it's almost -- it's an academic point at one level,
19 because they're not going to perform. I'm not going to be able
20 to make a finding that that plan is feasible.

21 MR. LAURIA: Your Honor, if the ruling is there's --
22 that they had the right to terminate, I don't know exactly what
23 I'd do other than seek relief from that ruling at some point in
24 time.

25 THE COURT: Well, that's why I'm trying to preserve

1 your rights by saying to you that the way that I think the best
2 way to do that is to have you stand up -- and I'm not there yet
3 at all -- but one possibility is for you to stand up at the
4 confirmation hearing on the ad hoc secured group plan and say
5 you present it for confirmation. And then we import this
6 record. And then you have an appeal right. If I'm wrong,
7 right, then -- I won't say if I'm wrong -- if a district
8 court -- if a higher court wants to reverse me, then --

9 MR. LAURIA: Well, what's --

10 THE COURT: -- I want to preserve your right to get
11 that court to say that.

12 MR. LAURIA: Let's start at the point where I thought
13 you said, which was hypothetically speaking you agreed with me.

14 THE COURT: Yes, okay.

15 MR. LAURIA: Okay. You turned it around, but you did
16 start out saying, hypothetically you agree with me.

17 THE COURT: Okay. Hypothetically, if I were to agree
18 with you --

19 MR. LAURIA: Okay --

20 THE COURT: -- okay?

21 MR. LAURIA: -- you agree with me that the bid is --

22 THE COURT: The bid is alive.

23 MR. LAURIA: -- is alive.

24 THE COURT: Right.

25 MR. LAURIA: It's irrevocable. What we would attempt

1 to do --

2 THE COURT: Well --

3 MR. LAURIA: -- at --

4 THE COURT: -- the bid is alive at the moment.

5 MR. LAURIA: Okay. At confirmation --

6 THE COURT: Right.

7 MR. LAURIA: -- we would ask the Court for a ruling
8 that confirmation of our plan constitutes acceptance of the
9 bid, and that pursuant to 1142(b) -- before we get to specific
10 performance or anything like that, this Court has the power to
11 order the parties to do everything that they have to do to
12 consummate the plan, okay, which includes ordering LBAC to
13 complete its obligations under the APA, as approved in
14 connection with confirmation.

15 THE COURT: Okay.

16 MR. LAURIA: It would be -- and to order the debtor to
17 sign the APA.

18 THE COURT: Okay, and --

19 MR. LAURIA: Okay, the Court has all the power to do
20 that. And so we're not talking about a specific performance
21 case; we're talking about the Court enforcing its powers under
22 1142(b) --

23 THE COURT: Okay.

24 MR. LAURIA: -- to make the parties do what they have
25 to do. And I think if LBAC doesn't perform, having been

1 ordered by this Court to do so, I think there are an array of
2 remedies that are available to this Court to cause the plan to
3 be consummated. And if LBAC wants to get relief from that
4 order, it's on them to seek appellate relief and/or an
5 injunction and provide a bond to protect parties from the
6 damage that may befall from the delay or the failure of the
7 plan to consummate.

8 THE COURT: So that's your -- okay, so that's the
9 theory of if I hypothetically agree with you.

10 MR. LAURIA: And here I am --

11 THE COURT: Okay, so then --

12 MR. LAURIA: -- talking about --

13 THE COURT: -- so now --

14 MR. LAURIA: -- my litigation two weeks from now --

15 THE COURT: I understand --

16 MR. LAURIA: You understand the disadvantage this puts
17 me at, Your Honor?

18 THE COURT: -- I understand. But then, so if you --
19 hypothetically, if I agreed with you that the bid was alive
20 today, and then we get to this hypothetical confirmation
21 hearing, and I hypothetically don't agree with the way you've
22 just articulated a path to force them to perform, then you say,
23 I'd like to present my alternative for confirmation. Now --

24 MR. LAURIA: Maybe, maybe.

25 THE COURT: Well, hold --

1 MR. LAURIA: You may find that our plan's not
2 feasible --

3 THE COURT: Hold on, okay.

4 MR. LAURIA: -- because you don't buy that they can
5 be --

6 THE COURT: Exactly --

7 MR. LAURIA: -- forced to perform --

8 THE COURT: -- okay. But in your statement, I think
9 that in the first go-around, you said that you wanted to
10 proceed with an alternative.

11 MR. LAURIA: Yes.

12 THE COURT: And you, when I asked you about that, you
13 said, oh, our plan has always provided for an alternative.

14 MR. LAURIA: Yes, Your Honor.

15 THE COURT: And I see the alternative provisions in
16 the asset purchase agreement, but where are they in the plan?

17 MR. LAURIA: The plan specifically provides for the
18 acceptance of an alternative bid.

19 THE COURT: Could you show me?

20 MR. LAURIA: Yes, if you'd give me just a moment.

21 THE COURT: I have -- I'll tell you what --

22 MR. LAURIA: I didn't come here prepared to --

23 THE COURT: I'm sorry.

24 MR. LAURIA: -- on this --

25 THE COURT: I have a --

1 MR. LAURIA: -- on this --

2 THE COURT: Okay, but we have to get to -- we have to
3 get to a conclusion today, by hook or by crook.

4 MR. LAURIA: Your Honor, I -- I mean, I don't -- I
5 didn't come --

6 THE COURT: Okay, you know what --

7 MR. LAURIA: -- prepared today to litigate my
8 alternative bid.

9 THE COURT: No, I just want -- again, as I said to Ms.
10 Strickland --

11 MR. LAURIA: I don't even --

12 THE COURT: -- I'm not asking you --

13 MR. LAURIA: -- I can't even find my plan.

14 THE COURT: -- to comment. I just want someone to
15 show me, in the plan --

16 MR. LAURIA: Just the plan.

17 THE COURT: -- and I'll give you -- let me do this,
18 okay, let me not put you on the spot, because it's not fair. I
19 don't do things by ambush. You can take a moment to look at
20 it. But --

21 MR. LAURIA: I would like to make two points before we
22 take that break.

23 THE COURT: Short.

24 MR. LAURIA: Short ones. Number one, prior to the
25 Court's approval of the bidding procedures and the entry of the

1 bid procedures order, there was one deal that held LBAC and
2 DISH to a proposal, and that was the plan support agreement
3 that they entered into with our clients --

4 THE COURT: Right.

5 MR. LAURIA: -- on July 23rd. At the bid procedures
6 hearing and as reflected in the order, a second deal was made
7 between the debtors and LBAC and DISH, and it was approved by
8 the Court. And that second deal was paid for by the debtors
9 with good consideration. I didn't pay for that deal; the
10 debtors committed consideration for that deal. They gave a
11 commitment to pay fifty-odd million dollars to LBAC if a
12 different plan was confirmed or if they were topped at an
13 auction.

14 THE COURT: Right, they paid for the opportunity to go
15 out -- for Mr. Basta to go out and find someone who would pay
16 more so that constituents other than yours could get money,
17 because at that point you were done; you were paid off and you
18 had no incentive to do anything else.

19 MR. LAURIA: But, Your Honor --

20 THE COURT: And before that the argument was, look, we
21 only have a batter-up who's swinging for the fences, because
22 the only way -- right? -- that the debtor was going to
23 relinquish control, the debtor as controlled by Mr. Falcone, in
24 your view of the world, was if there was enough money to get
25 down to him. And what the special committee -- why I was so

1 concerned with the special committee coming in was because
2 there was a huge range of value between the equity that
3 Harbinger and --

4 MR. LAURIA: But LBAC --

5 THE COURT: -- others held.

6 MR. LAURIA: -- got some -- got consideration at that
7 hearing.

8 THE COURT: Yes, it did.

9 MR. LAURIA: It got a commitment from the estate to
10 get a breakup-fee protection.

11 THE COURT: Right.

12 MR. LAURIA: And LBAC gave something, when that trade
13 was made, to the debtors, not to me or my clients but to the
14 debtors. A new deal was made for consideration. And you've
15 been told by both counsel, for the special committee and the
16 debtors, that that deal was to lock in the LBAC offer. And
17 that lock-in has nothing to do with my PSA, to which neither
18 the debtor nor the special committee are party to. They're not
19 bound by those milestones. Their deal is what the bid
20 procedures order says. And that bid procedures --

21 THE COURT: But --

22 MR. LAURIA: -- order --

23 THE COURT: Right, but --

24 MR. LAURIA: That bid procedures order --

25 THE COURT: But the -- but --

1 MR. LAURIA: -- refers to an APA dated July 23rd.

2 THE COURT: Right.

3 MR. LAURIA: And that's the bid that they locked in
4 and gave consideration to lock it in.

5 So that has -- the PSA, I would submit, Your Honor, is
6 completely irrelevant to the question of whether or not the bid
7 that was locked in by the bid procedures order is irrevocable.

8 THE COURT: Okay.

9 MR. LAURIA: Okay? Completely separate deal.

10 Point number two; very short point: What LBAC and
11 DISH are arguing is incomprehensible to me. They are saying
12 that if they're the winning bid, they can walk, they're not --
13 their bid is irrevocable, they can walk based on their
14 agreement with me. But if they're the second-place bid, they
15 can't walk. If they lose the auction, they can't walk. But if
16 they win the auction, they can walk. I've never heard of
17 anything like this.

18 Now, the only possible way -- and this is not what the
19 parties intended when they negotiated this language, but the
20 only possible way that it could make any sense is if they were
21 then locked in like every other qualified bidder, through
22 confirmation. And they made a separate agreement that they
23 would stick around beyond confirmation if they came in second
24 place. But to suggest that they can walk away, not being able
25 to point to a termination right in their bid, if they win, but

1 they can't walk away if they lose, I mean, you talk about
2 standing things on their head. That is as upside-down as it
3 gets.

4 THE COURT: We only had been concerned with locking
5 them in as the backup bidder. Remember, there was -- and this
6 might sound like nickels and dimes in the larger context, but
7 there was the breakup fee, right? But there was also an
8 expense reimbursement. And had we not kept them around -- then
9 there was an auction. And irrespective of whether or not there
10 was an earned breakup fee because of a subsequent closing, we
11 were in a position of agreeing to pay the expense reimbursement
12 for nothing, because then whether or not the winning bidder
13 closed, there was expense reimbursement. Why would we do that?

14 MR. LAURIA: We didn't do that.

15 THE COURT: Right, but what we did --

16 MR. LAURIA: We didn't do that.

17 THE COURT: But what we did -- and maybe there was
18 just a cosmic failure of --

19 MR. LAURIA: There was a lot of trading going on.

20 THE COURT: -- the meeting of the minds. Lot of
21 trading going on --

22 MR. LAURIA: You know, Your Honor --

23 THE COURT: -- right.

24 MR. LAURIA: -- this was not a single-issue hearing.

25 I mean, there was a -- this whole bid procedures --

1 THE COURT: So, Mr. Lauria --

2 MR. LAURIA: -- was heavily negotiated.

3 THE COURT: -- what you're telling me now is you never
4 said out loud the words "LBAC's going to walk" because you
5 wanted to keep your cards close to the vest?

6 MR. LAURIA: I certainly didn't want to concede what
7 our position was going to be when and if they took that
8 position. I mean, and it would be incredibly prejudicial to
9 have done so.

10 THE COURT: Okay. I think we ought to talk about some
11 scheduling things and some discovery issues that I think might
12 result from today. So what I'd like to do is take a break till
13 12:25 and then we're going to resume in this room, but without
14 the feed, for an informal conference off the record, but just
15 with the parties, off the record, to deal with some scheduling
16 matters. All right?

17 So you folks take a break. We'll do what we have to,
18 to cut the feed. And then I'm going to ask that you only
19 invite back into the courtroom the parties that we would
20 usually have in that kind of a session.

21 MR. LAURIA: All right.

22 THE COURT: Okay? Is everyone clear on that? 12:25.

23 (Recess from 12:14 p.m. until 2:50 p.m.)

24 THE COURT: All right, we're going to go back on the
25 record now to conclude the hearing today on the issues that

1 have been outlined in the statement of the ad hoc secured
2 group, which was filed at docket 1220, the reply in further
3 support of the objection of L-Band to the statement of the ad
4 hoc group, which was filed at docket 1246. And then there were
5 two subsequent pleadings that were filed on January 20th by the
6 ad hoc secured group. In addition, there was an objection of
7 L-Band that was filed with respect to the same issues.

8 I appreciated the arguments that the parties made this
9 morning. And I think, procedurally, the way this is best
10 approached, notwithstanding the parties' good attempts to tee
11 this up in a procedurally correct fashion, and I'm not
12 suggesting that it hasn't been, but I think what makes the most
13 sense is to give you a tentative view or ruling with respect to
14 the termination of the plan support agreement by LBAC. And I
15 say "by LBAC" and not the other plan sponsors, because the
16 letter dated January 7th, which notified the other parties to
17 the plan support agreement that there was a termination, was
18 sent by L-Band Acquisition and not by SPSO.

19 So that the issues that we're dealing with are the
20 termination of the plan support agreement by LBAC, effective at
21 11:59 on January 10th, and the withdrawal of the LBAC bid,
22 which I believe, based on what the parties have indicated here
23 today, LBAC's position was that that was effectuated by that
24 same notice term in the plan support agreement. The Court
25 expressed some confusion with respect to the provisions of the

1 plan support agreement and how the withdrawal of the bid had
2 been affected. And Ms. Strickland, on the record here today,
3 confirmed and made, I think, absolutely clear that LBAC
4 believed it had previously withdrawn the bid, and clarified
5 that in fact the bid has been withdrawn.

6 So as things stand now, the LBAC bid was withdrawn.
7 The ad hoc secured group's position is that the language in the
8 bid procedures superseded, if you will, the operation of the
9 milestones in the plan support agreement. And there was a lot
10 of argument back and forth today, including over how the
11 drafting of the order on bid procedures evolved.

12 It's my tentative view, which I will indicate to the
13 parties that I will be prepared to reflect onto the record of
14 the confirmation hearing of the ad hoc secured group's plan,
15 it's my tentative view that in fact the PSA was appropriately
16 and lawfully terminated as a result of the failures to achieve
17 the milestones that were set forth in the plan and that were
18 continued from time to time and that, as a result of that,
19 because the plan support agreement was terminated by LBAC, it
20 was permissible for LBAC to withdraw its bid, notwithstanding
21 what the ad hoc group has pointed out, which in its view was
22 contrary language in the bid procedures order.

23 I think it can be acknowledged that, taken literally
24 and out of context, the words in the bid procedures order in
25 fact say that the bid would be irrevocable through February

1 15th, 2014. But as I've stated before in the context of the
2 adversary proceeding, for example, I think it's incumbent on
3 the Court to view the language of agreements in the context --
4 and in this case the context certainly is well known to the
5 Court, although based on the arguments of the parties it seems
6 that people may have taken away different things from the
7 various proceedings that occurred. Be that as it may, as a
8 tentative matter, it's the Court's determination that the LBAC
9 bid has in fact been withdrawn.

10 The ad hoc secured group, at some point as we continue
11 on, will be free to present its plan for confirmation, and at
12 that time this ruling -- the Court's prepared to, at the
13 parties' request, reflect this ruling into the record of that
14 proceeding, to ensure that anybody's appeal with respect to
15 this particular determination is preserved.

16 And I think that that covers what we need to
17 accomplish today.

18 In terms of the ongoing schedule of what we're doing,
19 Mr. Barr, could you just very quickly recite the coming
20 attractions?

21 MR. BARR: Yes, Your Honor. Your Honor, putting aside
22 any conferences that may be necessary off the record regarding
23 discovery disputes go (sic) forward, I believe what we have
24 currently scheduled will be -- the next day in court is
25 December 31st, which is the --

1 THE COURT: Not December.

2 MR. BARR: I'm sorry; January 31st, which is the
3 hearing in connection with the debtor-in-possession financing
4 motion that we filed last week.

5 As I mentioned last time, we also do have an agreement
6 in principle with MAST on an extension of the maturity of the
7 DIP. We will be filing a notice pursuant to that DIP order and
8 agreement. If there are any objections to that, which we don't
9 anticipate, we can have those heard on the 31st as well; we'll
10 notice it in that fashion.

11 Then, Your Honor --

12 THE COURT: Is the hearing on the DIP going to be an
13 evidentiary hearing?

14 MR. BARR: To the extent we have objections or to the
15 extent that Your Honor would like a record, we will have --

16 THE COURT: Well --

17 MR. BARR: -- a declarant who we can proffer his
18 testimony, and he'll be here subject to cross-examination.

19 THE COURT: Okay. Thank you.

20 MR. BARR: On Monday, February 3rd, Your Honor, we
21 will then commence the confirmation hearing with respect to the
22 U.S. Bank-MAST Chapter 11 plan. We're anticipating that that
23 would be probably a two-day hearing; may slip into the 5th,
24 but -- so we've scheduled the 3rd and 4th for the MAST plan.

25 And then the 5th and 6th of that week, Your Honor, we

1 would have those days scheduled for continuation of the
2 adversary proceeding that was commenced by the company against
3 SPSO, Mr. Ergen, LBAC, DISH -- I'm sorry; not LBAC -- DISH and
4 EchoStar.

5 THE COURT: Okay. And then to the extent that that's
6 not completed, we will continue with that on February 11th?

7 MR. BARR: Correct, Your Honor.

8 THE COURT: And to the extent that it is completed,
9 then we will proceed to the confirmation of one of the other
10 plans?

11 MR. BARR: Correct, Your Honor.

12 THE COURT: Okay. Is there anything that anybody
13 wishes to add? Is there anyone -- any further clarification or
14 bells or whistles that anyone would like, surrounding the issue
15 of the termination of the PSA and the withdrawal of the LBAC
16 bid?

17 Okay. Thank you all very much for sticking with it
18 without a lunch break. And we'll wait to hear from you.

19 MR. BARR: Thank you, Your Honor.

20 THE COURT: Thanks.

21 Thanks, Karen.

22 (Whereupon these proceedings were concluded at 3:00 PM)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript is a true and accurate record of the proceedings.

Penina Wolicki

PENINA WOLICKI

AAERT Certified Electronic Transcriber CET**D 569

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