

1 valuable spectrum assets.

2           The questions before the Court among others, are  
3 whether SPSO's debt purchases violated the LightSquared LP  
4 credit agreement and whether its now approximately one-billion-  
5 dollar, inclusive of interest, should therefore be disallowed,  
6 or alternatively, whether SPSO's claim should be equitably  
7 subordinated by virtue of its conduct in connection with the  
8 debt purchases and/or in connection with these Chapter 11  
9 cases.

10           The Court's analysis is as follows:

11           And at this point I skip ninety pages of parties'  
12 procedural history and findings, and I pick up at page 94 with  
13 the discussion.

14 INTRODUCTION.

15           And I also will be sparing you a good deal of the  
16 footnotes which contain a lot of important materials, but will  
17 interrupt the flow of the decision.

18           The complaints assert a variety of causes of action  
19 against defendants DISH, EchoStar, SPSO and Mr. Ergen. The  
20 complaints seek redress against Mr. Ergen and the entities he  
21 controls for his allegedly unlawful conduct in purchasing the  
22 LP debt in violation of the provisions of the credit agreement  
23 that prohibit disqualified companies from purchasing the debt.

24           Under one or more of several theories of liability,  
25 plaintiffs maintain that SPSO is not an eligible assignee and

1 that therefore the claim of SPSO should be disallowed, or in  
2 the alternative, subordinated pursuant to Section 510(c) of the  
3 Bankruptcy Code.

4 The complaints also assert that SPSO and Mr. Ergen  
5 engaged in additional inequitable conduct during the course of  
6 these cases, conduct which plaintiffs assert provides further  
7 reason for the Court to impose the remedy of equitable  
8 subordination to redress the harm caused to innocent creditors.

9 For the reasons discussed below, the Court has  
10 determined that, although the SPSO claims shall not be  
11 disallowed, it shall be equitably subordinated in an amount to  
12 be determined.

13 II. SPSO CANNOT BE HELD LIABLE FOR BREACH OF THE  
14 EXPRESS TERMS OF THE CREDIT AGREEMENT.

15 A) SPSO was not technically prohibited from purchasing  
16 the LP debt.

17 At the center of this contractual dispute is the term  
18 "eligible assignee", a common term included in loan agreements  
19 in order to limit a lending institution's ability to assign the  
20 loan to other entities. See, e.g., Meridian Sunrise Village v.  
21 N.B. Distressed Debt Investment Fund, Ltd. 2014 Westlaw 909219,  
22 (W.D. Wash.).

23 Here the credit agreement permits only eligible  
24 assignees to acquire LP debt. Excluded from the definition of  
25 "eligible assignee are": one, natural persons, and

1 two disqualified companies. And as such, these entities are  
2 not eligible to purchase LP debt.

3 A disqualified company is defined in the credit  
4 agreement in relevant part as any operating company which is a  
5 direct competitor of the borrower, and set forth on schedule  
6 101-A, as well as any known subsidiary thereof.

7 Although "Subsidiary", upper case, is defined in the  
8 credit agreement in relevant part as any other person that is  
9 otherwise controlled by the parent and one or more subsidiaries  
10 of the parent, the word "subsidiary" as used in the definition  
11 of disqualified company is not capitalized.

12 As disqualified companies included on Schedule 101-A,  
13 DISH and EchoStar were not permitted to purchase the LP debt,  
14 nor was Mr. Ergen permitted to purchase the debt personally, as  
15 the credit agreement does not permit a natural person to be an  
16 eligible assignee.

17 SPSO, however, was not precluded by the express terms  
18 of the credit agreement from purchasing the LP debt, inasmuch  
19 as it is not an operating company which is a direct competitor  
20 of LightSquared listed on Schedule A. If, however, it is a  
21 known subsidiary of a disqualified company, it cannot be an  
22 eligible assignee.

23 Because the capitalized term "Subsidiary" was not  
24 utilized in the definition of disqualified company the Court  
25 looks to the commonly understood definition of the word

1 subsidiary. The dictionary definition of subsidiary used as a  
2 noun is a shortened version of subsidiary corporation, which is  
3 defined by Black's Law Dictionary as "a corporation in which a  
4 parent corporation has controlling share."

5 Similarly, courts have held that a subsidiary is  
6 commonly understood to mean a corporation "that is controlled  
7 by another corporation by reason of the latter's ownership of  
8 at least a majority of the shares of the capital stock.  
9 National Gear & Piston v. Cummins Power System, 2013 Westlaw  
10 5434638 (S.D.N.Y.).

11 As the Delaware Supreme Court has observed, "The  
12 ordinary and plain meaning of subsidiary requires ownership of  
13 more than half the stock of the subsidiary by the parent."  
14 Liggett Group Inc. v. ACE Property and Casualty, 798 A.2d.  
15 1024, (Del. 2002).

16 Neither DISH nor EchoStar controls SPSO by reason of  
17 its ownership of the majority of the shares of SPSO. In fact  
18 the evidence has established that Mr. Ergen wholly owns SPSO.  
19 SPSO is not a subsidiary of DISH or EchoStar.

20 While the term subsidiary is well understood to  
21 reference ownership, the broader term "affiliate" used  
22 elsewhere throughout the credit agreement includes entities  
23 controlled by or under common control with one another. See  
24 Delaware Insurance Guarantee Association v. Christiana Care  
25 Health Services -- Health Services 892 A.2d, 1073 (Del. 2006).



1           While SPSO may in fact be an affiliate of DISH and  
2 EchoStar the definition of disqualified company in the credit  
3 agreement does not include the term "affiliate", which the  
4 credit agreement defines in relevant part as "with respect to a  
5 specified person, another person that is under common control  
6 with the person specified."

7           By its terms the credit agreement does not prohibit  
8 affiliates of disqualified companies from buying LP debt.  
9 Moreover, as this Court previously observed in its decision on  
10 the motions to dismiss, even if one were to assume that the  
11 term subsidiary as used in the definition of disqualified  
12 company has the meaning of the defined term Subsidiary, such  
13 that control by DISH or EchoStar was the key inquiry,  
14 plaintiffs have not proven that DISH or EchoStar has the  
15 ability to control SPSO or that Mr. Ergen acts subject to the  
16 control of DISH or EchoStar as an agent would.

17           In fact, plaintiffs allege just the opposite, that Mr.  
18 Ergen controls DISH and EchoStar, makes decisions on their  
19 behalf and acts with complete authority for DISH and EchoStar  
20 to carry out those decisions.

21           Accordingly, in analyzing the plain words of the  
22 credit agreement, SPSO is an eligible assignee, and the Court  
23 finds no breach of an express term of the credit agreement.

24           And here I will read a footnote. To recover on a  
25 claim for tortious interference, a party must prove: one, the

1 existence of a valid contract between the plaintiff and the  
2 third party; two, defendant's knowledge of the contract;  
3 three, defendant's intentional procurement of the third-party's  
4 breach of contract without justification; four, actual breach  
5 of the contract; and five, damages resulting therefrom. See  
6 Kirch v. Liberty Media Corporation 449 F.3d 338 (2d Cir. 2006).

7 Because the Court finds no breach of an express term  
8 of a contract, the Court also finds that plaintiffs have failed  
9 to prove their claims against DISH and EchoStar for tortious  
10 interference with the contract.

11 III. SPSO'S ACQUISITION OF THE LP DEBT VIOLATED THE  
12 SPIRIT OF THE CREDIT AGREEMENT AND IS A BREACH OF THE IMPLIED  
13 COVENANT OF GOOD FAITH AND FAIR DEALING.

14 Although the Court declines to find that SPSO breached  
15 an express term of the credit agreement, there nonetheless  
16 remains the question of whether SPSO's acquisition of the LP  
17 debt was made on behalf of DISH or for the benefit of DISH, and  
18 if so, what consequences flow from that conclusion.

19 There is overwhelming evidence in the record that  
20 SPSO's acquisition of LP debt, at least as of April 2013 and  
21 possibly earlier, was carried out for the benefit of DISH with  
22 a tacit approval of or at least no interference by the members  
23 of the DISH board and certain members of DISH senior  
24 management, including its CFO and general counsel.

25 The facts are these:

1           A) SPSO's LP debt purchase.

2           1. The fall of 2011: Mr. Ergen identifies  
3       LightSquared as attractive and begins buying in April 2012.

4           Mr. Ergen testified that in the fall of 2011 he  
5       believed the spectrum and satellites of LightSquared might be  
6       an attractive investment opportunity for DISH and therefore  
7       began looking into acquiring LightSquared's LP debt. He asked  
8       Jason Kiser, the treasurer of DISH and a vice president of  
9       corporate development and DISH and EchoStar, to provide him  
10      with information.

11          Mr. Kiser testified at trial that until it was clear  
12      that DISH and EchoStar could not purchase the debt, the  
13      LightSquared investment was considered a corporate opportunity.

14          After reviewing the credit agreement and consulting  
15      with Sound Point and Sullivan & Cromwell, DISH's corporate  
16      counsel, and not Mr. Ergen's personal counsel, Mr. Kiser  
17      determined that both DISH and EchoStar were prohibited from  
18      buying the LP debt and communicated this to Mr. Ergen.

19          No evidence was submitted that Mr. Kiser or Mr. Ergen  
20      made a more formal inquiry to the boards of directors of DISH  
21      or EchoStar, or consulted with management of either company  
22      prior to making any personal purchases of LP debt.

23          Having gotten the all clear from Mr. Kiser, Mr. Ergen  
24      through SPSO began buying the LP debt in April 2012. In order  
25      to enable Mr. Ergen to purchase the LP debt, Mr. Kiser created

1 two limited liability companies, Bal Harbour Capital Management  
2 LLC and Bal Harbour Holdings LLC, which were subsequently  
3 replaced by two other entities: one, Special Opportunities  
4 Holdings LLC, which is solely owned by Mr. Ergen; and two, its  
5 wholly owned subsidiary, SPSO.

6 Mr. Kiser testified that the change to SPSO as the  
7 investment vehicle was necessary because Bal Harbour's  
8 formation documents listed a Littleton, Colorado address, which  
9 Mr. Ergen and Mr. Kiser determined may have compromised Mr.  
10 Ergen's anonymity and "might lead people to Mr. Ergen's  
11 doorstep."

12 Defendants maintained that Mr. Ergen desires to keep  
13 his personal investments confidential. Plaintiffs allege that  
14 the desire for anonymity here stems from Mr. Ergen's desire to  
15 conceal his purchases of LP debt to facilitate his intentional  
16 violation of the credit agreement.

17 2. The LP debt is a "good investment". Between April  
18 13th, 2012 and April 26th, 2013, Mr. Ergen through SPSO,  
19 contracted to purchase over one billion dollars in par value of  
20 LP debt of which SPSO actually closed trades for approximately  
21 844 million in par value. Specifically, prior to  
22 LightSquared's petition date on May 14th, 2012, SPSO purchased  
23 a total of approximately 287 million dollars in par value of LP  
24 debt with SPSO's largest purchase comprised of the May 4th,  
25 2012 purchase of Carl Icahn's approximately 247-million-dollar

1 position.

2           These initial purchases were made between 48.75 cents  
3 and 60.25 cents on the dollar. Mr. Ergen testified that at  
4 this time he believed the debt was a good investment and that  
5 he did not have an idea of how much SP -- how much debt SPSO  
6 would eventually buy.

7           3. "I would have them vote 'no' on LightSquared's  
8 forbearance request."

9           On May 4th, 2012, after Mr. Ergen agreed to purchase  
10 Mr. Icahn's 247-million-dollar position in the LP debt, but  
11 before the trade closed, he was given the option of directing  
12 the seller's vote on whether to authorize an amendment to the  
13 credit agreement pursuant to which the lenders would forebear  
14 from exercising remedies and which would have allowed  
15 LightSquared to continue to work toward a consensual  
16 arrangement with its lenders and possibly avoid a bankruptcy  
17 filing.

18           Despite, one, being told that Mr. Icahn was inclined  
19 to support the request for a short forbearance, and two, not  
20 having reviewed the terms of the amendment itself, Mr. Ergen  
21 directed a no vote on the Friday evening prior to the Monday  
22 response deadline.

23           His testimony that he voted no because he had been  
24 unable to review the proposed amendment was not credible, as  
25 the evidence reveals that the amendment documents could have

1 been obtained by Sound Point had Mr. Ergen and Mr. Kiser  
2 indicated an interest in reviewing them over the weekend.  
3 There was also no evidence introduced that Mr. Kiser or Mr.  
4 Ergen made any effort to discuss the proposed amendment with  
5 any of the other lenders.

6 While the debtors argue that these actions on the part  
7 of Mr. Ergen reveal that with respect to LightSquared debt he  
8 was not interested in acting like a traditional creditor, it is  
9 worth noting that there is nothing that requires a creditor to  
10 support a forbearance request.

11 That Messrs. Kiser and Ergen failed to testify  
12 truthfully about the reasons for the no vote is significant,  
13 however, and is part of a troubling pattern of noncredible  
14 testimony.

15 4. There might be some truth to the press reports of  
16 Ergen's LightSquared LP debt purchases.

17 After SPSO purchased Mr. Icahn's 247-million-dollar  
18 position in the LP debt, the Denver Post reported that Mr.  
19 Ergen had "snatched up" 350 million dollars of LightSquared  
20 debt.

21 This article prompted an e-mail from Gary Howard, a  
22 DISH board member to Stanton Dodge, DISH's general counsel and  
23 to other members of the board asking if the story was accurate.

24 Mr. Dodge's May 16th, 2012 e-mail reply on which he  
25 copied the entire DISH board, including Mr. Ergen, stated:

1 "Further to Gary's e-mail below and since another board member  
2 inquired about the recent press reports regarding LightSquared  
3 bonds, I wanted to send a brief note to the full board; the  
4 company, DISH, did not buy any LightSquared bonds."

5 Notably, Mr. Dodge's reply did not address the direct  
6 question of whether Mr. Ergen had purchased LightSquared debt  
7 personally, and there is no evidence that any member of the  
8 DISH board followed up in order to receive a clear response to  
9 this question, consistent with the fiduciary duties owed by the  
10 DISH directors to examine whether the purchases may have been a  
11 corporate opportunity.

12 While the Court will not insert itself in matters of  
13 DISH corporate governance that are the province of DISH and its  
14 shareholders, the Court will infer from this inaction that the  
15 members of the DISH board, who from press reports had more than  
16 an inkling of Mr. Ergen's purchases, were tacitly acquiescing  
17 to Mr. Ergen's foray into LightSquared's capital structure and  
18 they did not see fit to double-check the corporate opportunity  
19 questions it obviously raised.

20 Mr. Dodge's reply reveals the apparent attitude of  
21 members of the DISH board and senior management that where Mr.  
22 Ergen was concerned, it was better not to ask a lot of  
23 questions and to let him conduct his business as he saw fit.

24 Members of DISH senior management also first learned  
25 from the press of Mr. Ergen's LP debt purchases, made their own

1 inquiries to Mr. Ergen directly and were rebuffed. After Mr.  
2 Ergen did not provide them with candid answers, they also did  
3 not inquire further. Specifically, when Mr. Dodge confronted  
4 Mr. Ergen about the press report of his purported purchases of  
5 the LP debt, Mr. Ergen responded coyly, that there "might be  
6 some truth" to the report. There is no evidence that Mr. Dodge  
7 made further inquiry.

8 Mr. Cullen, who as executive vice president of  
9 corporate development, leads DISH's strategic acquisitions and  
10 is considered to be "Ergen's closest confidante on all things  
11 wireless with an office next to Ergen's," also asked Mr. Ergen  
12 about the reports of his LightSquared debt purchases, but was  
13 only able to elicit confirmation from Mr. Ergen that there  
14 either is or might be some truth to the reports.

15 At trial, Mr. Cullen acknowledged that he owed  
16 fiduciary duties to DISH but testified that upon learning of  
17 Mr. Ergen's purchases of LP debt he: one, did not ask Mr.  
18 Ergen why DISH was not buying the debt; two, did not ask in-  
19 house counsel whether there was an issue with Mr. Ergen making  
20 a personal investment in the debt; and three, did not take any  
21 steps to determine whether Mr. Ergen's purchases were a  
22 corporate opportunity.

23 Together these e-mails and conversations reveal a  
24 striking lack of candor between Mr. Ergen and the members of  
25 DISH's board of directors and senior management. In addition



1 to demonstrating that "no one crosses the chairman," as  
2 explicitly stated by one member of the DISH board, the  
3 inquiries or lack thereof posed to Mr. Ergen also suggest that  
4 the DISH board and senior executives may have been unconcerned  
5 about Mr. Ergen's personal LightSquared debt purchases and  
6 later his LBAC bid, because they had confidence that his  
7 strategy would inure to the benefit of DISH.

8           Regardless, it is notable that there were no further  
9 inquiries. Mr. Ergen testified at trial that until the May  
10 2nd, 2013 board presentation, he did not speak to anyone at  
11 DISH besides Mr. Kiser regarding his purchases of LP debt.

12           5. "If we can't be sure the company can buy, then I  
13 am interested to increase my position."

14           After his initial purchases in April and May of 2012  
15 Mr. Ergen did not purchase any -- pursue any purchases of LP  
16 debt until October 4th, 2012. Around that time, Mr. Ergen  
17 asked Mr. Kiser to check whether the restrictions on DISH's  
18 ability to acquire LightSquared debt had changed as a result of  
19 LightSquared's bankruptcy filing.

20           After Mr. Kiser wrote to Mr. Ergen that he could not  
21 get confirmation that the restrictions on DISH purchasing the  
22 debt had fallen away, Mr. Ergen responded, "If we can't be sure  
23 the company can buy them, then I am interested to increase my  
24 position at the seventy-five level at least up to a thirty-  
25 three percent ownership level of the class." This statement by

1 Mr. Ergen establishes that at least from that moment in time  
2 the preferred purchaser of the LP debt was DISH.

3 Mr. Kiser's testimony that the reason for again  
4 checking the credit agreement was to confirm that there was no  
5 corporate opportunity for DISH, was not credible and is not  
6 consistent with the precise words of Mr. Ergen's directive. In  
7 fact, it would appear that there did exist a path for DISH to  
8 become a lender under the credit agreement. The credit  
9 agreement by its express terms contains no restrictions on  
10 affiliates of disqualified companies becoming lenders.

11 The Court was presented with no evidence that the DISH  
12 board was in fact aware of this and considered whether to  
13 create an affiliate to purchase LP debt nor any other evidence  
14 to support the contention that Mr. Ergen's focus was on making  
15 sure that he was not usurping a DISH corporate opportunity.

16 Notwithstanding, from Mr. Ergen's choice of words in  
17 inquiring about whether DISH could purchase the LP debt, the  
18 Court can reasonably draw an inference that Mr. Ergen's  
19 statement that his investment was conceived of and always  
20 intended to be purely for personal purposes was not truthful.  
21 It is clear that DISH was the preferred purchaser.

22 After Mr. Ergen decided to acquire through SPSO at  
23 least a thirty-three-percent stake in LightSquared debt, Mr.  
24 Kiser asked Mr. Ketchum to track whether SPSO had a blocking  
25 position. Although Mr. Ketchum initially testified that he did

1 not recall discussing acquiring a blocking position with Mr.  
2 Kiser, he later admitted that Kiser had told him, "he was very  
3 interested in tracking whether or not SPSO had a blocking  
4 position with respect to LightSquared." Mr. Ketchum was not a  
5 credible witness on this point and many others.

6 6. "You've just bought a spectrum company."

7 When asked about the desire for a blocking position,  
8 both Mr. Kiser and Mr. Ergen testified that thirty-three  
9 percent ownership of the LP debt would provide SPSO and  
10 therefore Mr. Ergen with a blocking position, such that SPSO  
11 could enforce certain rights during the bankruptcy proceeding.  
12 However, neither Mr. Ergen nor Mr. Kiser would admit to any  
13 intended linkage between obtaining a blocking position in the  
14 debt and making a bid for the company, or how the former could  
15 pave the way for the latter: DISH's acquisition of  
16 LightSquared spectrum.

17 It is clear from the evidence, however, that such a  
18 strategy began to emerge by late March, early April 2013.

19 By March 25th, 2013, Mr. Ergen needed to purchase  
20 another 112 million dollars of LP debt to reach a blocking  
21 position. On March 28th, 2013, he initiated a trade for 160  
22 million dollars face amount of LP debt at ninety-six cents on  
23 the dollar, almost double the price he initially paid for the  
24 LP debt in April 2012.

25 Notably, in this trade, he also sought to purchase the

1 preferred stock of LightSquared LP that was bundled with the LP  
2 debt and offered to pay between ninety-two and ninety-five  
3 cents on the dollar for that, or approximately 122 million  
4 dollars, just so, as Mr. Kiser testified, Mr. Ergen could have  
5 the "privilege" of obtaining that LP debt.

6 At trial, Mr. Ergen continued to deny the fact that he  
7 was willing to pay that price because he wanted to secure a  
8 blocking position, instead stating that he bought substantial  
9 amounts at close to par because "he loved the investment."

10 Notwithstanding, on March 28th, 2013 the date Messrs.  
11 Ergen and Kiser believed that they had achieved their intended  
12 goal of obtaining a blocking position, providing the trade  
13 closed, Mr. Ketchum sent an e-mail to Mr. Kiser stating "You've  
14 just bought a spectrum company." Later in that same e-mail,  
15 Ketchum said internally to his colleague, "We now control the  
16 company."

17 B) Mr. Ergen's conduct in the spring of 2013  
18 establishes that he was acting for DISH.

19 Indeed, Mr. Ergen acknowledged at trial that his  
20 LightSquared strategy had changed as of April 2013. Mr. Ergen  
21 testified that at that time, because of changes in the wireless  
22 industry and at the FCC he saw a "window of opportunity." He  
23 stopped looking at LightSquared as a debt investment and began  
24 to view it as a potential acquisition candidate.

25 Mr. Ergen testified that he had a general

1 understanding of the exclusivity stipulation and believed that  
2 if he wanted to make a bid for LightSquared he would have to do  
3 so by July. He hired Willkie Farr as bankruptcy counsel  
4 because in his words, "I don't need them for an investment, but  
5 I need them if I'm going to reach out, if I'm potentially going  
6 to look at LightSquared as an acquisition."

7 1. 320 million dollars at ninety-six cents on the  
8 dollar and confidence in the collateral.

9 Through four separate trades entered into between  
10 April 1, 2013 and April 26, 2013, Mr. Ergen, through SPSO,  
11 purchased approximately 300 million dollars of LP debt at  
12 ninety-six cents on the dollar. These were the final purchases  
13 of LP debt completed by SPSO, bringing its total ownership of  
14 the LP debt to approximately 844 million dollars in face value,  
15 the face amount it still owns today.

16 When asked about his substantial purchases at ninety-  
17 six cents on the dollar, Mr. Ergen testified that he was "very  
18 confident in the collateral," and as a result he bought  
19 whatever people would sell at that price because, "he felt it  
20 was a great investment."

21 Noticeably absent from the picture painted by Mr.  
22 Ergen's testimony is the fact that SPSO's April 2013  
23 acquisitions of 320 million dollars of LP debt at ninety-six  
24 cents on the dollar, which gave SPSO more than fifty percent  
25 ownership of the LP debt, achieved by indirection, something

1 that it could not have achieved directly, the creation of  
2 leverage for DISH to acquire LightSquared's assets.

3 It is within the scope of Mr. Ergen's broad authority  
4 as chairman of the boards of directors and executive chairman  
5 of both DISH and EchoStar to lead DISH and EchoStar's strategic  
6 acquisition of spectrum assets. And the evidence demonstrates  
7 that Mr. Ergen's objective, beginning in April 2013, included  
8 preserving for DISH the option to bid for LightSquared's  
9 spectrum assets.

10 While in May 2012 it may have been unclear even to Mr.  
11 Ergen whether he was purchasing LP debt for his own benefit or  
12 for the benefit of DISH, as of April 26th, 2013, a few days  
13 before Mr. Ergen formally presented the opportunity to DISH,  
14 there is no doubt that he was acting for the benefit of DISH.

15 2. "Mr. Ergen's substantial interests in L2 debt and  
16 preferred stock complement any acquisition strategy."

17 Mr. Ergen's actions at the DISH and EchoStar board  
18 meetings held on May 1st and May 2nd, 2013, shortly after SPSO  
19 obtained its blocking position and DISH completed its April 3rd  
20 capital raise, further reveal his intention to benefit DISH by  
21 his debt acquisition, and paved the way for DISH to acquire  
22 LightSquared spectrum assets.

23 After disclosing his LP debt acquisition to the boards  
24 of DISH and EchoStar for the first time, Mr. Ergen gave the  
25 Ergen presentation, including his proposal for "any combination

1 of Mr. Ergen, EchoStar, and/or DISH based on company interest  
2 to acquire LightSquared's assets for 2 to 2.1 billion dollars."  
3 Specifically the Ergen presentation informed each board that  
4 Mr. Ergen's blocking position in the LP debt could help  
5 facilitate any bid for LightSquared's assets. "Mr. Ergen's  
6 substantial interest in L2 debt and preferred stock complement  
7 any acquisition strategy and could have significant influence  
8 in L2's Chapter 11 cases."

9 Mr. Ergen understood the critical nature of the timing  
10 of the bid, and he testified at trial that given the July 15th  
11 termination of the debtors' exclusive periods it was likely  
12 that LightSquared "could begin exploring strategic alternatives  
13 in early June if no restructuring or sale strategy emerges."  
14 His understanding was that "anyone could come to the court to  
15 make an offer for LightSquared, that that might be a corporate  
16 opportunity for DISH and for EchoStar."

17 Because Mr. Ergen recognized, however, that the DISH  
18 Board was at the time focusing on the potential Sprint and  
19 ClearWire transactions, had performed no analysis of  
20 LightSquared, and did not authorize a bid for LightSquared at  
21 that time, Mr. Ergen planned to make a bid "personally" to  
22 preserve "optionality" for DISH and/or EchoStar to bid on  
23 LightSquared assets. He did not, however, seek approval from  
24 either board to make a bid personally.

25 3. Mr. Ergen makes a bid himself, keeping options

1 open for DISH.

2 Two weeks later on May 15th, 2013, Mr. Ergen by his  
3 counsel submitted an unsolicited cash bid for LightSquared's  
4 spectrum for two billion dollars, the LBAC bid, on behalf of  
5 LBAC which had not yet been formed. The wording of the LBAC  
6 bid provided optionality for DISH to be the ultimate purchaser,  
7 stating that the newly formed buyer would be "owned by one or  
8 more of Charles Ergen, affiliated companies, and/or other third  
9 parties."

10 Nonbinding and expiring on May 31st, 2013, the bid  
11 emphasized LBAC's "willingness to fund the purchase prices on a  
12 nonrefundable basis prior to receipt of FCC and Industry Canada  
13 approvals and authorizations," and it explicitly stated that  
14 the cash purchase price of two billion dollars could be used to  
15 pay off LP debt.

16 With its lack of conditionality and offer of cash  
17 consideration sufficient to pay off the LP debt in full, the  
18 LBAC bid accomplished the objectives set forth in the Ergen  
19 presentation given to the DISH board two weeks earlier of  
20 proposing a bid that would "be highly attractive to  
21 stakeholders and put pressure on L2 fiduciaries to consider the  
22 proposal."

23 The existence of the LBAC bid quickly hit the press.  
24 Upon learning of the bid, no member of the boards of directors  
25 or management of DISH or EchoStar formally objected to Mr.



1 Ergen's having made a personal bid for LightSquared's assets.

2 Mr. Ergen, a top DISH execu -- Mr. Cullen, a top DISH  
3 executive, stated that he learned of the bid through news  
4 reports but did not ask Mr. Ergen if he was usurping a  
5 corporate opportunity, despite not being aware at that time  
6 that Mr. Ergen had presented the DISH board with the option to  
7 make a bid.

8 The Court can infer from the inaction of DISH's board  
9 and management upon learning of Mr. Ergen's personal bid that  
10 they either, one, understood that the LBAC bid and the strategy  
11 behind it were ultimately for the benefit of DISH, even if made  
12 by Mr. Ergen personally at that time; or two, they did not wish  
13 to impede Mr. Ergen's forward movement on his own bid,  
14 notwithstanding their fiduciary obligations.

15 4. "You were way ahead of your skis here."

16 On May 8th, 2013, one week prior to the LBAC bid, the  
17 DISH board had formed a special committee consisting of two  
18 directors independent of Mr. Ergen, Mr. Goodbarn and Mr.  
19 Howard. Pursuant to board resolutions, the special committee  
20 was vested with the power and authority to: one, review and  
21 evaluate, including any potential conflicts of interest arising  
22 out of Mr. Ergen's proposal to the DISH board regarding  
23 LightSquared and his personal interest in LightSquared; a  
24 potential bid for LightSquared; and whether such bid was in the  
25 best interests of DISH and its shareholders; and to discuss

1 and/or negotiate with such a transaction; two, negotiate  
2 definitive agreements with the parties concerning the terms and  
3 conditions of the potential bid; and three, determine whether  
4 such terms and conditions are fair to DISH.

5           The board formally resolved that the special  
6 committee's authority would expire only upon the special  
7 committee's "determination in its sole and absolute discretion  
8 as set forth in its written notice to the chairman of the board  
9 of directors 'as long as the bid for LightSquared's assets  
10 remains viable'."

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

18           Upon learning on May 22nd, 2013 of the special  
19 committee's recent engagement of independent counsel, Mr. Ergen  
20 pushed them to hold off asking why special committee counsel  
21 was needed and cautioning that "you are way ahead of your skis  
22 here."

23           Similarly, at a May 31st, 2013 meeting, Mr. Ergen  
24 suggested that the special committee should delay engaging its  
25 financial advisor, as in Mr. Ergen's view, there would be

1 "little activity, if any, in the coming weeks regarding a  
2 LightSquared transaction."

3 After delaying the retention of its professionals and  
4 keeping the committee in what Mr. Howard later described as a  
5 holding pattern, Mr. Ergen suddenly reversed course in early  
6 July, urging the special committee to complete its evaluation  
7 quickly and make a recommendation to the DISH board.

8 The existence and amount of the LBAC bid created a  
9 significant challenge to the special committee's task of  
10 evaluating a DISH potential bid and determining what terms and  
11 conditions were fair to DISH. Upon learning of the LBAC bid  
12 from news alerts on May 20th and 21st, 2013, Mr. Howard stated  
13 that he was surprised as it "was his expectation that Mr. Ergen  
14 would not make any LightSquared bid without first discussing it  
15 with the DISH board and the special committee in order to get  
16 their approval since any such bid could impact DISH's own  
17 strategy vis-a-vis LightSquared."

18 When asked whether the special committee considered  
19 proposing that DISH make a bid for LightSquared spectrum below  
20 the amount of the LBAC bid, Mr. Goodbarn stated that the LBAC  
21 bid "made it difficult socially to do that, because Ergen has  
22 put a line in the sand on the bid and we're part of a, you  
23 know, a DISH board and he owns a majority of the company."

24 Pressed further on why it would be difficult for DISH  
25 to make a bid lower than Mr. Ergen's bid, Mr. Goodbarn

1 explained that if Mr. Ergen had committed to a two-billion-  
2 dollar bid with no other bidder present and the special  
3 committee then bid 1.5 billion dollars, Mr. Ergen may take a  
4 big loss on his debt investment and, "that does not make a very  
5 happy chairman."

6           These statements by an independent board member  
7 demonstrate that Mr. Ergen as chairman of the board and  
8 majority owner of DISH exercised significant control. The  
9 special committee did not determine to bid the lower price, as  
10 Mr. Ergen had already staked out the territory with a bid that  
11 would ensure that he, as a substantial holder of LP debt, would  
12 be paid in full, and no one was interested in making him  
13 unhappy by altering that.

14           Furthermore, although the role of the special  
15 committee included evaluating any potential conflicts of  
16 interest, the repeated requests of the committee to Mr. Ergen  
17 for information regarding his LP trade debts were ignored, and  
18 Mr. Ergen never provided the committee with the requested  
19 schedule of his trades.

20           The special committee's stated reasons for seeking  
21 such information were significant: "To assess Mr. Ergen's  
22 conflict, to determine the potential profit that Mr. Ergen  
23 would make if DISH made a successful bid, and to assess whether  
24 DISH should have been entitled to pursue the corporate  
25 opportunity of buying LightSquared debt before permitting Mr.

1 Ergen to do so for his personal account."

2 Mr. Howard stated that the he did not recall ever  
3 hearing from Mr. Ergen or his counsel that the committee's  
4 request for information were improper or that Mr. Ergen had no  
5 obligation under DISH's charter to bring potential corporate  
6 opportunities to the attention of the DISH board. Yet, Mr.  
7 Ergen provided no reason for leaving the special committee in  
8 the dark on this key inquiry.

9 On July 3, 2013, Mr. Ergen sent to the special  
10 committee and David Moskowitz, an in-house attorney and a  
11 senior vice president for DISH and EchoStar, via e-mail, a  
12 presentation for the special committee and the DISH board.

13 In the e-mail, Mr. Ergen stated, "This is just a  
14 high-level view of LightSquared and its potential relation to  
15 DISH. Please feel free to share with the board or advisors.  
16 Also not on here would be the possibility of freeing up at  
17 least two of the existing DBSD TerreStar satellites that could  
18 be possibly be monetized."

19 The presentation, dated July 8th, 2013, was entitled  
20 "Strategic Investment Opportunity L-band Acquisition  
21 Corporation LLC", hereinafter referred to as the Ergen July 8th  
22 presentation. It was delivered to the DISH board of directors  
23 by Mr. Ergen at a special meeting on July 8th, 2013.

24 The Ergen July 8th presentation provided, for  
25 discussion purposes, in the context of considering whether DISH

1 would participate in the LBAC bid, certain valuation  
2 information relating to LightSquared's spectrum as of that  
3 date.

4 Under a line item entitled Net -- Implied Net Primary  
5 Asset Value, the Ergen July 8th presentation lists a range of  
6 values of between 3.341 billion and 5.213 billion, with a  
7 midpoint of 4.277 billion, referring to Mr. Ergen's estimate of  
8 the value of 20 megahertz LightSquared spectrum assets and its  
9 satellites, excluding its 10 megahertz of lower downlink  
10 spectrum.

11 Under the heading entitled Implied Supplemental Asset  
12 Value, the Ergen July 8th presentation lists a range of values  
13 of between 1.833 billion and 3.783 billion, with a midpoint of  
14 2.308 billion, for what it identifies as the total of: one, 5  
15 megahertz of reclaimed unusable AWS-4; two, 5 megahertz of  
16 reclaimed impaired AWS-4; and three, L-band downlink spectrum.

17 The implied supplemental asset value was Mr. Ergen's  
18 estimate of, A, the increase in value of DISH's existing  
19 spectrum that would flow from DISH's acquisition of  
20 LightSquared spectrum, which would permit unusable and impaired  
21 uplink AWS-4 spectrum to be converted to downlink; and B, his  
22 range of values for 20 megahertz of LightSquared's downlink  
23 spectrum.

24 In other words, the supplemental value of  
25 LightSquared's assets to DISH was estimated by Mr. Ergen to be

1 between 1.833 and 3.783 billion dollars, combined with a net --  
2 implied net primary asset value of 3.341 billion to 5.213  
3 billion. The total value of LightSquared's assets in DISH's  
4 hands was estimated by Mr. Ergen to be between 5.174 billion  
5 and 8.996 billion, with a midpoint of 7.085 billion.

6 On July 21st, 2013, the special committee presented  
7 its conclusion to the DISH board, recommending that DISH pursue  
8 the LBAC bid for 2.2 billion dollars, subject to five express  
9 conditions, four of which implicated further review and  
10 decision making by the special committee: one, that any  
11 material changes to the terms of the bid and/or APA would be  
12 subject to the review and approval of the special committee;  
13 two, that DISH would acquire one hundred percent of LBAC to the  
14 exclusion of EchoStar; three, that the special committee and  
15 its legal and financial advisors would remain involved in all  
16 negotiations regarding the proposed transaction going forward;  
17 four, that the special committee would review and approve the  
18 terms of the acquisition by DISH of Mr. Ergen's interest in  
19 LBAC; and five, that the committee expressly reserved the right  
20 to obtain all of the requested information regarding Mr.  
21 Ergen's acquisition of the debt and/or other securities issued  
22 by LightSquared as well as the right to evaluate potential  
23 corporate opportunities.

24 Even though the DISH board resolutions permitted  
25 disbandment of the special committee only upon the special

1 committee's own decision, so long as a bid for LightSquared  
2 remained viable, immediately after the special committee  
3 delivered its conditional approval of the LBAC bid, the DISH  
4 board abruptly disbanded the special committee without advanced  
5 notice.

Other than Messrs. Howard and Goodbarn who abstained,  
6 the board vote was unanimous.

7 On July 22nd, 2013, DISH agreed to buy LBAC from Mr.  
8 Ergen for one dollar without the special committee ever  
9 reviewing the terms of the acquisition agreement. On July 23,  
10 2013, DISH announced its intention to bid through LBAC for  
11 LightSquared spectrum.

12 The special committee had been disbanded, despite the  
13 fact that its conditions remain unsatisfied. In particular,  
14 the committee had neither negotiated nor approved the draft  
15 plan support agreement or the draft asset purchase agreement,  
16 which were filed with the Court together with the joint plan of  
17 reorganization on July 23rd, 2013, and which explicitly stated  
18 they were subject to further negotiation and approval by DISH.

19 One notable feature of the APA, incorporated by  
20 reference into the PSA, was its broad release of all claims  
21 against Mr. Ergen, DISH, EchoStar and SPSO, in contemplation of  
22 the full allowance of the SPSO claim. The proposal of such a  
23 release belies the assertions made by SPSO and DISH that they  
24 have no ties to one another, and supports the inference that  
25 Mr. Ergen and SPSO were acting for DISH in creating a path



1 where DISH, through LBAC, could take over as purchaser while  
2 still protecting Mr. Ergen from any down side on his  
3 substantial investment.

4 Despite many attempts to characterize it otherwise,  
5 the proposal of such a release reveals the strong linkage  
6 between SPSO's debt and DISH's bid and the inability to  
7 disguise such linkage with so-called separate hats.

8 While it is not the Court's role to pass judgment on  
9 the corporate governance and practices of DISH, the Court  
10 nonetheless concludes that the facts surrounding the special  
11 committee process show that, notwithstanding the existence of  
12 the special committee, Mr. Ergen himself was the driving force  
13 behind each step DISH took on the path toward DISH's  
14 LightSquared bid, including the actions taken in connection  
15 with his evolving acquisition strategy in the spring and summer  
16 of 2013.

17 Although the special committee was created to be  
18 independent, the blatant disregard and the conditions set forth  
19 in its recommendation for DISH's participation in its  
20 LightSquared acquisition, its abrupt dissolution by the DISH  
21 board, and its lack of involvement in the negotiations of the  
22 LBAC transactional documents, as they evolved in the late  
23 summer and into the fall of 2013, despite the explicit board  
24 resolutions to the contrary, indicate that the special  
25 committee was little more than window dressing.

1           5. Mr. Ergen was not acting solely on his own behalf  
2 in making a "personal bid" or in purchasing LP debt.

3           Even after acknowledging his change of strategy in  
4 April 2013 and his interest in making a bid for LightSquared,  
5 and faced with allegations that his debt purchases and the  
6 initial LBAC bid remain in contemplation of the potential DISH  
7 acquisition of LightSquared spectrum, Mr. Ergen has continued  
8 to deny that he acted other than for his own personal benefit.

9           Specifically, Mr. Ergen steadfastly maintains that he  
10 had an interest in purchasing and owning LightSquared spectrum  
11 assets personally and was prepared to own and operate a  
12 spectrum business himself. In response to the Court's  
13 questioning, Mr. Ergen testified that he believes he could  
14 operate a spectrum business without creating a conflict with  
15 DISH.

16           At the time of the May 15th LBAC bid, however, Mr.  
17 Ergen did not have any financing agreements lined up with  
18 investors and had not even received a term sheet related to a  
19 possible financing. A draft term sheet was only received by  
20 Mr. Ergen on July 18th, 2013 and its draft form indicated that  
21 no deal had been reached. Mr. Ergen also stated that at the  
22 time of the LBAC bid he had made no decisions about  
23 headquarters, employees or management of his personal spectrum  
24 company.

25           Taken as a whole, Mr. Ergen's statements that he was

1 prepared to run a spectrum business personally, and in  
2 competition with DISH, are farfetched, to say the least.  
3 Rather, they caused the Court to conclude that, at the time of  
4 the April 2013 LP debt purchases and the initial LBAC bid, the  
5 intended strategic investor was not Mr. Ergen, but rather DISH.

6 The evidence demonstrates that Mr. Ergen's substantial  
7 investment in LightSquared debt in April 2013 was made in full  
8 contemplation and in furtherance of DISH's potential  
9 acquisition of LightSquared spectrum.

10 The Ergen July 8th presentation and the valuation  
11 contained therein demonstrate the significant benefit to DISH  
12 from acquiring LightSquared spectrum, with the implied net  
13 supplemental asset value to DISH which had a midpoint of 2.308  
14 billion dollars alone, coming in above the LBAC bid amount of  
15 2.2 billion dollars, without even looking at the total  
16 aggregate value of the spectrum to DISH, which Mr. Ergen  
17 estimated at a value of between 5.174 and 8.996 billion.  
18 Such an enormous value could not simply have occurred to Mr.  
19 Ergen in an epiphany in the days or weeks before making such a  
20 detailed presentation to the DISH board. Rather, Mr. Ergen  
21 must have perceived the synergistic value reflected in this  
22 presentation much earlier, as he monitored the actions of the  
23 FCC and the movement of the pieces on the wireless spectrum  
24 chessboard, some of which he, himself, was moving.

25 In their post-trial brief, SPSO and Mr. Ergen also

1 argue that the evidence does not establish that SPSO's LP debt  
2 purchases were for the benefit of DISH because, as an initial  
3 matter, purchasing even one-third of the outstanding debt of  
4 the company did not confer on SPSO any rights to acquire the  
5 company.

6 As Mr. Ergen himself stated in the Ergen presentation,  
7 however, his substantial interests in L2 debt and preferred  
8 stock compliment any acquisition strategy and could have  
9 significant influence in L2's Chapter 11 cases. A competitor  
10 who obtains a substantial position in the debt of a distressed  
11 company and then bids for the assets often has a significant  
12 advantage which dissuades other bidders from participating in  
13 any sale process.

14 While Mr. Ergen's substantial near par purchases of LP  
15 debt in April 2013 are consistent with a plan to obtain a  
16 blocking position in order to acquire the underlying company,  
17 they are somewhat inconsistent with a personal investment by a  
18 typical creditor seeking to make a profit on distressed debt by  
19 buying low and selling high.

20 Indeed, Mr. Ergen's final purchase of LP debt, on  
21 April 26, 2013, was made just one week prior to his  
22 presentation to the DISH board on May 2, 2013, and less than  
23 three weeks before he made the LBAC bid.

24 While his substantial investment in LP debt reflects,  
25 he says, his confidence in the intrinsic value of LightSquared

1 spectrum assets, it also reflects his certainty that, in this  
2 capacity as DISH's controlling shareholder and chairman of its  
3 board of directors, he could cause DISH to do what he wanted to  
4 affect the acquisition of the assets at a price that would  
5 return his investment and possibly make a profit, while also  
6 benefiting DISH with valuable spectrum.

7           And the Ergen July 8th presentation makes clear just  
8 how valuable LightSquared spectrum could be for DISH,  
9 permitting unusable and impaired uplink AWS-4 spectrum owned by  
10 DISH to be converted to downlink and yielding a supplemental  
11 value to DISH of 1.833 billion to 3.783 billion dollars.

12           Given the control Mr. Ergen exercised over the DISH  
13 board, as evidenced, in particular, by his bullying of the  
14 special committee, it is clear that Mr. Ergen believed that  
15 after making the LBAC bid he could and would get DISH to step  
16 in as purchaser.

17           Finally, Mr. Ergen's substantial LP debt purchases are  
18 wholly inconsistent with his investing history. The evidence  
19 demonstrates that before his investment in LightSquared, Mr.  
20 Ergen had a history of diversified investing in conservative  
21 low-risk liquid assets, rather than investing a substantial sum  
22 in the distressed debt of a single company.

23           In fact, the evidence reveals that Mr. Ergen had never  
24 made a personal investment in distressed debt of anything close  
25 to the magnitude of his eventual 844-million-dollar investment

1 in LightSquared, nor had he ever made a significant personal  
2 investment, one, in a competitor of DISH or EchoStar; two, in a  
3 company considered a strategic investment for either one; or  
4 three, in any company owning spectrum assets. According to Mr.  
5 Ergen, he did not even discuss the almost one-billion-dollar  
6 investment with his wife, who was also the co-trustee of the  
7 fund that funded the purchases.

8 Mr. Ergen, who testified that, as the chairman of  
9 DISH, he focuses on the strategic direction of the company, was  
10 clearly planning for DISH, and the inconsistency of his  
11 LightSquared investment with his prior investing history only  
12 lends further support to the inference that SPSO's debt  
13 purchases were made to pave the way for DISH to acquire control  
14 of LightSquared's assets.

15 C) Breach of the implied covenant of good faith and  
16 fair dealing.

17 Based on the foregoing, the Court concludes that the  
18 conduct of Mr. Ergen and SPSO, undertaken on behalf of or for  
19 the benefit of DISH, was an end run around the eligible  
20 assignee provisions of the credit agreement that breached the  
21 implied covenant of good faith and fair dealing arising under  
22 the credit agreement. See Standard Chartered Bank v. AWB Ltd.,  
23 210 WL 532515 (S.D.N.Y. 2010). Simply put, that which a  
24 corporation is contractually unable to accomplish itself, in  
25 its own name, cannot be accomplished by interposing a shell

1 company. As the Court stated in Standard Chartered, "It is not  
2 a matter of piercing corporate veils. It is a matter of  
3 requiring a party to honor the contract and its covenants and  
4 not attempt to defeat assigned rights by interjecting an  
5 affiliated company."

6 Under New York Law, every contract contains an implied  
7 covenant of good faith and fair dealing in the course of  
8 performance. See *Empresas Cablevision v. JPMorgan Chase*, 680  
9 F. Supp. 2d 625 (S.D.N.Y. 2010). That implied covenant is, in  
10 spirit, a pledge that neither party shall do anything which  
11 will have the effect of destroying or injuring the right of the  
12 other party to receive the fruits of the contract.

13 In *Empresas*, a case in this district, District Judge  
14 Rakoff found that "conduct technically permissible under a  
15 credit agreement may nevertheless give rise to a breach of the  
16 implied covenant of good faith and fair dealing if it is  
17 intended to achieve a result that is prohibited by the  
18 agreement and would do away with the fruits of the contract".  
19 *Id.* at 632.

20 The facts of *Empresas* are straightforward. *Empresas*  
21 Cablevision borrowed 225 million dollars from JPMorgan Chase.  
22 The governing credit agreement restricted JPMorgan's ability to  
23 assign loan to another party without Cablevision's prior  
24 written consent. The credit agreement did allow JPMorgan to  
25 sell participations in the loan, which it could do without

1 Cablevision's consent, but only if the relationship between  
2 JPMorgan and Cablevision, as well as JPMorgan's rights and  
3 obligations under the credit agreement, remained unchanged.

4 In his decision, Judge Rakoff noted that Cablevision  
5 negotiated for and obtained a veto right over assignments in  
6 order to protect against the possibility of an unsuitable party  
7 being given the rights to enforce restrictive covenants or to  
8 receive information under the loan. Subsequently, JPMorgan  
9 agreed to assign ninety percent of the loan to Banco Inbursa, a  
10 bank under common ownership with a competitor of Cablevision.

11 After JPMorgan sought Cablevision's consent,  
12 Cablevision's counsel replied by letter stating that it would  
13 not consent to the proposed assignment because "It would be  
14 inappropriate and cause serious harm to our business and our  
15 competitive position if one of our major competitors is allowed  
16 to gain access to confidential and competitively sensitive  
17 information about us, or to exert any control over our business  
18 and affairs and hinder the development of our business."

19 The letter also stated that JPMorgan's sale of a  
20 participation of ninety percent of the loan to Inbursa, instead  
21 of an assignment, would similarly be unacceptable and would  
22 violate the "duty of good faith owed by JPMorgan under the  
23 credit agreement".

24 Notwithstanding, JPMorgan proceeded ahead with  
25 negotiating sale of a ninety-percent participation in the loan



1 to Inbursa and did not disclose the participation to  
2 Cablevision, even after the participation agreement was signed.  
3 By selling the participation, rather than assigning the loan,  
4 JPMorgan avoided the transfer restrictions in the credit  
5 agreement that necessitated borrower consent.

6 When Cablevision learned that the agreement between JP  
7 Morgan and Inbursa, it promptly sought a preliminary injunction  
8 preventing JP Morgan from effectuating the transfer.

9 It argued that the participation agreement was, for  
10 all relevant purposes, "a disguised but unconsented-to  
11 assignment" that breached the credit agreement or that "so  
12 subverts the purpose underlying Cablevision's right to veto  
13 assignments of the loan as to breach the covenant of good faith  
14 and fair dealing implied by law in the credit agreement."  
15 Judge Rakoff enjoined the transfer, finding that JPMorgan  
16 violated the implied covenant of good faith and fair dealing by  
17 attempting, through the "guise of a purported participation" to  
18 effectuate a prohibited assignment that it could not have  
19 implemented directly.

20 While the Court observed that JPMorgan's argument that  
21 the participation was "technically consistent" with the credit  
22 agreement may be "superficially correct," its actions were  
23 nevertheless impermissible because they "effectuated what is in  
24 substance a forbidden assignment that the transfer restrictions  
25 were designed to prevent," thus undermining Cablevision's veto

1 rights under the credit agreement.

2 Had the transfer been allowed, the participation  
3 agreement would have given Inbursa the potential to access  
4 extensive confidential information about the business affairs  
5 and financial condition of Cablevision, all of which  
6 Cablevision desired to keep its competitors from obtaining.

7 Thus, the Court granted Cablevision's request for a  
8 little near injunction concluding that "JPMorgan violated at a  
9 minimum the covenant of good faith and fair dealing  
10 automatically implied by law in the credit agreement and "that  
11 such an end run, if not a downright sham, was not permissible  
12 as it did away with the fruits of the contract."

13 Here, as in Empresas, in which consent to sell a  
14 participation was technically not required by the credit  
15 agreement, the Court's finding that SPO (sic) is technically an  
16 eligible assignee under the credit agreement might end the  
17 analysis, but as in Empresas, contracts must be read in  
18 context. The context here requires reading the eligible  
19 assignee provision and the rest of the credit agreement in the  
20 context of the intent on the part of LightSquared to prevent  
21 competitors from gaining access to its capital structure.

22 This intent was readily apparent from the face of the  
23 credit agreement and is overtly evidenced by, one, the language  
24 utilized in the definitions of eligible assignee and of  
25 disqualified company, which refers to direct competitors of

1 LightSquared, designed to limit ownership of the LP debt; and  
2 two, LightSquared's May 9th and May 12th amendments to the  
3 credit agreement to add additional LightSquared competitors,  
4 including DISH, to the list of disqualified companies.

5 As set forth in detail in the findings of fact, which  
6 I'm not reading now, pursuant to the credit agreement, eligible  
7 assignees are entitled to receive substantial nonpublic  
8 information about LightSquared and are granted access to  
9 LightSquared's officers and directors for information regarding  
10 LightSquared's ongoing business and operations, and they also  
11 receive a right to vote on certain material matters, including  
12 waivers, exercise of remedies, and other similar matters.

13 The debtors have appropriately pointed out that one  
14 could reasonably expect a competitor to vote differently than a  
15 noncompetitor lender on material matters concerning  
16 LightSquared, and more significantly, a competitor given access  
17 to material nonpublic information about LightSquared may use it  
18 to LightSquared's detriment given that a competitor may possess  
19 a desire to see LightSquared fail. As a result, LightSquared  
20 has a legitimate basis for its desire to prohibit competitors  
21 from becoming holders of its LP debt.

22 The problem is that the credit agreement was not  
23 crafted sharply enough to achieve that intent. Moreover, the  
24 problem was exacerbated by the lack of action by LightSquared  
25 in the face of rampant public speculation about the debt

1 purchases.

2 Mr. Ergen found a loophole in the express terms of the  
3 credit agreement and exploited it. That is not wrong in and of  
4 itself.

5 The wrong arises from Mr. Ergen's purchases of the LP  
6 debt beginning in the spring of 2013 when he intended his  
7 substantial interests in the debt to complement any acquisition  
8 strategy and have significant influence in the bankruptcy  
9 cases. He intended and preferred that it be DISH that  
10 acquired LightSquared's spectrum and he pursued such purchases  
11 to preserve valuable options for the benefit of DISH.

12 These purchases violate the spirit of the credit  
13 agreement, as the harm that LightSquared sought to avoid, a  
14 competitor entering its capital structure and acting against  
15 its interests, has now come to pass. Mr. Ergen's use of SPSO  
16 to evade the terms of the credit agreement that prevented him  
17 and DISH from buying the LP debt, thus deprive LightSquared of  
18 the fruits of the credit agreement's restrictions.

19 While technically permitted to buy LP debt, SPSO was  
20 essentially a front used by Mr. Ergen to implement his strategy  
21 to the benefit of DISH, a forbidden lender under the credit  
22 agreement. That SPSO's strategy was formulated specifically to  
23 chief an end run around restrictions in the credit agreement is  
24 amply supported by the record.

25 The Court concludes that at least as of mid-April 2013  
during the period in which SPSO acquired an additional 320

1 million dollars of LP debt Mr. Ergen, through SPSO, was not  
2 acting on his own behalf to acquire LP debt as a personal  
3 investment. Rather, he was acting to acquire a strategic  
4 advantage which he knew he would have to tender to the DISH  
5 Board to give DISH the option of acting via the vehicle of a  
6 bid for LightSquared's spectrum assets, which were clearly  
7 attractive to DISH whether or not DISH consummated a  
8 transaction with Sprint.

9           The record also supports the conclusion that Mr.  
10 Ergen's strategy was deployed on behalf of DISH as early as  
11 October 2012 when he told Mr. Kiser "if we can't be sure the  
12 company can buy them, then I am interested to increase my  
13 position at the seventy-five level at least up to a thirty-  
14 three percent ownership level of the class." Simply put, had  
15 he been advised that DISH could buy the LP debt, Mr. Ergen's  
16 words reflect that his preference that DISH, the preferred  
17 purchaser, buy the debt. But having identified a roadblock in  
18 the credit agreement, Mr. Ergen simply created a special  
19 purpose vehicle, drove around the roadblock, and took an  
20 alternate route to his destination.

21           Nor can it be seriously maintained that Mr. Ergen did  
22 not personally direct and indeed control virtually every aspect  
23 of the process leading to the formulation of the LBAC bid in  
24 its ultimate pursuit by DISH. From his stunning lack of candor  
25 with the DISH Board and management to the stonewalling and

1 disbanding of the special committee, the message is loud and  
2 clear. No one crosses or even questions the actions of the  
3 chairman. Charles Ergen is, in every sense, the controlling  
4 shareholder of DISH and wields that control as he sees fit.  
5 His acquisition through SPSO of the LP debt violated the  
6 covenant of good faith and fair dealing, automatically implied  
7 by law in a credit agreement.

8           Indeed, the extent to which DISH believed an end run  
9 around the terms of the credit agreement was perfectly  
10 acceptable was made crystal clear during closing arguments.  
11 When asked by the Court if an affiliate of DISH could have  
12 purchased LP debt without running afoul of the credit  
13 agreement, counsel for DISH agreed "based on the words of the  
14 contract".

15           After a further hypothetical situation was posed to  
16 counsel, if SPSO had hypothetically a side agreement with DISH,  
17 that DISH would guarantee the return of DISH's capital on his  
18 investment of LP debt, counsel responded that he still believed  
19 that SPSO would not have breached the credit agreement under  
20 such a scenario, even if SPSO was hedged with a disqualified  
21 company such as DISH.

22           DISH's view, in other words, is that, if the credit  
23 agreement does not explicitly prohibit a particular transfer by  
24 its express terms, any contrivance or subterfuge to avoid  
25 running afoul of those express terms is A-okay. This cannot be

1 correct.

2           Finally, defendants' attempts to distinguish Empresas  
3 are unavailing. They argue that Empresas is entirely different  
4 from this case because in Empresas, JPMorgan colluded with  
5 Inbursa to alter fundamentally the agreement between  
6 Cablevision and JPMorgan, and Inbursa actively bargained for  
7 nonstandard provisions in the participation agreement with  
8 JPMorgan, both facts which are not present here.

9           Regardless of whether collusion occurred here or not,  
10 and there have been no allegations that Mr. Ergen in fact  
11 colluded with any lenders from whom he purchased LP debt, and  
12 notwithstanding the fact that SPSO's LP debt purchases were  
13 made under standard terms, the violation of the spirit of the  
14 credit agreement in each case remains the same.

15           Having been informed more than once that DISH and  
16 EchoStar could not purchase the LP debt under the express terms  
17 of the credit agreement, Mr. Ergen sought to do indirectly what  
18 he knew was not permitted directly. As in Empresas, although  
19 the LP debt purchases by SPSO may have appeared "superficially  
20 permissible", those purchases which by April 13th were made  
21 essentially for DISH in contemplation of a potential DISH  
22 acquisition were intended to circumvent the creditor  
23 agreement's restrictions on transfers to DISH.

24           Contrary to defendant's assertions, the restrictions  
25 on competitors becoming lenders were bargained for by

1 LightSquared in the same way that Cablevision bargained for the  
2 right to veto assignees, but neglected to include such  
3 provision the right to veto parties' purchasing participations.

4 SPSO must be held accountable for its conduct in  
5 context. Mr. Ergen's multiple hats, personal, SPSO, LBAC,  
6 DISH, cannot be selectively deployed to disguise SPSO or  
7 insulate SPSO from responsibility for its actions in using a  
8 guise to achieve an end run around the substance of the  
9 eligible assignee restrictions in the credit agreement, and  
10 undercut what Mr. Ergen certainly knew the restrictions were  
11 designed to prevent.

12 IV. SPSO'S CLAIMS SHOULD NOT BE DISALLOWED.

13 A) SPSO's LP debt claim is not void or voidable even  
14 if the court were to have found an express breach and even  
15 though the court finds an implied breach.

16 Section 502 of the Bankruptcy Code provides that a  
17 properly filed proof of claim is deemed allowed unless a party-  
18 in-interest objects, 11 U.S.C. 502(a). Various other  
19 subsections of Section 502 set forth the grounds for  
20 disallowing a claim, including Section 502(b)(1), which  
21 authorizes disallowance because the claim is unenforceable  
22 under any agreement or applicable law. Section 502(b) provides  
23 "the court shall allow such claim in such amount except to the  
24 extent that, one, such claim is unenforceable against the  
25 debtor and property of the debtor under any agreement or



1 applicable law."

2 SPSO maintains that even if it was not an eligible  
3 assignee, the SPSO claim would still be enforceable against the  
4 LightSquared estate, as nothing in the credit agreement treats  
5 transfers as void or voidable even if they are made in  
6 violation of the transfer restrictions.

7 The Court concludes that SPSO is correct on this  
8 point. Even if the Court had found that SPSO breached the  
9 express terms of the credit agreement and was not an eligible  
10 assignee, the plain language of the credit agreement does not  
11 support disallowance of the SPSO claim.

12 Plaintiffs argue that the credit agreement provides  
13 that a transferee, who is not an eligible assignee, acquires no  
14 rights under the credit agreement, and therefore, such  
15 transferee cannot assert a claim against the company with  
16 respect to any purchase of the LP debt.

17 Accordingly, they argue any claim of SPSO based on the  
18 credit agreement must be disallowed. In support of this  
19 argument, plaintiffs rely on Section 10.04(a) of the credit  
20 agreement which provides that "nothing in this agreement  
21 express or implied shall be construed to confer upon any person  
22 other than the parties hereto, their respective successors and  
23 assigns permitted hereby, participants to the extent provided  
24 in paragraph D of this section, and to the extent expressly  
25 contemplated hereby the other indemnities any legal or

1 equitable right, remedy or claim under or by reason of this  
2 agreement."

3 As Mr. Ergen and SPSO point out, however, plaintiffs  
4 failed to mention that other relevant provisions of the credit  
5 agreement, which provide that any breach by a lender or  
6 participant of the transfer restrictions under the credit  
7 agreement, does not excuse performance by LightSquared.

8 Specifically, Section 10.04 of the credit agreement  
9 provides in pertinent part that LightSquared "agrees that any  
10 breach by any lender or participant or subparticipant of the  
11 restrictions on assignment hereunder shall not excuse in any  
12 respect performance by the borrower under the loan documents.

13 Contrary to plaintiff's argument, Section 10.04(d) of  
14 the agreement makes clear that neither a breach of the express  
15 terms of the credit agreement nor a breach of the implied  
16 covenant of good faith and fair dealing renders wrongfully  
17 transferred debt claims unenforceable against LightSquared and  
18 therefore disallow it. SPSO also points out that similar  
19 language has been found insufficient to invalidate transfers.  
20 See LCE Lux HoldCo v. Entretenimiento GM de Mexico, 287 F.R.D.  
21 30 (S.D.N.Y. 2012).

22 Under any circumstances, even in the case of an  
23 express breach, in order for a claim to be disallowable, the  
24 contract must expressly provide that any breach of the contract  
25 such as an assignment in violation of the agreement shall

1 render the assignment wholly void or invalid. See In re: 785  
2 Partners LLC, 2012 Westlaw 401, 497, (S.D.N.Y 2012) citing  
3 Pravin Banker Associates v. Banco Popular, 109 F.3d 850 (2d  
4 Cir. 1997), assignment of loan is valid rendering the assignee  
5 a secured creditor and party-in-interest in the bankruptcy even  
6 if the assignee did not meet the definition of an eligible  
7 lender where the contract language invalidating improper  
8 assignment. See also -- see Purchase Partners LLC v. Federal  
9 Savings Bank, 914 F.Supp 480 (S.D.N.Y. 2012), contractual  
10 provisions prohibiting assignment are not enforceable except  
11 where "the relevant provision of the contract contains clear,  
12 definite, and appropriate language declaring an assignment  
13 invalid".

14 Here, the credit agreement does not contain clear  
15 language voiding an assignment to a party that is not an  
16 eligible assignee, or invalidating a claim by such party  
17 relating to the credit agreement. Thus, even if the Court had  
18 found that SPSO is not technically an eligible assignee under  
19 the express terms of the credit agreement, the SPSO claim would  
20 not be void or voidable.

21 B) The inaction and delay of LightSquared and  
22 Harbinger preclude the award of affirmative damages.

23 Beginning in May 2012, LightSquared and Harbinger new  
24 or had strong reason to believe that Mr. Ergen was the  
25 purchaser of LP debt. Substantial documentary evidence in the

1 record reflects that at a minimum, beginning with the sale of  
2 Carl Icahn's 247 million dollar LP debt position to a Sound  
3 Point client on May 4th, 2012, which was reported in the press,  
4 the debtors and Mr. Falcone harbored serious suspicions that  
5 Mr. Ergen had entered LightSquared's capital structure. For  
6 example, on May 5th, 2012, Mr. Falcone responded to an e-mail  
7 from a LightSquared creditor writing, "Maybe we shouldn't file  
8 if Ergen is circling the wagons, though I think it a positive,  
9 may bring in another strategic".

10 Falcone's e-mail to Ara Cohen of Knighthead, Mr. Marc  
11 Montagner of LightSquared to Stan Holtz of Moelis, "Ketchum,  
12 with his 175 million dollar fund, bought 350 of the debt on  
13 Friday. He is probably a front for Charlie Ergen."

14 Falcone to Ara Cohen, "I can understand why you guys  
15 balked. Charlie will definitely give you guys twenty-five  
16 percent and an independent board and your full claim." Sarcasm  
17 aside, Mr. Falcone surmised that the buyer of LP debt was Mr.  
18 Ergen, was also set forth in a number of e-mails he sent to  
19 members of the press. See Falcone to Matthew Goldstein of  
20 Thompson Reuters, "Ergen will prompt more strategics to step  
21 in."

22 May 16th, Falcone to Greg Bensinger of the Wall Street  
23 Journal, "Carlos Slim apparently involved with Ergen as  
24 purchasers of LP debt, and after questions from Bensinger  
25 adding that "he clearly wants the spectrum and the satellites.

1 Let me know before I tell someone else if you are going to  
2 write anything."

3 After sending these e-mails, Mr. Falcone testified he  
4 understood that the Wall Street Journal may write an article  
5 based on the information provided.

6 LightSquared and Harbinger attempt to explain such  
7 e-mail correspondence as either idle banter or, with respect to  
8 the media, a fishing expedition to prod for information on the  
9 identity of the buyer.

10 When asked at trial about his e-mails to Mr. Bensinger  
11 of the Wall Street Journal about Mr. Ergen and Carlos Slim, Mr.  
12 Falcone explained that he was "trying to get Bensinger to get  
13 information for me to confirm because, before he does anything,  
14 he's got to go out and corroborate."

15 Other e-mails touting Mr. Ergen as a purchaser were,  
16 according to Mr. Falcone, sent either, one, to fish for  
17 information or, two, in the hope that Mr. Ergen's presence  
18 would get other competitors interested in LightSquared as  
19 strategic investors. For example, on October 4th, 2012, Mr.  
20 Falcone emailed Omar Jaffrey, a banker, telling him "you may  
21 want to circle up with your contact at AT&T and let him know  
22 Ergen continues to buy bonds."

23 At trial, Mr. Falcone explained that in sending this  
24 e-mail he was fishing for information to "corroborate what he  
25 believed", and he was also hoping Mr. Jaffrey could "get AT&T

1 involved because LightSquared was looking for strategic  
2 investors at the time." As Mr. Falcone testified to "have a  
3 strategic kind of kicking the tires on your company validates  
4 the asset and it may bring in, it may prompt other strategics  
5 to get involved."

6 None of these e-mails reflects alarm on the part of  
7 Mr. Falcone or LightSquared that a competitor who might act  
8 against LightSquared's interests had likely entered its capital  
9 structure or that the uncertainty of such party -- the  
10 uncertain identity of such party was troubling to them.

11 Quite the contrary, the correspondence and evidence  
12 reveals that Mr. Falcone conveniently used his suspicions of  
13 Mr. Ergen's trading in LP debt as an item to publicize in order  
14 to drum up possible interest in LightSquared from strategic  
15 investors, some of whom themselves were LightSquared  
16 competitors.

17 And as the trading price of LP debt increased from  
18 forty-eight cents on the dollar in April 2012 to ninety-six  
19 cents on the dollar in April 2013, Mr. Falcone seemed even less  
20 inclined to complain about the allegedly harmful presence of a  
21 competitor in the capital structure.

22 Even as late as March 28th, 2013, Mr. Falcone and Drew  
23 McKnight of Fortress both expressed in an e-mail chain their  
24 views that it was beneficial that a potential strategic  
25 investor, Mr. Ergen, was also buying LightSquared preferred

1 stock in addition to LP debt. Mr. Falcone explained at trial  
2 that he considered this a validation of spectrum value, and in  
3 addition, as stated in the e-mail exchange, he felt that Mr.  
4 Ergen's LP debt acquisition could help blow up the ad hoc  
5 secured group unless Mr. Ergen joined them.

6 Well, he denied at trial that he knew the details of  
7 the exclusivity stipulation between the debtors and the ad hoc  
8 secured group, which required the debtors to start preparatory  
9 work on a sale process on June 3rd, 2013 and to formally  
10 commence a sale process on July 15th, 2013 upon the termination  
11 of exclusivity if the ad hoc secured group still remained the  
12 largest holder -- holders of LP debt and no consensual deal  
13 between the parties had been achieved. Mr. Falcone admitted  
14 that he understood that such requirement would fall away if Mr.  
15 Ergen became the largest holder of LP debt.

16 At trial Mr. Falcone maintained that depending on the  
17 day and the information he received, his belief changed as to  
18 who was behind Sound Point's purchases. For example, when  
19 asked on May 9th, 2012 if he still believed that it was Mr.  
20 Ergen buying the LP debt, he answered, I don't know if it was  
21 the Carlos Slim and Charlie Ergen day, but it could have been  
22 one or the other. Also, I just didn't know, you know,  
23 depending upon, at this point in time, what minute of the day  
24 it was, I had believed on the one hand it could be AT&T, and  
25 then six minutes later, I changed my mind, I think it's Ergen.

1           Notwithstanding the contention that Mr. Falcone and  
2           LightSquared were unsure whether the purchaser of the LP debt  
3           was related to DISH rather than Carlos Slim, the owner of one  
4           of the largest telecommunications empires in the world, or  
5           Cablevision, one of the largest cable providers in the United  
6           States and a disqualified company, all competitors of  
7           LightSquared suggests that LightSquared was not overly  
8           concerned about the presence of any of these parties in its  
9           capital structure.

10           In fact, the addition of DISH to the credit  
11           agreement's list of disqualified companies on May 9th, 2012  
12           appears to have been pursued by Mr. Falcone, at least partially  
13           in spite, to trap Mr. Ergen in a minority position in the LP  
14           debt after he had acquired Mr. Icahn's position. On May 6th,  
15           2012, after learning of the purchase of Mr. Icahn's 247 million  
16           dollar position in the LP debt, Mr. Falcone wrote to Ara Cohen  
17           of Knighthead, "Well, I'm working on giving Ergen a nice  
18           surprise by adding DISH to the list of disqualified companies."

19           Despite the significant amount of documentary evidence  
20           indicating that they knew or should have known, LightSquared  
21           and Harbinger maintain that it was not until May 21st, 2013  
22           that they first received confirmation that Mr. Ergen was the  
23           party behind SPSO's purchases of LP debt. They argue that  
24           prior to being informed by SPSO's counsel on May 21st, 2013  
25           public information provided them with no certainty as to who



1 was behind SPSO's purchases. They emphasized the widespread  
2 speculation in the media and that news reports, blogs, and  
3 rumors at various times pointed to Carlos Slim, the Dolan  
4 family or Mr. Ergen as the purchaser.

5 Moreover, LightSquared and Harbinger maintain that  
6 they made diligent efforts to determine who was behind Sound  
7 Point's purchases of LP debt, pointing to, among other things,  
8 voicemails left by Mr. Montagner for Mr. Ketchum, efforts by  
9 Moelis to obtain information from Mr. Ketchum and from Willkie  
10 Farr, their attempts through UBS, and Mr. Falcone's efforts to  
11 reach out to people on the street such as reporters, Mr.  
12 Cullen, and representatives of AT&T and Sprint.

13 Notwithstanding the fact that beginning in May 2012  
14 there was a long history of speculation in the express but no  
15 definitive confirmation that Mr. Ergen was the purchaser, it is  
16 clear from the totality of the evidence that for nearly a year  
17 LightSquared knew or had reason to believe that Mr. Ergen was  
18 behind SPSO.

19 Despite LightSquared's protestations that it attempted  
20 to ascertain the identity of the purchaser and the efforts to  
21 which it points, the fact remains that LightSquared, a Chapter  
22 11 debtor, did nothing to seek to obtain that information  
23 through the many tools available to it under the Bankruptcy  
24 Code, including Bankruptcy Rule 2004, or to seek any relief  
25 from this Court with respect to the debt purchases by SPSO,

1 which requested relief may have included a motion to enforce  
2 the restrictions in the credit agreement or an injunction  
3 similar to that obtained in Empresas.

4 In fact, there appears to have been a certain degree  
5 of ambivalence as to whether the presence of Mr. Ergen was a  
6 positive or a negative for LightSquared, one, in its search for  
7 strategic investors, and two, in terms of the implication of  
8 Mr. Ergen's holdings under the requirements set forth in the  
9 exclusivity stipulation. Regardless of LightSquared's ultimate  
10 view, what is clear is that no action was ever taken.

11 LightSquared's breach of contract allegations have  
12 been asserted too late in the game to be actionable. The  
13 equitable doctrine of laches requires that the following  
14 elements be shown: one, conduct giving rise to the situation  
15 complained of; two, delay by the plaintiff in asserting a claim  
16 despite the opportunity to do so; three, lack of knowledge on  
17 the defendant's part that a claim would be asserted; and four,  
18 injury or prejudice to the defendant if relief is granted to  
19 the plaintiff. *Caldor v. S Plaza Associates*, 217 B.R. 121  
20 (S.D.N.Y. 1998).

21 To equitably estop a plaintiff from asserting its  
22 claim, a defendant must demonstrate that the complaint of, one,  
23 made a false representation or concealed material facts; two,  
24 intended that such conduct would be acted upon by the  
25 defendant; and three, had knowledge of the true facts. In

1 their answer to LightSquared's complaint, SPSO and Mr. Ergen  
2 raise each of these equitable doctrines and others as defenses  
3 barring any recovery against them.

4           The Court finds that while all the elements of the  
5 doctrines of laches or equitable estoppel have not been met,  
6 sufficient elements of each doctrine have been satisfied to  
7 conclude the pursuit or award of affirmative damages to  
8 LightSquared and Harbinger with respect to SPSO's conduct in  
9 acquiring LP debt.

10           The Court has concluded that LightSquared and  
11 Harbinger knew or had strong suspicions that Mr. Ergen was  
12 behind SPSO's purchases through Sound Point. Yet, even  
13 assuming any uncertainty on the part of LightSquared and  
14 Harbinger, they failed to act to confirm the identity of the  
15 purchaser of the LP debt, and once confirmed, they failed to  
16 take any action to prevent Mr. Ergen from closing trade after  
17 trade, instead delaying in filing of suit until after Mr. Ergen  
18 had acquired 844 million dollars in LP debt and made a bid for  
19 LightSquared's assess.

20           Meanwhile, for over one year, SPSO had purchased its  
21 LP debt and other than in connection with the bundled March  
22 28th trade never heard a peep of protest from LightSquared. As  
23 far as SPSO can reasonably conclude, the debtors appeared to  
24 have no concern about SPSO's status as purchaser. Such  
25 inaction and delay now preclude the Court from making an

1 affirmative award of damages to LightSquared on account of Mr.  
2 Ergen's conduct.

3 V -- do you need a drink, Mr. Dugan?

4 MR. DUGAN: Thank you.

5 THE COURT: V. SPSO'S CLAIM SHOULD BE EQUITABLY  
6 SUBORDINATED TO THE EXTENT OF INJURY CAUSED TO INNOCENT  
7 CREDITORS.

8 Although SPSO cannot be found to have breached the  
9 technical requirements of the credit agreement, its conduct and  
10 that of its principal are nonetheless far from blameless.

11 Mr. Ergen's carefully crafted and strategically  
12 deployed decision to acquire the LP debt, despite the  
13 restrictions in the credit agreement, and in furtherance at  
14 least as of April 2013 of his strategic objective to acquire  
15 LightSquared's assets for DISH, supports equitable  
16 subordination of SPSO's conduct to the extent creditors have  
17 been injured by such conduct.

18 Moreover, as discussed in detail below, SPSO's  
19 additional misconduct in connection with the delayed closing of  
20 hundreds of millions of dollars of LP debt trades and its  
21 stunning lack of candor on this issue provides an additional  
22 basis for equitable subordination of its claim. Taken as a  
23 whole, SPSO's conduct not only violates the covenant of good  
24 faith and fair dealing implied in all contracts but also  
25 constitutes an affront to the duty of good faith imposed on

1 those who participate in Chapter 11 proceedings.

2 A) Applicable law.

3 Bankruptcy courts have brought equitable powers and  
4 have the ability to invoke equitable principles to achieve  
5 fairness and justice in their reorganization process. See  
6 Momentum Manufacturing v. Employees Creditors Committee, 25  
7 F.3d 1132 (2d Cir. 1994). See also Law v. Siegel, 134 S.C.  
8 1188 (2014).

9 The doctrine of equitable subordination codified in  
10 section 510(c) of the Bankruptcy Code is one such equitable  
11 power that the Bankruptcy Court may employ to rearrange the  
12 priorities of creditors' interests and to place all or part of  
13 a wrongdoer's claim in an inferior status in order to achieve a  
14 just result in the reorganization of a debtor.

15 The equitable subordination doctrine empowers the  
16 Bankruptcy Court to consider "whether notwithstanding the  
17 apparent legal validity of a particular claim, the conduct of  
18 the claimant in relation to other creditors is or was such that  
19 it would be unjust or unfair to permit the claimant to share  
20 pro rata with the other claimants of equal status. In re:  
21 Adler, Coleman Clearing Corporation, 277 B.R. 520 (S.D.N.Y.  
22 2002), citing 80 Nassau Associates, 169 B.R. 837 (S.D.N.Y.  
23 1994), In re: Enron Corporation, 169 B.R. 837, In re: Enron  
24 Corporation, 333 B.R. 205 (2005).

25 First articulated in the seminal case Pepper v.

1 Litton, 308 U.S. 295 (1939), the doctrine itself empowers the  
2 Court to look beyond the apparent facial validity of a claim  
3 and evaluate the conduct giving rise to the claim.

4 The test for equitable subordination was originally  
5 articulated in Benjamin v. Diamond, In re: Mobil Steel, and has  
6 since been adopted by courts in the Southern District of New  
7 York. See 80 Nassau Associates, Adler, Enron, ABF Capital  
8 Management v. Kidder Peabody, also known as In re: Granite  
9 Partners.

10 As such, in order for this Court to exercise its power  
11 of equitable subordination, three conditions must be satisfied:  
12 one, the claimant must have engaged in some type of inequitable  
13 conduct; two, the conduct must have resulted in injury to the  
14 creditors of the bankrupt or conferred an unfair advantage on  
15 the claimant; and three, equitable subordination of a claim  
16 must not be inconsistent with the provisions of the Bankruptcy  
17 Act.

18 In determining whether these three conditions are  
19 satisfied, Mobil Steel instructs the Court to be mindful of  
20 three principals. First, inequitable conduct directed against  
21 the debtor or its creditors may be sufficient to warrant  
22 subordination of or a claim irrespective of whether it was  
23 related to the acquisition or assertion ever that claim.  
24 Second, a claim or claim should be subordinated to the extent  
25 and only to the extent necessary to offset the harm which the

1 debtor and its creditors suffered on account of the inequitable  
2 conduct. And third, an objection on equitable grounds must  
3 contain some substantial factual basis to support its  
4 allegations of impropriety.

5 Prong 1, inequitable conduct. Prong 1 of the Mobil  
6 Steel test requires a showing that the claimant engaged in some  
7 type of inequitable conduct. Inequitable conduct is not  
8 limited to fraud or breach of contract. Rather, it includes  
9 even lawful conduct that shocks one's good conscience. As  
10 Judge Bernstein noted in 80 Nassau Associates, inequitable  
11 conduct means, among other things, a secret or open fraud, lack  
12 of faith or guardianship by a fiduciary, an unjust enrichment,  
13 not enrichment beau chance, astuteness or business acumen but  
14 enrichment through another's loss brought about by one's own  
15 unconscionable, unjust, unfair, close or double dealing, or  
16 foul conduct.

17 Traditionally, equitable subordination was  
18 inapplicable to ordinary creditors as opposed to insiders, but  
19 it is now well settled that the doctrine applies to general  
20 creditors or noninsiders, though the circumstances warranting  
21 equitable subordination of a noninsider's claim arise less  
22 frequently because the opportunities for abuses triggering  
23 equitable subordination tend to be more readably available to  
24 insiders.

25 In order to identify the precise type of conduct

1 supporting equitable subordination of noninsider's claim, some  
2 courts have applied a heightened standard of wrongdoing, the  
3 majority requiring conduct that is gross and egregious.  
4 However, courts in this district have held that there is no  
5 different or heightened standard by which to judge a  
6 noninsider's conduct, though there may be fewer traditional  
7 grounds available because neither undercapitalization nor  
8 breach of fiduciary duty applies to the conduct of a  
9 noninsider. Unless the noninsider has dominated or controlled  
10 the debtor to gain an unfair advantages, the type of  
11 inequitable conduct that justifies subordination of a  
12 noninsider's claim is breach of an existing, legally recognized  
13 duty under contract, tort or other area of law.

14 In commercial cases, the proponent of equitable  
15 subordination must demonstrate, for example, "a substantial  
16 breach of contract and advantage taking by the creditor".  
17 Where a proponent is able to establish inequitable conduct in  
18 connection with contractual obligation, courts have granted  
19 equitable subordination. See In re: Model Imperial holding  
20 that a creditor's creation of a scheme to circumvent  
21 contractual obligations including negative covenants in the  
22 loan documents, which provided it with an unfair advantage,  
23 warranted equitable subordination of its allowed claim.

24 In the absence of a contractual breach, the proponent  
25 must demonstrate fraud, misrepresentation, estoppel or similar



1 conduct that justifies the intervention of equity. 80 Nassau  
2 Associates, Accord Lois U.S.A. A violation of the implied  
3 covenant of good faith and fair dealing may provide a grounds  
4 for equitable subordination. See Lois U.S.A. Declining to  
5 make a substantive determination with respect to the extent to  
6 which a claim for violation of the covenant of good faith and  
7 fair dealing would support equitable subordination, pending  
8 further development of the facts but noting that if proven,  
9 such conduct may justify equitable subordination.

10 See also Enron, 333 B.R. 220, holding that Section  
11 510(c) of the Bankruptcy Code affords the court discretion when  
12 considering subordination of claims based on common law  
13 concepts of the equitable doctrine and stating that the  
14 Bankruptcy Court has the equitable power to circumstances  
15 surrounding any claim to see that injustice or unfairness is  
16 not done. Accordingly, creditor misconduct in connection with  
17 a Chapter 11 process itself, irrespective of applicable  
18 nonbankruptcy law, provides an appropriate creditor for  
19 equitable subordination of such creditor's claim.

20 Prong 2. Injury. Once inequitable conduct has been  
21 found, the court must next determine whether the claimant's  
22 conduct caused injury to the debtor or its creditors or  
23 resulted in an unfair advantage to the claimant. Mobil Steel,  
24 563 at 700. For a creditor to have achieved an unfair  
25 advantage as required under the Mobil Steel test, there must

1 have been a benefit to the creditor. In turn, for equitable  
2 subordination to be warranted, such a benefit or unfair  
3 advantage must have resulted in an injury to the debtor or its  
4 creditors. Without injury, there would be no reason to  
5 equitably subordinate a claim. See 9281 Shore Road Owners Corp  
6 v. Seminole Realty. See also In re: Marketex Holdings  
7 Corporation.

8 Equitable subordination requires injury and an unfair  
9 advantage because subordination is a remedial measure designed  
10 to offset the harm resulting from the inequitable conduct. It  
11 is not penal in nature. See Mobil Steel, "a claim or claims  
12 should be subordinated only to the extent necessary to offset  
13 the harm which the bankrupt and its creditors suffered on  
14 account of inequitable conduct."

15 In calculating the extent to which a claim should be  
16 subordinated, the Bankruptcy Court should "attempt to identify  
17 the nature and extent of the harm it intends to compensate in  
18 the manner that will permit a judgment to be made regarding the  
19 proportionality of the remedy to the injury that has been  
20 suffered by those who will benefit from the subordination. In  
21 re: Papercraft v. Citicorp Venture Capital, 2002 WL 34702177  
22 (W.D. Pa. 2002).

23 While the harm and amount of injury should be based on  
24 the supportive evidence in the record, the remedy of equitable  
25 subordination should remain flexible to deal with the

1 inequitable conduct at issue.

2           As the court noted in In re: Teltronics Services,  
3 Inc., the remedy of equitable subordination must remain  
4 sufficiently flexible to deal with manifest injustice resulting  
5 from the violation of the rules of fair play. Where ingenuity  
6 spawns unprecedented vagaries of unfairness, bankruptcy courts  
7 should not decline to recognize their marks nor hesitate to  
8 turn the twilight for offending claimants into a new dawn for  
9 other creditors. 29 B.R. 139 (E.D.N.Y. 1983). Because  
10 equitable subordination is remedial rather than punitive in  
11 nature, the extent of equitable subordination of a claim is not  
12 related to the amount paid for the claim by the offending  
13 claimant.

14           Purpose of equitable subordination is to protect  
15 creditors against unfairness and to restore creditors to the  
16 position they would have been in if the misconduct did not  
17 occur. As such, there is no justification for linking  
18 equitable subordination of claim to the amount the creditor  
19 paid for the claim or the profit the creditor received or may  
20 receive from such purchase. If the injury sustained by the  
21 estate or other creditors is greater, the equitable  
22 subordination should be greater. Conversely, if the injury to  
23 creditors is less than, then the profit realized by the  
24 offending creditor, the extent of equitable subordination  
25 should be less. Simply put and contrary to Papercraft, there

1 is no nexus between the amount a creditor pays for its claim  
2 and the amount of injury sustained by other creditors of the  
3 estate as a result of the creditor's misconduct.

4         Indeed, capping the recovery on a creditor's claim to  
5 the amount it paid for the claim is inconsistent with the  
6 notion that equitable subordination is remedial in nature.  
7 Rather, the court should engage in an evaluation of the harm  
8 that the estate's other creditors suffered as a result of the  
9 creditor's misconduct based upon the supportive evidence of the  
10 record.

11         Nonetheless, Papercraft identifies three categories of  
12 economic harm that provide a useful template for determining  
13 the extent of equitable subordination: one, quantifiable  
14 monetary harm that results from delay; two, harm that results  
15 from uncertainty; and three, harm that results from delay that  
16 can be measured by professional fees and administrative  
17 expenses incurred by the estate as a result of the litigation.

18         The facts of Papercraft, a ten-year litigation saga  
19 that resulted in a suite of eight decisions, are instructive.  
20 Citicorp Venture Capital, CBC, an insider and fiduciary of the  
21 debtor Papercraft attempted to take control of Papercraft's  
22 assets and obtain a significant profit of the expense of other  
23 creditors by secretly purchasing claims against Papercraft for  
24 a deeply discounted amount and then objecting to the  
25 confirmation of a plan of reorganization proposed by the debtor

1 in favor of a competing plan favoring CBC. Papercraft's  
2 unsecured creditors committee filed a motion for summary  
3 judgment, seeking to limit the allowance of claims held by CBC.

4 The bankruptcy court issued a memorandum, opinion, and  
5 order finding that the purchases at issue were all found to  
6 have occurred during the seven-month period between the time  
7 the debtor filed its plan of reorganization and the time it  
8 filed its disclosure statement, and therefore, CBC's purchases  
9 at a discount, without disclosure, while an insider,  
10 constituted breaches of CBC's fiduciary duty to Papercraft.  
11 Accordingly, the Bankruptcy Court limited CBC's allowed claim  
12 and distribution in the plan to the purchase price of the  
13 claim.

14 After a trial on the issue of equitable subordination  
15 of CBC's claim, the court withdrew and vacated its prior  
16 decision, finding that CBC breached its fiduciary duty to the  
17 debtor as an insider for failing to disclose its identity in  
18 purchasing the claims and as an equitable subordination remedy  
19 limiting CBC's claim to the extent of the purchase price of the  
20 claim. But the Bankruptcy Court declined to equitably  
21 subordinate CBC's claim holding that further subordination of  
22 CBC's thus limited claims, pursuant to the principles of  
23 equitable subordination, was not appropriate because the  
24 Bankruptcy Court was already limiting CBC's allowed claim to  
25 the amount it paid for such claim.

1           The parties then cross appealed, and on appeal, the  
2 district court affirmed the Bankruptcy Court's factual findings  
3 that CBC had acted inequitably and caused injury to Papercraft  
4 and its creditors and gained an unfair advantage and agreed  
5 with the Bankruptcy Court's finding that CBC's claim should be  
6 limited to the amount it paid for such claim so as to eliminate  
7 any potential profit.

8           The district court reversed the Bankruptcy Court on  
9 the issue of further subordination and held that any  
10 subordination beyond the limitation of CBC's recovery to the  
11 amount paid for such claim should be supported by factual  
12 findings and reconciled with principles of equity.  
13 Accordingly, the district court remanded the Bankruptcy Court  
14 for a further finding on the extent to which CBC's allowed  
15 claim should be equitably subordinated.

16           On remand, the Bankruptcy Court found that CBC's  
17 recovery would be further subordinated for, one, additional  
18 administrative expenses incurred during the delay caused by  
19 CBC; two, interest in dividends lost by creditors during delay;  
20 and three, professional fees and expenses incurred and/or paid  
21 by the estate.

22           I'm sparing you a million citations.

23           Additional appeals ensued and the district court  
24 affirmed the Bankruptcy Court's decision but reduced the lost  
25 interest component of the subordinated claim.

1           Ultimately, the Third Circuit upheld the additional  
2 subordination of CBC's claim for attorney's fees, reasoning  
3 that the Bankruptcy Court did not award a monetary judgment for  
4 attorney's fees to penalize CBC but rather to return to other  
5 creditors the position they would have been in had CBC not  
6 acted inequitably and affirmed the district court's reduction  
7 of the lost interest component of CBC's subordinated claim.

8           In determining the amount of harm, the Bankruptcy  
9 Court in Papercraft explained that it need not arrive at a  
10 figure with precise accuracy and that any difficulty in  
11 precisely quantifying the harm should not go down to the  
12 benefit of the wrongdoer.

13           Prong 3. Consistency with the Bankruptcy Code. The  
14 third prong of the Mobil Steel test acknowledges that equitable  
15 subordination cannot be used to alter the statutory scheme  
16 imposed by bankruptcy law. Accordingly, while a Bankruptcy  
17 Court can apply the equitable doctrine at its discretion, it's  
18 power to subordinate and allow a claim is not boundless, and  
19 courts cannot use equitable principles to disregard unambiguous  
20 statutory language in the bankruptcy code.

21           The application of the third prong of the Mobil Steel  
22 test ensures that the full breadth of the remedy of equitable  
23 subordination is available while ensuring that its reach does  
24 not violate any provision of the Bankruptcy Code or become  
25 punitive as opposed to remedial. The requirement that

1 subordination be consistent with bankruptcy law comes into play  
2 only after the court has concluded that the first two prongs  
3 have been satisfied.

4 By virtue of the codification of the doctrine in  
5 Section 510(c) of the code, the third prong of the Mobil Steel  
6 doctrine warrants little attention.

7 B) Mobil Steel prong 1, SPSO's inequitable conduct.

8 1. Breach of the implied covenant of good faith and  
9 fair dealing.

10 As the Court has found, Mr. Ergen's acquisition of the  
11 LP debt through SPSO violated the spirit and purpose of the  
12 credit agreement's restrictions designed to prevent competitors  
13 from purchasing LP debt and breached the credit agreement's  
14 implied covenant of good faith and fair dealing. This Court  
15 has held that a violation of the implied covenant of good faith  
16 and fair dealing may provide grounds for equitable  
17 subordination.

18 Although many aspects of SPSO's conduct are, as has  
19 been suggested, perfectly lawful, including making purchases  
20 anonymously, acquiring a blocking position, and making an  
21 unsolicited cash bid for distressed assets, its purchases of LP  
22 debt in order to preserve a strategic option for the benefit of  
23 DISH, a disqualified company, violated the spirit of the credit  
24 agreement's restrictions on competitors owning LP debt. Such  
25 conduct, as described more fully above, constitutes inequitable



1 conduct sufficient to warrant the imposition of equitable  
2 subordination of the SPSO claim.

3 2. SPSO through the conduct of Kiser and Ketchum  
4 purposefully delayed the closing of LP debt trades.

5 In addition to SPSO's inequitable conduct in acquiring  
6 the LP debt, SPSO also engaged in inequitable conduct by  
7 effectively sidelining hundreds of millions of dollars of LP  
8 debt during the weeks and months leading to the court sanction,  
9 termination of exclusivity, on July 15th, 2013, all while SPSO,  
10 Mr. Ergen and eventually LBAC and DISH fine-tuned their bid  
11 strategy. SPSO, through Mr. Ergen, did so by purposefully  
12 delaying the closing of LP debt trades in the face of repeated  
13 demands to close and despite the ready availability of the  
14 funds necessary to close.

15 Even if SPSO's acquisition of LP debt was faultless,  
16 its intentional delay in closing its trades of LP debt alone is  
17 sufficient to constitute the type of inequitable conduct  
18 necessary for the imposition of equitable subordination by the  
19 Court. The evidence of purposeful delay could not be more  
20 clear.

21 SPSO was formed by Mr. Ergen with an initial capital  
22 contribution of only ten dollars and its operating agreement  
23 did not require additional capital contributions from Mr. Ergen  
24 as managing member.

25 Even though Sound Point knew that SPSO was funded with

1 an insufficient amount of initial capital to buy a significant  
2 amount of LP debt, it nevertheless traded for SPSO because Mr.  
3 Ketchum understood that SPSO was backstopped by Mr. Ergen. The  
4 evidence establishes that after Sound Point executed a trade  
5 for SPSO, the trade would be funded only very shortly before or  
6 on the closing date.

7 At that time Mr. Kiser would contact Mr. Ergen's asset  
8 manager, Bear Creek Asset Management, and tell Bear Creek how  
9 much money was needed to close the trade, after which Mr. Ergen  
10 would then authorize the wire transfer and Bear Creek would  
11 liquidate investments to fund the transfer. Liquidity was not  
12 created by Mr. Kiser immediately upon placing a trade. Rather,  
13 as admitted by Mr. Kiser at trial, only after delaying for as  
14 long as possible on closing a trade were the funds for the  
15 purchase wired for closing. Of the twenty-five trades entered  
16 into by SPSO for purchases of LP debt, eighteen of them took  
17 over two months to settle, and of those eighteen trades six  
18 took over four months to settle.

19 By May 20th, 2013, SPSO had contracted for, but had  
20 failed to settle approximately 593,757,000 dollars in face  
21 amount of LP debt trades and approximately 610 million dollars,  
22 counting trades held by brokers on that date, more than thirty-  
23 three percent of the total outstanding amount of LP debt  
24 obligations, and had kept open a number of trades that it had  
25 entered into as far back as December 12th, 2012. Mr. Kiser

1 explained the delays as stemming from the fact that he and Mr.  
2 Ergen were not in any rush to close the LP debt trades. In  
3 their view, the trades "didn't need to be closed until you  
4 absolutely had to" as there was "wasn't an economic benefit to  
5 doing it."

6 As Mr. Kiser testified, Mr. Ergen was getting a return  
7 on his capital and his investment. So if he didn't have to pay  
8 for it and he can make money on another end where his money was  
9 invested, that seemed like a smart move. The documentary  
10 evidence on this point is to the contrary, as bank statements  
11 produced by Bear Creek indicate that Mr. Ergen earned a  
12 relatively low rate of interest on the funds in his trust  
13 accounts. In addition, there were economic penalties imposed  
14 on SPSO for leaving LP debt trades open for an extended period  
15 of time, including having to forego adequate protection  
16 payments. This fact further undermines the economic  
17 explanation advanced by Mr. Kiser to explain the delay.

18 Moreover, no evidence was introduced that either Mr.  
19 Ergen or Mr. Kiser took the possibility of a penalty to SPSO  
20 into account in determining, one, when to close unsettled  
21 trades, or two, which of Mr. Ergen's investments to liquidate  
22 to pay for SPSO's debt trades, despite the fact that Messrs.  
23 Ergen and Kiser had been made aware of how the adequate  
24 protection payments worked.

25 Bear Creek, which independently selected which of Mr.

1 Ergen's assets would be liquidated to fund the trades, was not  
2 even made aware that SPSO would have to pay cost of carry fees  
3 and forego adequate protection payments if the LP debt trades  
4 were not closed by a certain date. In fact, there is no  
5 evidence that any analysis at all was done by Mr. Ergen, Mr.  
6 Kiser or Bear Creek to determine the return on any of the  
7 assets in Mr. Ergen's personal trust to determine which assets  
8 to liquidate for closing. The economic benefit justification  
9 for delaying the closing of trades simply does not pass muster.

10 Liquidity concerns were another purported reason for  
11 the delayed closing of the LP debt trades, according to Mr.  
12 Kiser. At trial Mr. Kiser first denied that liquidity reasons  
13 caused any delays, until he was reminded that he had testified  
14 otherwise at his deposition when he suddenly recalled giving  
15 that as an explanation. Asked if there was ever a time when  
16 Mr. Ergen lacked the liquidity to promptly close a trade, Mr.  
17 Kiser testified at trial that where Mr. Ergen may not have had  
18 funds available, yes, that occurred.

19 Mr. Kiser equivocated, however, when pressed as to  
20 whether he could identify any investments that Mr. Ergen would  
21 have needed to exit, which would have taken longer than three  
22 days, saying, it depended. Mr. Ergen had things that were all  
23 over the gamut of types of investments. Some were a lot less  
24 liquid.

25 Mr. Kiser's testimony on the liquidity issue lacks

1 credibility. And even Mr. Ergen admitted that as far as he  
2 knew, there was not a delay in closing because of any liquidity  
3 issue, stating that "I don't believe other than several days or  
4 perhaps a Friday where it didn't make economic sense to wire  
5 money, there was any delays because of that reason." Bear  
6 Creek also confirmed that after Mr. Ergen authorized a wire  
7 transfer from his personal trust, Bear Creek could make it  
8 available for transfer within several days.

9 Even a cursory glance at Mr. Ergen's bank statements  
10 showed that funds were liquidated on a rolling basis from the  
11 investments held by his personal trust with hundreds of  
12 millions of dollars in cash sometimes sitting in Mr. Ergen's  
13 trust account for several weeks before they were used to fund a  
14 trade. The evidence further shows that at least in one case  
15 liquid funds were readily available, but Mr. Kiser instructed  
16 Bear Creek to hold off wiring funds.

17 The alleged liquidity issue was clearly manufactured  
18 by Mr. Kiser and the lies to counterparties regarding liquidity  
19 were passed along by Mr. Ketchum, who was often informed by Mr.  
20 Kiser that funds were "not available to close a trade" and  
21 asked no further questions.

22 Mr. Kiser and Mr. Ergen also blamed the delays in  
23 closing the SPSO trades on the need to complete upstream  
24 paperwork and on false starts from both the seller and the SPSO  
25 sides of the trades. Neither of these was a credible

1 explanation for what the documentary evidence clearly reveals  
2 was a concerted effort to delay on the part of Messrs. Kiser  
3 and Ergen.

4 Mr. Ergen testified that the variation in the dates  
5 between trading and closing in LP debt trade had to do with the  
6 upstream paperwork that had to be done to verify who the actual  
7 owners were, which was not that easy and could take anywhere  
8 from weeks to months.

9 Because of this time to verify and the need to have  
10 both documents and funding ready to close a trade, Mr. Kiser  
11 testified that there were a lot of false starts that went both  
12 ways. None of this testimony was credible.

13 The volume of e-mails admitted into evidence reveals  
14 that counterparties to the trades that had been held open for  
15 months were, in fact, ready and eager to close, and they became  
16 more frustrated as time went on.

17 Parties repeatedly reached out to Sound Point to  
18 settle trades, but often they could get little traction. See  
19 Sound Point, January 24th, 2013 replying, "Sorry, but we are  
20 not able to settle that one right now," in response to weekly  
21 inquiries from UBS seeking to close a trade.

22 March 7th, 2013, Sound Point e-mail stating it would  
23 be to settle "next week" in response to repeated inquiries  
24 since February 13th regarding a December 2012 trade.

25 In particular, Jefferies, the executing broker for the

1 majority of the LP debt trades, was pushed aside for months by  
2 Sound Point, who provided excuse after excuse for the failure  
3 to close numerous open trades.

4 In February 2013, Jefferies sent ongoing e-mail and  
5 telephone requests to Sound Point to close multiple trades with  
6 trades dates going back as early as October 23rd, 2012.

7 At that time an employee of Ketchum reminded him that  
8 "we have been pushing Jefferies off for nearly three weeks."

9 On April 23rd, 2013 Mr. Ketchum wrote to Mr. Kiser  
10 that "Kevin" of Sound Point, "thinks we can hold Jefferies off  
11 on any payments until at least May 15th in connection with over  
12 289 million dollars in LP debt that had not settled."

13 After Jefferies followed up with Sound Point on April  
14 25th seeking to close eighty-eight million dollars of open  
15 trades, Mr. Ketchum inquired whether he could plausibly blame  
16 SPSO's delay on the upstreams but was told by Sound Point  
17 personnel that the work had already been completed. Mr.  
18 Ketchum then e-mailed back and forth with a colleague about  
19 which lie to use, whether he should tell the counterparty "that  
20 we are still doing legal work on the upstreams, that we are  
21 waiting for funding from our investor, or that we are in the  
22 process of executing some other large positions we have to pay  
23 for this."

24 It was ultimately determined that the colleague should  
25 use the latter excuse, together with the statement that Mr.

1 Ketchum has spoken with Steve Sander, the head of sales at  
2 Jefferies, about this.

3 The need to delay Jefferies was based on Mr. Ketchum's  
4 understanding from Mr. Kiser that SPSO did not have capital  
5 available to fund the trade and thus Jeffries needed to be put  
6 off for a period of time.

7 As of May 9th, SPSO had seven open trades with  
8 Jefferies totaling 588 million dollars in LP debt trades dating  
9 back as far as January 2013. Jefferies was imploring Sound  
10 Point to close the trades. Mr. Sanders at Jefferies appealed  
11 to Mr. Ketchum "this is a big problem for me. I would like to  
12 come down and talk to you this afternoon around 4 or 5 p.m.  
13 mano a mano. Is this possible?"

14 Mr. Ketchum replied that he was waiting for other  
15 "trades to settle" -- a lie -- and that he "had already pushed  
16 extremely hard to get to where we are now in terms of  
17 closing." None of the open trades closed for another several  
18 weeks.

19 As he knew, Mr. Ergen did not like to hold up funds  
20 which could be invested elsewhere, Mr. Kiser testified that he  
21 instructed Mr. Ketchum to prepare a schedule for him showing  
22 unsettled trades and expected settlement dates so that he could  
23 have the money available on those dates in order to avoid the  
24 back and forth with counterparties who may not have been ready  
25 to close when the funds were made available.



1           Mr. Ketchum also testified that proposed settlement  
2     dates for the unsettled trades were requested by Jefferies, and  
3     he tried to act as intermediary between SPSO and Jefferies, an  
4     anxious counterparty who was trying to get trades settled.

5           Mr. Ketchum stated that the "proposed settlement dates  
6     in the schedule e-mailed to Mr. Kiser on May 8th, 2013 which  
7     were up to four months or more after the trade date were  
8     suggested by Mr. Ketchum as a compromise solution in order to  
9     get the open Jefferies trades settled, and he proposed the  
10    schedule to Mr. Kiser before conveying such dates to Jefferies  
11    in order to see if a schedule of this kind was capable of  
12    execution by SPSO. While it is not clear whether such proposed  
13    dates were actually sent to Mr. Jefferies, Mr. Ketchum's  
14    testimony on this point was not credible.

15           The proposed settlement dates contained in the  
16    schedule e-mailed from Mr. Ketchum to Mr. Kiser on May 8th,  
17    2013 reflect not a prediction for liquidity planning purposes  
18    of when trades would be ready to close, but rather a game plan  
19    for delaying the closing of open trades as long as possible.

20           In fact, in addition to this schedule, Sound Point had  
21    also prepared an analysis of the average days it took to settle  
22    an LP debt trade with Jefferies after the trade date, sixty-  
23    nine days, and the average days after the industry norm  
24    "contractual settlement date of T plus twenty", or twenty days  
25    after the trade date, which was thirty-eight days. There is to

1 reason for Sound Point to have performed such an analysis other  
2 than to provide support for its proposed further delays.

3 In fact, with the exception of the Icahn trade, all of  
4 SPSO's trades failed to close before a T-plus-twenty  
5 contractual settlement date.

6 Astonishingly, Mr. Ketchum testified on direct  
7 examination that even when the counterparty to a trade was  
8 ready and eager to settle a trade, Mr. Kiser had instructed  
9 them to delay the closing. See January 15th transcript,  
10 Ketchum.

11 "Q. Did you ever have a discussion with Mr. Kaiser in which  
12 you and Mr. Kiser agreed that you should delay the closing of a  
13 trade?

14 "A. Yes."

15 See also Plaintiff's Exhibit 204, Sound Point employee  
16 e-mailing Ketchum on June 4th regarding a LightSquared trade  
17 entered into on May 3rd and stating, "Jefferies is looking to  
18 settle the other two trades. Do you want to or delay?"

19 Mr. Kiser admitted that even when directly informed  
20 that counterparties were ready to close, he sought to defer  
21 settlement as long as possible.

22 This goal was evident in much of the documentary  
23 evidence submitted. See, e.g., Plaintiff's 495, Ketchum to  
24 Kiser, "We need to close our March 25th trade before month end,  
25 for example May 25th or so, to stave off Jefferies."

1           The spring of 2013 was a crucial time in the debtor's  
2 Chapter 11 cases. The exclusivity stipulation approved by this  
3 Court in February 2013 extended LightSquared's exclusive period  
4 to file a reorganization to July 15th, 2013.

5           The parties did not reach a deal for a consensual plan  
6 by June 3rd. Preparatory work for a sale process of all or  
7 substantially all of the debtor's assets was required to begin  
8 with the formal sale process commencing on July 15th.

9           In the spring of 2013, LightSquared and its  
10 stakeholders, in particular, significant holders of LP debt,  
11 were involved in negotiations with respect to terms for  
12 consensual plan of reorganization.

13           Beginning in late May 2013 and continuing thereafter,  
14 Moelis had also contacted over ninety parties to discuss a  
15 joint venture or strategic partnership.

16           On June 7th, 2013, the debtors received court approval  
17 to enter into and perform under an engagement letter with  
18 Jefferies in connection with securing potential exit financing  
19 for the debtors, after which a roadshow kicked off to seek to  
20 raise capital.

21           During this period SPSO continued to amass large  
22 quantities of LP debt and intentionally delayed the closing of  
23 large blocks of trades, all without formally revealing its  
24 identity. As a result, all of these parallel movements forward  
25 by the parties were stymied.

1           LightSquared has alleged that it was not sure which  
2 lenders to negotiate with and whether the ad hoc secured group  
3 was able to carry a class, such that it could enter into a  
4 binding commitment with respect to a plan, such that any hope  
5 of achieving a consensual plan during this period was derailed.

6           Without spending the cash necessary to close hundreds  
7 of millions of dollars of open trades and by intentionally  
8 leaving them in limbo for three to four months longer, Mr.  
9 Ergen arrogated to himself the power to control the forward  
10 motion or lack thereof of the bankruptcy case beginning in  
11 April 2013.

12           Indeed, the exclusivity stipulation provided that it  
13 could be terminated if the ad hoc secured group collectively  
14 ceased to be the largest holder of LP debt. On June 13th,  
15 2013, SPSO "joined" the ad hoc secured group specifically to  
16 ensure that the termination conditions contained in paragraph  
17 15 of the stipulation would not be triggered.

18           Within days of nominally joining the ad hoc secured  
19 group, several hundreds of millions of dollars in hung trades  
20 just happened to close, making SPSO the controlling member of  
21 the group by virtue of the size of its holdings.

22           SPSO's decision to join the ad hoc secured group was  
23 undoubtedly made for the strategic purpose of controlling the  
24 sale process for the debtor's assets with DISH as the buyer.  
25 And the fact that it rendered the negotiated and court-ordered

1 exclusive period meaningless was ignored.

2 Mr. Ergen understood that the exclusivity stipulation  
3 would terminate in July, and enabling the stipulation to remain  
4 in place until then furthered his interest of keeping the  
5 status quo until the DISH board had authorized DISH to step  
6 into the shoes of LBAC and pursue the bid.

7 While a creditor who is not an insider is not a  
8 fiduciary, a creditor nonetheless does not have the unfettered  
9 right to engage in such purposeful obstruction of the process.  
10 SPSO failed to act in a way that is consistent with the most  
11 basic concepts of good faith that are fairly to be expected of  
12 Chapter 11 creditors, especially those who voluntarily join the  
13 capital structure of a debtor well after distress has set in.

14 As SPSO vehemently maintains, many aspects of SPSO's  
15 conduct are entirely acceptable, albeit aggressive, and do not  
16 provide grounds for equitable subordination. Such lawful and  
17 acceptable conduct includes buying distressed debt, buying  
18 distressed debt anonymously, buying distressed debt anonymously  
19 at prices close to par, acquiring a blocking position in a  
20 class of debt, and making an unsolicited bid for the assets of  
21 a debtor.

22 Nothing in this Court's decision should in any way  
23 alter such conduct in the distressed debt marketplace. The  
24 Bankruptcy Code and the Chapter 11 process tolerate and even  
25 contemplate self-interested and aggressive creditor behavior.

1           Notwithstanding, SPSO's conduct in acquiring the LP  
2 debt and in controlling the conduct of the Chapter 11 case  
3 through purposeful delays in closing hundreds of millions of  
4 dollars of LP debt trades during a critical time frame in these  
5 cases breaches the outer limits of what can be tolerated.

6           While it is generally acceptable to obtain and deploy  
7 a blocking position to control the vote of a class with respect  
8 to a proposed plan of reorganization, it is not acceptable to  
9 deploy a blocking position to control the conduct of the case  
10 itself, to subvert the intended operation of a court-approved  
11 exclusivity termination arrangement, and to prevent the Court  
12 from directing and having visibility into events unfolding in  
13 the case.

14           In response to the allegations that they purposefully  
15 sidelined hundreds of millions of dollars in debt and prevented  
16 the Chapter 11 cases from moving forward, SPSO and Mr. Ergen  
17 say no harm, no foul, citing to the fact that there is no  
18 evidence that SPSO had any impact on plan negotiations in the  
19 spring and summer of 2013, but that is not true.

20           Had there been clarity with respect to the ownership  
21 of the LP debt during that time period, the parties may have  
22 made substantial progress on a plan and it is possible that the  
23 debtor's exclusive periods could have been extended, a game  
24 changer in the course of the debtor's cases. See Mobil Steel  
25 prong two, how SPSO's conduct harmed creditors.

1           Having acquired a controlling position in the LP debt  
2 by use of the special purpose vehicle, whose special purpose  
3 was to achieve an end run around the credit agreement and then  
4 purposefully sidelining hundreds of millions of dollars of LP  
5 debt while fine-tuning its acquisition strategy, SPSO has  
6 harmed the creditors of LightSquared.

7           Having seized control of the class of LP debt, SPSO  
8 seized control of the case itself, rendering meaningless the  
9 heavily negotiated and court-ordered process leading to the  
10 termination of exclusivity on July 15th, 2013.

11           SPSO's inequitable conduct has inflicted as yet  
12 unquantified harm on LightSquared's creditors as a result of  
13 the delay, uncertainty and increased administrative costs  
14 suffered by these estates.

15           While various numbers and calculations of harm have  
16 been suggested by plaintiffs and by the ad hoc secured group,  
17 quantification of the amount of harm is beyond the agreed-upon  
18 scope of this first phase of the adversary proceeding and will  
19 be determined after further proceedings before this Court.

20           D. Remedy.

21           SPSO has gone to great lengths to identify the many  
22 things that it did that are "perfectly legal" and just plain  
23 smart and warns ominously that any finding of liability would  
24 roil the debt markets. But its otherwise lawful pursuit of  
25 aggressive and profitable distressed debt transactions does not

1 entitle it to do what it did to the LightSquared estate and  
2 cases.

3 As Mr. Ergen so colorfully explained during the trial,  
4 "You can live in a bubble if you want to and probably never get  
5 any disease, but you go play in the mud and the dirt and you  
6 probably aren't going to get disease either because you get  
7 immune to it. So you pick your poison and I think we choose to  
8 go play in the mud."

9 Here playing in the mud involved end running the  
10 LightSquared credit agreement and then purposefully holding in  
11 limbo hundreds of millions of dollars of debt trades and  
12 undermining the ability of the debtor, the constituents and  
13 even the Court to conduct the case. Determining the amount of  
14 the harm that has occurred to these estates as a result of  
15 SPSO's conduct, while difficult, will not be impossible, and  
16 the SPSO claim will be subordinated accordingly.

17 CONCLUSION:

18 For the foregoing reasons the Court finds that the  
19 SPSO claim will be equitably subordinated in an amount to be  
20 determined after further proceedings before this Court. The  
21 Court's findings and conclusions remain subject in all respects  
22 to a complete decision to be filed in these cases as soon as  
23 practicable.

24 We're going to take a short break.

25 The next one is a little shorter, but not by much.



1 they're making is, look, the board didn't meet, there was no  
2 authorization, this started with one -- I think it was a five  
3 million dollar trade. The only thing you have is that it was  
4 facilitated, executed by Mr. Kiser. You have nothing.

5 In fact, when you play the tape forward, you have  
6 everyone agreeing that when the board ultimately was informed a  
7 year later or so, the board knew nothing about the prior trades  
8 and that lack of knowledge is evidence of the lack of  
9 authorization. So that's, I think, a fair statement of at  
10 least part of the argument.

11 How could you say that they were authorized when you  
12 have a big public company that has to dot its i's and cross  
13 it's t's, and everyone agrees that this was news to them when  
14 they were informed about it after the fact? So how do I get  
15 around that?

16 MR. STONE: Right. So I'm not -- I guess we would not  
17 agree that everyone agrees that that didn't happen because none  
18 of that is of record but I think the real point here is that  
19 the cases they cite make it very clear that authority can be  
20 actual, apparent or implied. So you have to have an inference  
21 of some kind of authority.

22 Now here, the authority is clearly implied by the  
23 titles, alone, of Ergen and Kiser. And they are high-ranking  
24 employees and officers of DISH and EchoStar. And there's a  
25 case called Old Republic v. Hansa World Cargo that we cite in

1 our brief, that says that -- just that: that a title is  
2 enough. But you could also look at the restatement -- the  
3 Second Restatement on agency, Section 103: by placing an agent  
4 in a position that has a customary scope that constitutes a  
5 manifestation by the principal, an assent and intention are to  
6 be inferred from the surrounding facts and circumstances.

7 So the fact that Mr. Ergen is the executive chairman  
8 and Mr. Kiser is the treasurer, we think that, alone, raises  
9 the inference of authority.

10 THE COURT: But then you get to the point that was  
11 made that if Mr. Ergen decided to buy a parcel of land or an  
12 item of some kind and he had Mr. Kiser do that for him, then in  
13 every case is he buying something for DISH? I mean how do I  
14 draw that line?

15 MR. STONE: Right, so part of this goes to again, you  
16 have to infer from the facts and circumstances, are these  
17 things that would normally be in the scope of that type of  
18 person's authority? And here we have the executive chairman  
19 and the treasurer who actually makes investments for the  
20 company. So it is a reasonable inference that they are acting  
21 within the scope of their authority.

22 We can also look at Nevada law which really this  
23 should be a Nevada law issue; they cite New York cases.  
24 There's a case called USACM Liquidating Trust v. Deloitte &  
25 Touche, 764 F.Supp 2d 1210. Now, the Court there held that the

1 company's majority stakeholders who were also officers of the  
2 company were acting within the scope of their employment and  
3 authority because "the movement of corporate assets and  
4 decisions about which investments to make, which creditors to  
5 pay and what information to disclose are ordinary functions of  
6 management which typically would be attributed to the company."

7 THE COURT: All right. But here he was spending his  
8 own money.

9 MR. STONE: Well, we don't know that. We don't know  
10 where the money came from. We know that in that -- that was  
11 his claim in Nevada, that that was his own money but that  
12 hasn't been established as of record yet.

13 THE COURT: Okay.

14 MR. STONE: I would also note, Your Honor, that the  
15 two cases that they do cite, Cromer and Imburgio, we think  
16 don't apply at all. And one of those cases, it was a New York  
17 Supreme Court case, they dismissed the complaint because the  
18 acts that alleged were acts that clearly the agent could not  
19 take -- could never have taken under any circumstances.

20 And in the Cromer case, there was an effort by the  
21 plaintiff there to establish Ernst & Young International as an  
22 agent of a U.S. affiliate and the Court found that there was no  
23 implied authority because they were completely separate  
24 companies and really had no relationship.

25 Your Honor, just one more word with respect to the use

1 of information from Nevada and I regret that we put a few  
2 bullet points in our brief. I really opened Pandora's box. It  
3 would have been a lot easier not to do that.

4 THE COURT: I skipped them.

5 MR. STONE: And I only go back to this point because  
6 Mr. Dugan said the law is very clear that you can rely on  
7 things that we've put into the record. Well, we haven't put  
8 anything into the record. The Court can take judicial notice  
9 of the fact that Mr. Ergen testified X, Y, Z in Nevada, but  
10 it's not evidence and it's not something that can defeat our  
11 allegations.

12 And the cases that they cite in their brief are really  
13 cases where, for instance, a plaintiff makes a claim under a  
14 proxy statement that there was a false disclosure and the proxy  
15 itself bears out precisely the opposite. That's  
16 understandable.

17 But if you have two documents, one document says X and  
18 that's alleged in the complaint and they come back with a  
19 document that says Y, those are subject to proof. So the way  
20 the system works is we get to test those statements and this  
21 court gets to make credibility determinations about witness  
22 statements.

23 Arguments contained in briefs are of, I would contend,  
24 of even lesser dignity, and certainly the arguments that Mr.  
25 Ergen made in the Nevada proceedings would fall into that

1 category. So we think by injecting the Nevada pleadings into  
2 the motion to dismiss, they've just created more problems for  
3 themselves because all those things really do is raise fact  
4 issues.

5 THE COURT: Can I ask you a couple of questions about  
6 the complaint?

7 MR. STONE: Yes.

8 THE COURT: So I'm trying to square the prayer for  
9 relief with the various counts and allegations and I'm having a  
10 little bit of a hard time. You're asking for disallowance of  
11 SPSO's claims in full which has to be based on some other  
12 applicable law or agreement, right? We're not doing the  
13 equitable disallowance thing.

14 MR. STONE: That's correct, Your Honor.

15 THE COURT: Okay. And then you say or at a minimum,  
16 in part to the extent that SPSO would receive an unjust profit  
17 for its inequitable conduct, why is that an appropriate measure  
18 of damages for me to consider? Why should I be concerned with  
19 an unjust profit as opposed to some damage that you can prove  
20 occurred to the creditors of this estate? Why do I care about  
21 whether or not there's a profit there, just or unjust?

22 MR. STONE: Well, we think that Your Honor can fashion  
23 a lot of remedies. This is a court of equity, and we believe  
24 that to the extent that there was a manipulation or at least an  
25 upset to the bankruptcy process, that it could be appropriate

1 for a court to take into account the fact that this party that  
2 didn't belong in the capital structure in the first place and  
3 had -- and took actions that caused an effect in the bankruptcy  
4 proceeding, could be subject to having their claim disallowed  
5 which would leave more funds for the other constituents.

6 THE COURT: Okay. Then in 114(b) you ask for a  
7 subordination of SPSO's claims to all claims -- all claims.  
8 You're not just talking about at the LP entity. You're talking  
9 about all creditors' claims? Because it's different from what  
10 Harbinger asked for. Harbinger asked for subordination, just  
11 at the LP debt. Do you mean all claims?

12 MR. STONE: No, I think just at the LP stage.

13 THE COURT: Just at the LP.

14 MR. STONE: Yes, I think that would --

15 THE COURT: So you're not asking for subordination to  
16 the Inc. debt?

17 MR. STONE: No, Your Honor. We don't think that would  
18 be appropriate.

19 THE COURT: Neither do I. Okay. Is subordination in  
20 your existing plan?

21 MR. STONE: In the complaint?

22 THE COURT: In the plan.

23 MR. STONE: Oh, in the plan.

24 THE COURT: Mr. Barr?

25 MR. BARR: For the record, Matt Barr from Milbank

1 Tweed. Your Honor, the current plan has a provision that says  
2 it could take into account subordination and the effect of  
3 subordination. It does not currently provide for the  
4 subordination of any particular creditor.

5 THE COURT: Okay, thank you.

6 So is it your position that if I don't find an  
7 underlying breach, I should nonetheless and can nonetheless  
8 equitably subordinate some or all of the claim? There's no --  
9 hypothetically I don't find a breach.

10 MR. STONE: Yes, Your Honor. I think that there is a  
11 separate argument, separate from the breach of contract that if  
12 Mr. Ergen or SPSO or other parties engaged in inequitable  
13 conduct that had an effect on the bankruptcy proceeding, that  
14 that's an available remedy.

15 THE COURT: Okay. So for the breach of contract, case  
16 law has been cited to me that -- for the proposition that if a  
17 claim is transferred in violation of a prohibition or an  
18 assignment, there's nonetheless a valid claim. How do I get  
19 around that? In other words, the credit agreement does not  
20 state that an assignment in contravention of the assignment  
21 provisions of the credit agreement means that the assignment is  
22 void or voidable. The credit agreement doesn't say that;  
23 everybody agrees on that.

24 MR. STONE: That's true, Your Honor.

25 THE COURT: And the case law, at least some of the

1 case law that's been pointed to me says that you still have a  
2 valid claim even if you hold an assignment in violation of a  
3 prohibition on assignment but there's a breach of contract  
4 claim against the original assignor obligor. So how do I get  
5 around that?

6 MR. STONE: Well, two things, Your Honor; first, I  
7 would point out that the LCE Lux HoldCo case that they cite,  
8 the Court recognized there that when the agreement evinces a  
9 clearly stated intent to render a party powerless to assign,  
10 there's no need for the nonassignment clause to also contain  
11 talismanic language or magic words describing the effect of any  
12 attempt by the payee to make an assignment. And the Court went  
13 on there to say that in that particular case, it didn't render  
14 it per se void because of some other language in the credit  
15 agreement.

16 Our point is we don't have to use words null and void  
17 here. We think they didn't have a claim. We recognize that  
18 there is language talking about a participation. And so while  
19 they may have had or may still have some economic interest,  
20 they don't have a true claim. And that's one of the things I  
21 think that goes into our theory of harm which is we didn't  
22 really know who to deal with at various points in this process  
23 because if they didn't belong in the credit agreement -- or,  
24 I'm sorry, in the capital structure, they didn't have a claim.  
25 And what we read that to mean is they may have an economic



1 participation but they shouldn't have been able to vote on  
2 anything. They probably shouldn't have been able to  
3 participate even in the ad hoc committee.

4 THE COURT: The next thing that I wanted to talk about  
5 was damages because I think one of the additional arguments  
6 that's been made both by Mr. Dugan and by Mr. Giuffra is that  
7 what's the damage. What's the damage here? We're having an  
8 auction tomorrow, weather permitting. What's the damage?

9 MR. STONE: Yes. And Your Honor, I think, to the  
10 extent that we're talking about money damages which is in our  
11 prayer for relief, that's something that we will have to  
12 develop after the evidence comes in. But we could have  
13 certainly been harmed in a number of ways including the fact  
14 that maybe there's per se harm because they really don't belong  
15 in the capital structure here and it's --

16 THE COURT: But I don't know what that means.

17 MR. STONE: Well --

18 THE COURT: I don't know what that means, "per se  
19 harm". If you go back to the reasons that this provision was  
20 put into place, and if you look at, I think from the stand  
21 point of what it took to put somebody into that category, it  
22 had to be established with the administrative agent that you  
23 were putting into that category, I think the language was, a  
24 bona fide operating company.

25 So in other words, the agent didn't want the borrower

1 to be able to simply say willy-nilly these ten entities can't  
2 buy. It had to actually be a bona fide operating company that  
3 was a competitor, right? So you look at the context of that  
4 and yet we're now at a spot where we are, and I don't know what  
5 they're doing, but one would imagine that the bankers who are  
6 involved in the sale process are, in fact, actively encouraging  
7 competitors to take a look at what's for sale.

8 MR. STONE: Right.

9 THE COURT: So I'm chasing my tail a little bit.

10 MR. STONE: Right, but they're doing that in the  
11 context of one competitor having somewhat of a leg up in the  
12 sense that they were on the scene first, they bought up all  
13 this debt when we argue they should not have been able to, and  
14 among other things, that could have a chilling effect on other  
15 parties coming in to bid. So that's one possible harm. And we  
16 also think --

17 THE COURT: But it's not that simply that somebody  
18 owns debt that they bought at a discount, right? Because  
19 that's --

20 MR. STONE: No.

21 THE COURT: -- SOP; that's standard operating  
22 procedure, right?

23 MR. STONE: That's correct, Your Honor. This is part  
24 of -- in our view, part of an overall plan to buy the debt, to  
25 bid for the assets in a way that would assure a result for

1 Ergen/DISH/EchoStar that would be highly beneficial to them and  
2 not necessarily the most beneficial for the estate.

3 THE COURT: But that's the part I don't understand  
4 because we're having an auction; we're having a sale process.  
5 Anybody who wants to can come in and bid. So that's the part  
6 that I don't understand in terms of the causation factor that  
7 on the one hand you can say look, there was a breach; they  
8 violated the prohibition on assignments; there has to be a  
9 consequence. We can say okay, hold that thought. And then  
10 over here we can say, okay, well, what was the damage because  
11 we're now at the point where anybody can come in and bid.  
12 You're in a court-supervised process. There are standards that  
13 have to be complied with. I'm just trying to -- I'm just  
14 struggling to understand the relationship between the acts  
15 complained of and the damage and the causation of the damage.

16 MR. STONE: Yeah, I mean, Your Honor, I think that,  
17 without knowing more in discovery, we don't know precisely what  
18 the damages are. But I think our theory is that by becoming a  
19 part of the capital structure when they weren't entitled to,  
20 that they were able to direct this case in a way that is  
21 different. And you're right that we ended up in this  
22 particular place that we are, but we think that maybe we would  
23 have gotten to a different place, and maybe we would have been  
24 in a place that was more beneficial to all of the constituents  
25 in this case.

1 THE COURT: Okay.

2 MR. BARR: Your Honor, can I just add one, maybe,  
3 answer to your question?

4 THE COURT: I gave Ms. Strickland a hard time, so I  
5 have to be equal opportunity here.

6 MR. BARR: Can I then hand him a piece of paper?

7 MS. STRICKLAND: I think that's fair.

8 THE COURT: Thank you, Ms. Strickland. You can --

9 MR. BARR: So I should hand it?

10 THE COURT: You can go whisper to him --

11 MR. BARR: Okay.

12 THE COURT: -- just to keep it totally -- totally  
13 equal.

14 MR. STONE: Yeah, I'd -- Mr. Barr was putting a finer  
15 point on my point that Mr. Ergen/LBAC has a leg up in the sense  
16 that 60 cents of every dollar goes -- he's bidding with \$1.60  
17 for every dollar that the other competitors would bid.

18 THE COURT: But that's the point -- that's the point I  
19 made about three minutes ago, which is that that structure,  
20 schema, doesn't describe anything different from somebody who  
21 buys debt at a discount and then is in a position to credit  
22 bid. So that's not different.

23 The distinction that you were making to me was this is  
24 a competitor. This was somebody who wasn't allowed to come in.  
25 And there's just -- those two things are not the same. So

1 there's no general prohibition about somebody buying debt at a  
2 discount and then they have a strategic advantage when it comes  
3 time for a plan of reorganization. So I can't go down that  
4 path.

5 Before I let you off the hook, though, can I ask one  
6 more thing, because --

7 MR. STONE: Certainly, Your Honor.

8 THE COURT: A lot's been made of the fact that the  
9 debtor or Harbinger -- and/or Harbinger knew that Mr. Ergen was  
10 making these purchases, knew that SPSO was making the  
11 purchases. It was widely reported in the press, and nothing  
12 was done. So what am I supposed to do with that allegation?

13 I mean, some of it can be taken as a fact. I can take  
14 judicial notice of the press reports, not for the truth but  
15 that they existed.

16 MR. STONE: Yes.

17 THE COURT: So what am I supposed to do with that on  
18 the motion to dismiss?

19 MR. STONE: I think that all that Your Honor can do is  
20 give those press reports that you're taking judicial notice of  
21 the weight that they deserve, which isn't much, because there  
22 is a whole factual record out there that I think will show that  
23 we weren't aware of it, but that's for another day.

24 THE COURT: You think it's possible that Mr. Falcone  
25 was aware of it and just didn't tell the rest of the company?

1 MR. STONE: Well, I suppose that's possible. I don't  
2 know that to be the case. I only know that based on our due  
3 diligence in bringing this complaint, I think we would have  
4 been hard pressed to bring this complaint had we known from day  
5 one that this was Mr. Ergen buying the debt.

6 THE COURT: Well, if there was a press report, for  
7 example, that there was a press report that "anonymous" is  
8 hacking into LightSquared's computer system, you would have  
9 gone out and looked into that, right?

10 MR. STONE: Correct.

11 THE COURT: Okay. So there's a press report that  
12 Charlie Ergen is buying into your capital structure. One would  
13 think you would go out and try to figure that out, right?

14 MR. STONE: Exactly. We did that. We were  
15 stonewalled at every turn.

16 THE COURT: From May, 2012.

17 MR. STONE: Yes.

18 THE COURT: Okay. Anything else?

19 MR. STONE: No. That's all, Your Honor.

20 THE COURT: Okay. I think we are going to -- Mr.  
21 Friedman, if you don't mind?

22 MR. FRIEDMAN: I'd love a break. That would be great.

23 THE COURT: Okay. Let's just take a break and we'll  
24 come back at 3:15. Okay? And if you folks want to bring in  
25 coffee or other drinks, that's fine.

1 UNIDENTIFIED SPEAKER: Great. Thank you, Your Honor.

2 UNIDENTIFIED SPEAKER: Thanks.

3 (Recess from 3:05 p.m. until 3:21 p.m.)

4 THE COURT: Okay. Mr. Friedman, good afternoon.

5 MR. FRIEDMAN: Your Honor, good afternoon. David  
6 Friedman for Harbinger.

7 Your Honor, I find myself in the unfamiliar role this  
8 afternoon as being a cheerleader for the debtor. When people  
9 think of cheerleaders they rarely think of me.

10 THE COURT: But now, from now on everybody is going  
11 to, so --

12 MR. FRIEDMAN: From now on -- hopefully --

13 But we are -- I mean, to put this simply, if Your  
14 Honor -- we think the debtor has filed a good complaint. We  
15 thought we could -- we thought it was in our interests and in  
16 the interests of those who similarly share in this litigation  
17 to join.

18 We were given leave to file an objection to the claim  
19 as well, but what we tried to do was just simply to add  
20 additional facts and make some, I think, modest changes in  
21 terms of the prayers for relief, just tweaking --

22 THE COURT: But the technical aspect of it is that as  
23 a technical matter your Counts I and II shouldn't stand, right?

24 MR. FRIEDMAN: Well, I think that -- I think, as Your  
25 Honor granted us, we thought, and I thought that Mr. Dugan said

1 this as well, that these, that I, II go together. I thought  
2 they were all sort of the same point.

3 THE COURT: Well, I think what you're trying to do  
4 is -- I's the declaratory relief, right? II is the breach of  
5 contract. III is the --

6 MR. FRIEDMAN: Claim disallowance.

7 THE COURT: -- claim disallowance. So to me it's all  
8 baked into the claims disallowance.

9 MR. FRIEDMAN: I think it is, but I would say, and we  
10 were careful, because we noticed a tort claim peering out from  
11 the debtors' complaint, and we, on the one hand, we thought  
12 well, we weren't granted leave to do that, so we better be  
13 careful --

14 THE COURT: Right.

15 MR. FRIEDMAN: -- because I --

16 THE COURT: But that didn't reply to the equitable  
17 subordination.

18 MR. FRIEDMAN: Well, so then we thought about it some  
19 more and said well, the truth is in the way that this  
20 litigation has now morphed we were dismissed. We were off to  
21 the side. Now the debtor has moved to the front of the line  
22 with their complaint. And we looked at it, and we thought  
23 what's -- we didn't want to -- we didn't think we had anything  
24 to add on the tort claim, because it was too reminiscent of our  
25 own litigation. We really didn't want to go back there again.



1 THE COURT: Right.

2 MR. FRIEDMAN: But we thought that the -- we really  
3 thought that under Caldor, as simply a party-in-interest, we  
4 could join in all that relief. So we didn't think it had -- we  
5 thought that apart from -- there was leave granted to us, but  
6 then -- and that would be -- let's assume the debtor never did  
7 anything, so we would have leave granted to us to do whatever  
8 we were granted leave to do.

9 THE COURT: Right.

10 MR. FRIEDMAN: Then the debtor jumps in and files a  
11 lawsuit.

12 THE COURT: Right.

13 MR. FRIEDMAN: And I think that under Caldor, under  
14 the Second Circuit's decision in Caldor, I think anybody can  
15 jump into that adversary proceeding in a "me too" capacity.  
16 And that's, really, where we are on all these other claims.  
17 We're in a "me too" capacity.

18 Now, could we restrain ourselves to not throw in a few  
19 words that we thought made it better or more helpful? We did,  
20 but we --

21 THE COURT: But if you're in a "me too" capacity then  
22 we have the opposite of what we had at the beginning, which was  
23 the debtor being in a "me too" capacity.

24 MR. FRIEDMAN: Exactly. Exactly.

25 THE COURT: Right?

1 MR. FRIEDMAN: Yes.

2 THE COURT: So if all you're saying is that you're in  
3 a "me too" capacity that's different than prosecuting claims  
4 derivatively on behalf of the estate.

5 MR. FRIEDMAN: Oh, of course. Absolutely.

6 THE COURT: So I think that, maybe, you and I don't  
7 have that much to talk about if we agree that, essentially --  
8 well, I'm going to come back to equitable subordination, but  
9 Counts I and II go. Count III is identical to the debtors'  
10 count. I don't think you get anything more or less by being  
11 involved. Equitable disallowance goes, consistent with the  
12 first decision. And then you get to the equitable  
13 subordination, which you could have done in a plan, which you  
14 could do in a plan, and what it seems to be saying is if you  
15 find this then we're going to be able -- then we're going to  
16 propose a plan that it's going to be predicated on. I'm  
17 reading between the lines.

18 MR. FRIEDMAN: The sequencing doesn't work, because  
19 you're going to decide this, presumably, at confirmation time  
20 if you have a trial, so people are going to have to decide  
21 earlier than that whether it's a proposal plan that has some  
22 subordination in it.

23 THE COURT: Well, you can -- I know you know how to do  
24 this -- you can do a plan that has different toggles in it.

25 MR. FRIEDMAN: We sure can. So, and just --

1 THE COURT: Right.

2 MR. FRIEDMAN: -- by coincidence, tomorrow is the  
3 deadline to file a plan, so look at that.

4 THE COURT: Right.

5 MR. FRIEDMAN: So --

6 THE COURT: So what I'm trying to understand, though,  
7 I mean, I'm just -- I'm trying to be procedurally efficient  
8 here -- is that at the end of the day, I think it all will not  
9 matter. I mean, even if I were to grant the motion to dismiss  
10 the equitable subordination, I don't know that that would stand  
11 as preclusion of your proposing a plan based on that. I mean,  
12 maybe it would, but I don't think that's where we are here  
13 today.

14 MR. FRIEDMAN: I would ask, Your Honor, because I  
15 think the -- equitable subordination, I'd just jump -- if you  
16 don't mind if I just jump to that, because we're on the topic.

17 THE COURT: Sure.

18 MR. FRIEDMAN: Equitable subordination is a claim in  
19 which the remedy is sometimes the hardest thing to tailor,  
20 because people could all agree what bad conduct looks like, but  
21 the remedy has to be tailored, really, to fit the crime. It's  
22 supposed to just be remedial, not do any more.

23 THE COURT: Right.

24 MR. FRIEDMAN: It's not really punitive. It's more  
25 remedial.

1 THE COURT: Right.

2 MR. FRIEDMAN: So --

3 THE COURT: But can I just stop you for one minute?

4 MR. FRIEDMAN: Yes.

5 THE COURT: Because you're asking for equitable  
6 subordination wearing the hat of a creditor at LP, right?

7 MR. FRIEDMAN: Yes.

8 THE COURT: Right?

9 MR. FRIEDMAN: Yes.

10 THE COURT: Because all you're saying is that --  
11 subordinate the claim to the claims of other creditors, and  
12 you're asking to do that as a creditor at LP.

13 MR. FRIEDMAN: Yes. Yes.

14 THE COURT: What's your claim? What's the claim of  
15 Harbinger at LP?

16 MR. FRIEDMAN: We have a trade claim at LP. It's not  
17 a meaningful claim, but we're at a derivative capacity. I  
18 mean, just to be clear. I mean, we are joining the debtors'  
19 claim for equitable subordination. We're not specifically  
20 speaking.

21 What we think the Court should consider, I don't think  
22 you can reach -- there's no way to reach a remedy today. It's  
23 almost like you have a patient that is exposed to some  
24 toxicity. They're really going to the doctor tomorrow.  
25 Tomorrow they start seeing the doctor, and maybe they'll go to

1 some specialists over the next couple of weeks, but in terms of  
2 determining the extent to which -- and I will be very careful  
3 not to go beyond that -- but the extent to which there has been  
4 harm is really playing itself out as we speak, and, perhaps,  
5 over the next few days. So I think it's almost impossible to  
6 consider a remedy.

7 But the remedy that we would seek would be a remedy  
8 that belongs to the estate. I mean, we're not seeking -- we're  
9 just joining in the -- we're intervening in the estate's desire  
10 to equitably subordinate. We can't do it on our own because we  
11 don't have a particular harm to our particular claim that we  
12 can allege. So under the Second Circuit's decision, they're  
13 right. We don't have our own equitable subordination claim.  
14 So it's only the estate's claim.

15 And we rise and fall with the debtor here. We don't  
16 have any independent rights.

17 THE COURT: So then I should just dismiss your  
18 complaint in its entirety?

19 MR. FRIEDMAN: No.

20 THE COURT: I'm just trying to understand what's left  
21 of your complaint.

22 MR. FRIEDMAN: No. Everything that is in our  
23 complaint is either, in the case of the objection to claim, our  
24 own independent right to object to a claim --

25 THE COURT: That one is --

1 MR. FRIEDMAN: But they're doing it too.

2 THE COURT: Right.

3 MR. FRIEDMAN: So if they were to win we wouldn't have  
4 to win again. And --

5 THE COURT: But if you had come in with a complaint  
6 that was just the claims disallowance clean --

7 MR. FRIEDMAN: Yes.

8 THE COURT: Then we wouldn't be having any of this  
9 other conversation.

10 MR. FRIEDMAN: Right.

11 THE COURT: And nothing would have precluded you, as  
12 the proponent of a plan, from proposing a plan that called for  
13 the equitable subordination of all or part of any claim you --

14 MR. FRIEDMAN: Right.

15 THE COURT: -- thought you could equitably  
16 subordinate, right?

17 MR. FRIEDMAN: Right. Right.

18 THE COURT: So isn't that --

19 MR. FRIEDMAN: But then you'd have to -- you wouldn't  
20 want to start litigating that on January 9. I mean, you  
21 wouldn't want to start hearing about that on January 9th, I  
22 would think. You'd want to start at least getting that process  
23 started now. Meaning there's two elements to equitable  
24 subordination. There's liability and there's damages, right?

25 THE COURT: Right.

1 MR. FRIEDMAN: So right now the debtor has --

2 THE COURT: But right now all I'm doing is a motion to  
3 dismiss.

4 MR. FRIEDMAN: Right. Right.

5 THE COURT: Right?

6 MR. FRIEDMAN: But we'll --

7 THE COURT: So --

8 MR. FRIEDMAN: But you'd have to get past that. I  
9 mean, we'd have to get to this eventually. I thought we were  
10 doing this now so that by January 9th we have -- whatever's  
11 left, we know what's left of these cases.

12 THE COURT: But if something's left then we're going  
13 to start a trial on those issues --

14 MR. FRIEDMAN: Yes.

15 THE COURT: -- on January 9th.

16 MR. FRIEDMAN: Yes. Yes.

17 THE COURT: And what's the deadline for the proposal  
18 of your plan?

19 MR. FRIEDMAN: Tomorrow.

20 THE COURT: Right. So nothing I say today, other than  
21 the possibility that as a matter of law there's not going to be  
22 equitable disallowance, which --

23 MR. FRIEDMAN: Subordination. Oh, I'm sorry.

24 THE COURT: -- which -- subordination. Thank you.

25 You have to put in a plan tomorrow --

1 MR. FRIEDMAN: No question.

2 THE COURT: -- that's going to have to have a  
3 placeholder for it, one way or the other, and we're --

4 MR. FRIEDMAN: Yes.

5 THE COURT: We're dealing with a common set of facts.

6 MR. FRIEDMAN: Right.

7 THE COURT: I mean, this all --

8 MR. FRIEDMAN: There --

9 THE COURT: The same set of transactions --

10 MR. FRIEDMAN: Right.

11 THE COURT: -- that everybody's talking about.

12 MR. FRIEDMAN: So the rest of our complaint is just a  
13 platform for us to get up and try to make our arguments as a  
14 party -- as under 1109, under Caldor, why we think they're  
15 right. I'm just here to say why I think Mr. Stone is right and  
16 make a couple of more points.

17 THE COURT: But Counts I and II you couldn't plead,  
18 because they were beyond the scope of what you were given  
19 permission to plead.

20 MR. FRIEDMAN: Right.

21 THE COURT: And you needed a motion. So those are  
22 going to be dismissed.

23 MR. FRIEDMAN: But he pled them. So why can't I join  
24 in those? In other words, Caldor says that anybody who's a  
25 party -- under 1109 --



1 THE COURT: Right.

2 MR. FRIEDMAN: -- anybody, even Harbinger -- anybody  
3 has the right to intervene in an adversary proceeding brought  
4 by the debtor.

5 THE COURT: Okay.

6 MR. FRIEDMAN: Anybody. There's no barrier to entry.

7 THE COURT: Right.

8 MR. FRIEDMAN: It's an unconditional, absolute right.

9 THE COURT: But you didn't file an intervention. You  
10 filed a separate complaint.

11 MR. FRIEDMAN: I filed it because there were  
12 already -- Your Honor, I thought it was -- we were given the  
13 right to file a second amended complaint. I thought that to  
14 intervene in a complaint and intervention was somewhat awkward.  
15 I mean, so -- because the intervention took the lead, so we  
16 kind of tried to slip in underneath it.

17 But I thought it was clear from our complaint, because  
18 we provided Your Honor a redline from it, we took every single  
19 word in their complaint. We just added some additional words  
20 to it. That's all.

21 THE COURT: You did. But it was their first time  
22 pleading a complaint because, as you just said, they  
23 intervened.

24 Look, I think this is all a lot of procedure, but I  
25 don't want to make any mistakes in how I tee this up. In my

1 mind, the cleanest thing to do is that you dismiss Counts I and  
2 II. I haven't gotten to whether or not Count III, the  
3 disallowance goes or not.

4 MR. FRIEDMAN: Um-hum.

5 THE COURT: The equitable disallowance is gone. And  
6 then you have left equitable subordination, which I have to  
7 decide whether it survives a motion to dismiss, but I think  
8 that you didn't have to bring that in an adversary. That could  
9 have been done in a plan. You get to the same place.

10 MR. FRIEDMAN: Okay. I mean, sometimes it's hard to  
11 know, and you have to, so --

12 THE COURT: Sure. I understand. I don't think  
13 there -- it's not mandated one way or the other.

14 MR. FRIEDMAN: Right.

15 THE COURT: But the Rules say that you can --

16 MR. FRIEDMAN: Your Honor, if you deny the motion to  
17 dismiss as to the debtors' complaint and simply say Harbinger  
18 has a right to participate in that litigation, participate in  
19 discovery and cross-examine witnesses, appear in court, file  
20 briefs, then that's fine. You can dismiss our claims. That  
21 was the only reason to have joined, for that purpose.

22 THE COURT: Okay.

23 MR. FRIEDMAN: But --

24 THE COURT: Do you want to talk about the motion to  
25 dismiss on the merits with respect to the claims disallowance?

1 MR. FRIEDMAN: Yeah. Just a couple of things. I do.

2 First of all, I just want to speak about agency for a  
3 minute, because I think agency ties into all this. I mean, I  
4 don't think that -- I don't need to go through it now verbatim,  
5 but I do think that the complaint was well pled in terms of  
6 Mr. Ergen and Mr. Kiser acting within the scope of their  
7 employment on behalf of DISH.

8 Also, in connection with the purchase of the  
9 LightSquared debt, in other words, this is not a piece of land  
10 in the middle of Colorado or wherever. I mean, this was -- and  
11 that's always the issue. I mean, if Mr. Ergen hit somebody  
12 with his car, DISH is not liable. But when he acts within the  
13 scope of his employment, and in particular, I mean, this is --  
14 this is, kind of, the uber-scope of his employment. That's  
15 what he does. He looks to buy spectrum assets, and there's no  
16 question from the beginning -- this was pled in the debtors'  
17 complaint -- this was all part of a plan by DISH to acquire  
18 spectrum assets, and it was planned by DISH. And I think one  
19 of their points was Mr. Ergen himself is alleged to have sort  
20 of viewed DISH as the default purchaser, but if they couldn't,  
21 he'd take it on his balance sheet until DISH could figure out a  
22 way to benefit from it. But it was always DISH as, sort of,  
23 the intended purchaser.

24 And that's what they pled. I mean, it may or may not  
25 be true. I mean, I'm just -- but for purposes of the

1 complaint, that is what they pled. I believe it to be true,  
2 but it doesn't matter what I believe.

3 The other thing is about --

4 THE COURT: But the Ergen defendants take the same  
5 predicate facts --

6 MR. FRIEDMAN: Right.

7 THE COURT: -- and put a different interpretation on  
8 it. They say from the beginning Mr. Ergen asked can DISH buy  
9 this debt, and he was told no. And he said okay, I'm going to  
10 buy it myself.

11 MR. FRIEDMAN: Right.

12 THE COURT: Right?

13 MR. FRIEDMAN: Right.

14 THE COURT: And they say that that demonstrates that  
15 he bought it for himself and not for DISH, because he knew that  
16 DISH couldn't acquire it.

17 MR. FRIEDMAN: So there's two -- so which  
18 interpretation would you like? There's their interpretation,  
19 which is he always wanted to keep it separate because he knew  
20 that it was not permitted for DISH to be the buyer, or would  
21 you like a different interpretation, which is that he knew DISH  
22 couldn't be the buyer, so he created an artifice to do it  
23 through DISH but to make sure that DISH didn't have its  
24 fingerprints on it? I mean, they're -- this is what makes  
25 horse races. I mean, there are multiple interpretations of

1 these facts. I don't think it makes sense to get beyond that  
2 right now.

3 But I do want to say thing about this notion of  
4 authorization because it just kind of hit home given what I do  
5 most of the time for a living. This idea that debtors are  
6 not -- or that corporations are not bound by the unauthorized  
7 acts of their employees, like I say, I wish that there were  
8 true. I mean, Adelphia's board, as we all know, did not  
9 authorize the Rigases to commit a fraud. Nonetheless, Adelphia  
10 was almost indicted and put out of business, okay? A lot of  
11 innocent were almost harmed because of those acts.

12 Unfortunately, corporations are, in fact, bound not  
13 just by the authorized acts, but by the unauthorized acts.  
14 That's Kirschner (ph.). That's Bennett Funding. That's the  
15 Breeden (ph.) case. I mean, there's hundreds of cases about  
16 that. So this idea that you need auth -- now, authorization  
17 was pled. It was pled that Ergen and Kiser had authority. But  
18 if they didn't, I think the law's like -- I think the Kirschner  
19 case said that the law for like for over a hundred years has  
20 been that corporations are bound by the unauthorized acts of  
21 their employees, as well as the authorized acts.

22 If we didn't have that problem, we would have no in  
23 pari delicto doctrine, which is why I say what I do for a  
24 living. I mean, this whole notion that you attribute or impute  
25 the actions of agents that are principals, even when

1 unauthorized, is what created the in pari delicto doctrine.

2 THE COURT: So hypothetically, assuming that you have  
3 a controlling shareholder who owns eighty-eight percent of a  
4 company --

5 MR. FRIEDMAN: Um-hum, right.

6 THE COURT: -- and he wants to engage in a  
7 transaction, how does he go about making sure that there's no  
8 allegation after the fact that he wasn't acting on behalf of  
9 the company? You've got the control, but then you've got a  
10 person who may have any number of businesses or interests or  
11 investments. What --

12 MR. FRIEDMAN: I think -- Your Honor said the word  
13 "context", and that's the easiest way. I mean, if Mr. Ergen  
14 went out and bought himself a beautiful house in Aspen, that  
15 would have nothing to do -- he wouldn't have to go to the DISH  
16 board for that. There are some times when the line is  
17 difficult to define. This is not one of those times. This is  
18 a time when what he is buying, purportedly, personally -- and  
19 this is, I think, the fundamental factual dispute between the  
20 sides -- but what he is buying purportedly in a personal  
21 capacity is the very thing that he's in the business of buying  
22 for DISH.

23 In other words, he was the mastermind when DISH wanted  
24 to buy Clearwire or Sprint. I mean, he's -- in fact, I -- you  
25 know what? I won't even say what happened in Nevada, but that

1 was clearly the point that he is the critical employee of DISH  
2 when it comes to buying spectrum assets.

3 THE COURT: So I think that the defendants made the  
4 point that he wasn't clairvoyant. He started buying the debt  
5 well before the proceeding, right?

6 MR. FRIEDMAN: There was -- he started buying the debt  
7 at a time when it was a distressed investment. No question  
8 about it. So remember, this is a company with no cash flow, so  
9 any blimp and it is in trouble. And there's no question that  
10 it was a distressed investment from the first day.

11 Look, I want to just -- in terms of the definition of  
12 the word "subsidiary", we spent way too much time on this the  
13 last time, so I'm not going to say anything other than I think  
14 what we concluded --

15 THE COURT: Can -- is there a path for the plaintiff  
16 to prevail if I don't find that SPSO is a subsidiary of DISH?

17 MR. FRIEDMAN: Yes, there is a path to prevail because  
18 you have that -- I think you used the word "sham", and let me  
19 just bring that back to the case -- it's the Spanish  
20 Cablevision case, the Empresas Cablevision. Judge Rakoff  
21 decided that in 2010, where he looked at -- it was, oddly  
22 enough, a media company with a sale where there is an  
23 injunction sought to prevent the bank, the lender from selling  
24 a piece of debt to a competitor. And under that credit  
25 agreement, there was no way under the credit agreement to

1 actually -- what happened was they realized they couldn't sell  
2 the debtor to a competitor. So the lender sold the  
3 participation. And he didn't have the architecture here where  
4 the participants themselves had to qualify.

5           So a large participation in the bank debt was sold to  
6 a competitor -- or it was about to be sold to a competitor.  
7 And the borrower went out and sought an injunction. And what  
8 Judge Rakoff said is, you know what, I can comb through this  
9 entire agreement and I can't find anything here that says you  
10 can't do this, but you really can't do it because this is just  
11 too smart by half. I mean, you've actually identified  
12 something which has exactly the same substantive impact as what  
13 was trying to be avoided, and yet you found a clever way to  
14 avoid the tactical provisions.

15           And he said one cannot enter into a contract and then  
16 do everything in his power to prevent the other party from  
17 getting the benefits of that contract. And I think that's  
18 really -- that's sort of the answer to your point, sort of the  
19 sham. You don't have to pierce the veil for that. You just  
20 need to show that there was an intention by the parties to do  
21 this in a way to frustrate the benefits that the parties knew  
22 each other had come to expect in the context of that contract.  
23 I think it's a very unique case and very much on point in that  
24 context.

25           But getting back to "subsidiary", I don't really -- I



1 thought where we left it, I thought where we left off is Your  
2 Honor was skeptical as to whether or not "subsidiary", with a  
3 small S meant "Subsidiary", with a large S. And I thought  
4 where we left off was, okay, we can't prove to you as a matter  
5 of law that "subsidiary" means "Subsidiary". But no one can  
6 prove the contrary, either, meaning whatever "subsidiary"  
7 means, okay, either to prove that it doesn't mean the defined  
8 term or that it means in common parlance and we have a specific  
9 understanding of what that means. I don't think this is  
10 provable as a matter of law.

11 So you may conclude at the end of a trial that the  
12 debtor didn't meet its burden of proof of showing what  
13 "subsidiary" means. But I just don't think it's there for  
14 the --

15 THE COURT: But they're saying -- they're quoting the  
16 stuff we learned first year in law school that you only go to  
17 extrinsic evidence when you have an ambiguity.

18 MR. FRIEDMAN: Right.

19 THE COURT: And they're saying that it says  
20 "subsidiary". Everybody knows what a "subsidiary" is. And as  
21 a matter of law, SPSO is not a "subsidiary" --

22 MR. FRIEDMAN: Um-hum, well --

23 THE COURT: -- of DISH or EchoStar.

24 MR. FRIEDMAN: So I think what the debtor did, and I  
25 think what we did also, was to canvas the definitions of

1 "subsidiaries". And some were good, some were bad. Certainly,  
2 there's a few of them out of there which would indicate as to  
3 an entity which another entity controls. So control, in and of  
4 itself, some definitions, could be a subsidiary. I just don't  
5 think you can get there as a matter of law.

6 I mean, I'm not going to go through this again, but I  
7 just think that this is an issue which is -- Your Honor, I  
8 almost would say to you if it doesn't mean -- we cited a case  
9 where a court said come on, capital letter, not capital letter,  
10 it's got to be the same thing. So maybe they were wrong.  
11 Maybe Your Honor's right. But at the end of the day, I don't  
12 think anybody can say definitively from the record what  
13 "subsidiary" means, whether it's the common parlance definition  
14 of "subsidiary" or if we're trying to work within the credit  
15 agreement.

16 I think it is the paradigmatical ambiguous provision.  
17 And if we're talking about ambiguous provisions, you sort of  
18 have to add the second one, which is what does it mean when  
19 Section 10.04 says nothing in this agreement, express or  
20 implied, shall be construed to confer upon any person other  
21 than -- I'm paraphrasing -- other than eligible assignees any  
22 rights under this agreement. Okay, so it says that. Then, it  
23 says someplace else that if you have a bad assignment, it  
24 doesn't relieve the borrower.

25 THE COURT: Right. But it also doesn't say that the

1 assignment in violation of the provision of the credit  
2 agreement is void or voidable.

3 MR. FRIEDMAN: Right. But if --

4 THE COURT: So --

5 MR. FRIEDMAN: But just think about that for a second.  
6 If it said that, what would that tell us? If it said that, it  
7 was void or voidable, it would say that you should be talking  
8 to Carl Icahn. You should be talking to Appaloosa. You should  
9 be -- because that's the context of it. If that's -- no one is  
10 voiding these trades, and they sort of are where they are.  
11 They're in the hands of SPSO. So now we have to decide, in the  
12 hands of SPSO -- because there's nothing that reverts them back  
13 to their original sellers. So in the hands of SPSO --

14 THE COURT: That would be a pretty market-disruptive  
15 thing to do, right?

16 MR. FRIEDMAN: Well, it's not what the agreement says,  
17 though. So I don't know that it even matters. I mean, it's  
18 not what the agreement says. But -- so now in the hands of  
19 SPSO, what are SPSO's rights under the contract if they are  
20 ineligible? It says that they don't have any rights at all,  
21 and then it says something of -- there's some kind of a savings  
22 clause, which either applies to them, or it means that if they  
23 breach the credit agreement, it doesn't enable LightSquared to  
24 say okay, you got -- I don't owe anybody anything. I'm --

25 THE COURT: This is the free house.

1 MR. FRIEDMAN: It's a free house. Right. So --

2 THE COURT: Right.

3 MR. FRIEDMAN: -- I just think that these are not  
4 issues that are readily susceptible to a legal definition.

5 Your Honor, you have anything else for me? Otherwise,  
6 I don't know that I have anything else to say.

7 THE COURT: I don't. Thank you, Mr. Friedman.

8 MR. FRIEDMAN: Well, thank you.

9 MR. DUBLIN: Good afternoon, Your Honor. Philip --

10 THE COURT: Good afternoon.

11 MR. DUBLIN: -- Dublin, Akin Gump, on behalf of Mast  
12 and U.S. Bank.

13 And Your Honor, I'll be very brief. Both Mr. Stone  
14 and Mr. Friedman, in talking about the equitable subordination,  
15 were focused on the LP estates.

16 THE COURT: Right.

17 MR. DUBLIN: The LP lenders have claims against Inc.  
18 as well. Inc. is a guarantor of the LP debt. And we now --

19 THE COURT: Right.

20 MR. DUBLIN: -- right now don't know ultimately what  
21 transactions are going to be approved. So it's possible for  
22 value at LP not to provide sufficient val -- not to be  
23 sufficient value at LP to pay them in full.

24 THE COURT: Right.

25 MR. DUBLIN: In which case, it would be our view that

1 the equitable subordination at Inc. would be alive, assuming it  
2 survives today, and that the SPO claims would be subordinated  
3 to the payment of the Inc. claims, because, otherwise, we're  
4 pari where we don't have collateral at Inc. So it's not just  
5 an LP estate issue. It's an Inc. estate issue as well,  
6 depending on --

7 THE COURT: It's --

8 MR. DUBLIN: -- the ultimate form of the transaction.

9 THE COURT: -- it's the Inc. estate's claim against  
10 the LP estate, right?

11 MR. DUBLIN: No, the LP lenders have claims at Inc.  
12 because they have guarantee claims.

13 THE COURT: Right.

14 MR. DUBLIN: And Inc. is obligated on our debt as  
15 well.

16 THE COURT: Right.

17 MR. DUBLIN: So if --

18 THE COURT: But how does the equitable  
19 subordination -- in other words, everybody at LP has to be --  
20 if they're paid in full, than that's -- then they don't come --

21 MR. DUBLIN: But if they're -- but if they're not --

22 THE COURT: -- they don't co --

23 MR. DUBLIN: -- but if they're not, because we don't  
24 know what the ultimate form of the transaction is going to be.

25 THE COURT: Right. But why does equitable

1 subordination -- the equitable subordination has to do with the  
2 order of priority in which the LP creditors get paid. If  
3 they're all paid in full, right, there's no impact up at Inc.

4 MR. DUBLIN: Correct. But if they're not --

5 THE COURT: Right.

6 MR. DUBLIN: -- if they're not paid in full --

7 THE COURT: Right.

8 MR. DUBLIN: -- there could be impact at Inc.

9 THE COURT: Right. But --

10 MR. DUBLIN: In which case, we believe, to the extent  
11 the Inc. lenders have not been paid in full and there was  
12 improper conduct by SPSO in his capacity as an LP lender and  
13 we're both fighting over pots of value at Inc., for which we're  
14 unsecured creditors on account of our guarantees, they should  
15 be subordinated to us, because --

16 THE COURT: Okay.

17 MR. DUBLIN: -- otherwise we'd be pari. So we think  
18 the comments have been made that equitable subordination is  
19 only an LP estate issue. It's an Inc. estate issue as well.

20 THE COURT: Okay. Well, I mean, this gets back to all  
21 the difficulties that we've been having for these many months  
22 now on intervening and how you do it. So you've said that, but  
23 that doesn't live -- that doesn't live anywhere else. Is that  
24 something that's in your plan?

25 MR. DUBLIN: It's -- well, it's in the complaint.

1 It's in the debtors' complaint. It seeks to subordinate the LP  
2 claims -- the LP lenders' claims held by SPSO to --

3 THE COURT: All claims.

4 MR. DUBLIN: -- other claims of the LightSquared  
5 estates.

6 THE COURT: Okay. So the --

7 MR. DUBLIN: So it's --

8 THE COURT: -- answer --

9 MR. DUBLIN: -- on an estate-by-estate basis where  
10 those claims reside they would be subordinate.

11 THE COURT: All right. It's mushed to use a  
12 technical, legal term.

13 MR. DUBLIN: It's a very good technical, legal term.

14 THE COURT: Yeah.

15 MR. DUBLIN: Yeah.

16 THE COURT: It's mushed now. So as and when we get  
17 there, we'll have to --

18 MR. DUBLIN: It may --

19 THE COURT: -- we'll have to --

20 MR. DUBLIN: Exactly.

21 THE COURT: -- make it clearer that that's what people  
22 are talking about, because it's not clear now. I hear you.  
23 You've just --

24 MR. DUBLIN: Okay.

25 THE COURT: -- made it clear --

1 MR. DUBLIN: Okay.

2 THE COURT: -- what your position is. But in  
3 reading -- putting all this together, that was not clear.

4 MR. DUBLIN: Okay, understood. Thank you, Your Honor.

5 THE COURT: So Mr. Barr, is that what you intended for  
6 Mr. Stone? I'm just not smart enough to follow this through,  
7 because it's definitely not clear.

8 MR. BARR: Your Honor, you asked a question before,  
9 and we clarified that it was the LP.

10 THE COURT: Right.

11 MR. BARR: Mr. Dublin reminded us -- and we have lots  
12 of things that we have in our head -- that there is an  
13 unsecured guarantee claim.

14 THE COURT: There is.

15 MR. BARR: Right. So --

16 THE COURT: Right. That's why I asked you the  
17 question, and I thought you gave me the answer. But --

18 MR. BARR: So there --

19 THE COURT: -- but not so much.

20 MR. BARR: -- there could be a deficiency claim at  
21 Inc. And then, if the conduct yields equitable subordination,  
22 the Inc. creditors would have the same type of argument for  
23 subordination to them. So they would be both, Your Honor.

24 THE COURT: Okay. And your -- anything further, Mr.  
25 Dugan? Do you want to go again?



1 MR. DUGAN: Your Honor, if you don't mind?

2 THE COURT: Sure.

3 MR. DUGAN: Just to make a few points. I'll try to be  
4 as brief as possible.

5 THE COURT: It's okay. The sun just came out, so --

6 MR. DUGAN: I'll take that as a good sign. What Your  
7 Honor -- I did just want to hit on a few points made by counsel  
8 for Harbinger and for LightSquared. Just on the agency point,  
9 because I think it's important. I did not hear counsel for  
10 LightSquared take the position that they were seeking here or  
11 they were alleging here was that DISH is Ergen and Ergen is  
12 DISH in those terms. I think -- I'm supposing the reason why  
13 they didn't say that is because they understand that they  
14 haven't really pled an alter ego claim in their complaint. And  
15 an alter ego claim, Your Honor, is difficult to prove. It's  
16 hard to prove, and you have to prove --

17 THE COURT: Well, I --

18 MR. DUGAN: -- specific facts.

19 THE COURT: -- I don't know. We're putting different  
20 nuances on what people said. I thought that what Mr. Friedman  
21 very much was saying was that Mr. Ergen and DISH should be  
22 equated for the purposes of determining whether or not the  
23 purchases by SPSO were made by an eligible assignee, and he  
24 does so knowing that I don't believe in equitable disallowance.  
25 So that has to be so as a matter of violation of the contract.

1 So now you stand up and say that's not what he said.

2 MR. DUGAN: Well, I'm really focused on LightSquared's  
3 complaint first because they're the complaint that I think is  
4 the governing complaint --

5 THE COURT: Okay.

6 MR. DUGAN: -- and the one that I think should  
7 control --

8 THE COURT: Okay.

9 MR. DUGAN: -- what we're focused on in terms of what  
10 this trial, if we're going to have one, would be about. And so  
11 I would address what Mr. Friedman said differently. But with  
12 respect to what the LightSquared complaint alleges, it doesn't  
13 allege an alter ego theory. It doesn't say -- it doesn't  
14 allege the kind of facts that Twombly/Iqbal require, which are  
15 facts that can lead to plausible inferences of the following  
16 things that you have to allege when alleging an alter ego  
17 theory, which is comingling of funds, undercapitalization --  
18 not of SPSO; of DISH, because the allegation is DISH is Ergen  
19 and Ergen is DISH -- so comingling of the funds of Ergen and  
20 DISH. Undercapitalization of DISH; that would be very hard to  
21 allege. I think it would be actually an impossible hurdle  
22 given that DISH is a twenty-billion-dollar company, absolutely  
23 no suggestion at all. And there can't be that it is in anyway  
24 undercapitalized. There's no suggestion or allegation that Mr.  
25 Ergen, in some sense, directed DISH's assets without DISH's

1 authorization. These are the kinds of things that you would  
2 need to be able to allege to show an alter ego theory, a unity  
3 of interest between -- a complete unity of interest between  
4 Ergen and DISH such that one was the alter ego of the other.

5           They have not alleged that. I think what Mr. Stone  
6 pointed to repeatedly in his argument was that the titles of  
7 Ergen and Kiser should be enough that -- their titles -- he was  
8 the chairman, Kiser was the treasurer -- should be enough to  
9 enable them to put forth an agency theory. I do want to point  
10 out, Your Honor, that the doctrine he was using to make that  
11 argument -- the implied authority doctrine -- basically would  
12 be -- would work like this. Ergen would say I'm the chairman  
13 of DISH. I'm buying these as the chairman of DISH. That  
14 allegation would set forth an implied authority claim.

15           But here, there's no allegation that Ergen was out in  
16 the market place as the chairman of DISH buying these trades.  
17 There's no allegation that he was purporting to be the chairman  
18 of DISH while he was buying these trades. What they're  
19 alleging is he was buying these trades, and he was the chairman  
20 of DISH, not that he was using his title in any way. There's  
21 no allegation sufficient to suggest an implied authority in  
22 that context, Your Honor.

23           Just touching very briefly on the context question,  
24 Your Honor. Putting aside Nevada -- you don't have to look at  
25 any pleadings in Nevada -- looking only at the facts of this

1 bankruptcy proceeding and the facts that were in the record in  
2 this bankruptcy proceeding regarding when Ergen bought the  
3 debt, when he started buying the debt and the other events that  
4 occurred, Your Honor, I think, can take notice when Mr. Ergen  
5 began buying the debt, there was no bankruptcy case. There was  
6 no exclusivity period in place.

7           There was no sale of assets proposed. I think, Your  
8 Honor, because Sprint and Clearwire -- not from Nevada but from  
9 SEC filings and other documents; in fact, Mr. Friedman referred  
10 to those transactions -- Sprint and Clearwire were on the  
11 scene. Those were twenty-billion-dollar transactions that DISH  
12 was consumed with. If you look at the context of when Mr.  
13 Ergen began his debt purchases and the context of those  
14 purchases, I don't think it supports the argument that there  
15 was unity of interest among DISH and SPSO with respect to Mr.  
16 Ergen's purchases. I think it shows that those were quite  
17 different things that happened at different points of time as  
18 matters unfolded.

19           Your Honor, Mr. Stone made an argument that, with  
20 respect to damages, that maybe we would be in a different place  
21 in this proceeding if Mr. Ergen's purchases had not occurred,  
22 if SPSO was not an ad hoc lender -- a secured lender. What Mr.  
23 Stone is overlooking, though, is that since way before SPSO's  
24 identity was known, the ad hoc secured group has been pushing  
25 for a sale of this company. They fought an exclusivity battle

1 with the debtors in order to advocate and push for a sale of  
2 the assets of this company.

3 I think it's very likely to believe that even if SPSO  
4 was not a debtor in any way -- I'm sorry, a creditor in any  
5 way, that LBAC would still have made a bid for these assets,  
6 that that bid would still have been well received by the ad hoc  
7 secured group. There's nothing really we can point to, to  
8 suggest that we would be in a different place now had these  
9 SPSO debt purchases not occurred.

10 Your Honor, Mr. Friedman mentioned the case, Empresas,  
11 I believe: not a bankruptcy case, Your Honor. That case has  
12 been out there since 2010.

13 THE COURT: But the thing -- the concern of the LP  
14 lenders all along is they weren't going to be paid in full,  
15 right? They're -- so of course they were pleased when the bid  
16 came in when it did because it paid them in full. But they  
17 were -- their concern was that the bid would come in lower.

18 MR. DUGAN: Your Honor, yes, you're right. But my  
19 point is only to say that there's no basis to think that  
20 because of SPSO's debt purchases that we're now in a different  
21 position --

22 THE COURT: Well, the theory --

23 MR. DUGAN: -- than we would have otherwise have been.

24 THE COURT: -- the theory that was alleged in the  
25 first Harbinger complaint was that because such a large amount

1 of the trades were hung or were hanging at the time that it  
2 roiled the markets and it made the debtor unable to take  
3 advantage of its exclusive period. That was --

4 MR. DUGAN: And I guess all we're really saying, Your  
5 Honor, is that the different interests and different goals of  
6 the ad hoc -- I'm sorry -- secured group and LightSquared were  
7 matters of public record from way before SPSO got involved. I  
8 mean, the secured lenders wanted a sale of the assets.  
9 LightSquared and Harbinger did not, and that was a battle they  
10 fought repeatedly for many months before SPSO was ever on the  
11 scene.

12 It really was not because of SPSO that that battle was  
13 being fought. It was because, as Your Honor has rightly  
14 identified, the lenders were concerned that they wouldn't get  
15 paid in full.

16 THE COURT: Well, the hypothesis, though -- their  
17 hypothesis is that had there been -- I'm not saying I agree  
18 with it, but they're saying that if they knew who held the  
19 debt, they would have known who they could negotiate with. Or,  
20 if they had known that those trades weren't going to close,  
21 they could have been released from some of their obligations  
22 with respect to exclusivity, and that then there would have  
23 been a different plan and that therefore, there would not have  
24 been an LBAC bid. That's the -- whether you believe that  
25 that's a likely causal chain or not, that's what they're

1 saying.

2 So exclusivity would not have been expired. They  
3 would have filed a different plan, and that would have  
4 precluded the LBAC bid. That's, I think, what they say would  
5 have happened.

6 MR. DUGAN: Understood, Your Honor. And I think we  
7 can leave it at that. Our only point is to suggest that the  
8 differing goals and objectives of LightSquared, Harbinger and  
9 the lenders are a matter of record and don't support the  
10 inference that were not for SPSO they would have come together.  
11 That's the point we're making.

12 THE COURT: I see what you're saying.

13 MR. DUGAN: Yeah, that's the point we're making.

14 THE COURT: The peace in the valley point.

15 MR. DUGAN: Exactly, Your Honor.

16 THE COURT: Okay.

17 MR. DUGAN: Sorry it took me so long to get there.

18 THE COURT: That's okay.

19 MR. DUGAN: The only other point I was going to make  
20 is with respect to the Empresas case, if I'm saying it  
21 correctly, that Mr. Friedman pointed out. That has been -- to  
22 the extent it's applicable here, Your Honor, that has  
23 certainly -- has been a case that's been decided since 2010.  
24 It was out there. Your Honor noted during one of counsel's  
25 arguments that there was certainly public record information

1 about Mr. Ergen's involvement in this from very early on. 2004  
2 discovery was an option for the debtors, certainly as of the  
3 bankruptcy proceeding, to seek discovery of SPSO if that was  
4 something that they thought was indicative of wrongdoing in any  
5 way that -- they never did that.

6 They didn't seek to stop these trades in any way.  
7 We've made this point before. I will add that Harbinger's  
8 complaint specifically references an inquiry in December of  
9 2012 by Mr. Falcone in which he says I know you're buying the  
10 debt. Now, he was writing to Tom Cullen, who was a senior  
11 executive at DISH. Their point is that was an inquiry. We  
12 were asking him. We weren't saying we -- I know we said we  
13 knew. We didn't really know. We were just asking. Well, they  
14 never sent an e-mail to Carlos Slim, I don't think. My only  
15 point is, as much as they might want to sort of backpedal from  
16 it, the identity of SPSO was not a big question mark in their  
17 minds, I think, at any point during this.

18 THE COURT: But shouldn't we have a trial where we can  
19 ask Mr. Falcone that very question?

20 MR. DUGAN: I think that would be a very short trial,  
21 Your Honor, but it's possible. But we think that the record on  
22 this case would enable you to draw the inferences that are  
23 there from the pleadings that have been filed the appropriate  
24 way, which would lead to dismissal.

25 THE COURT: Okay. Thank you. Mr. Giuffra?



1 MR. GIUFFRA: Thank you, Your Honor. I'd like to try  
2 to simplify this a bit. And I think Mr. --

3 THE COURT: Sure.

4 MR. GIUFFRA: -- if that's possible, at least maybe  
5 get two of the parties out of the case, but maybe all. Mr.  
6 Stone said something interesting, and I went back and looked at  
7 Count V of the complaint. And I think it's important to sort  
8 of -- to take the Court through it. Paragraph 109, which we  
9 were --

10 THE COURT: Give me a moment to get there, okay?  
11 Paragraph 105, you said?

12 MR. GIUFFRA: 109, 109.

13 THE COURT: 109? Okay?

14 MR. GIUFFRA: That's the paragraph that references UBS  
15 and that the tortious interference that was supposedly engaged  
16 in by DISH and EchoStar related to UBS' relationship vis-a-vis  
17 the credit agreement. And it says SPSO, DISH, EchoStar, and  
18 then Mr. Ergen. And I guess we probably should have focused  
19 even more on this. And then, on 110, they suddenly drop out  
20 SPSO. Do you see that? And then, they have just a generalized  
21 oh, he said well, this is sort of just generalized interfering  
22 with the credit agreement, and I presume with LightSquared's  
23 relationship vis-a-vis the credit agreement.

24 Now, if you then turn back to paragraph 86, where they  
25 make the allegation that SPSO is a subsidiary of DISH and

1 EchoStar, right, which is sort of the lynchpin allegation in  
2 the complaint, and then you turn to the next page, second claim  
3 for relief, that's a breach of contract claim against SPSO.  
4 Now, it's black letter law that you can't bring a breach of  
5 contract claim and a tortious interference claim with the same  
6 entity. You have basically a choice. You can bring your  
7 breach of contract claim or you can bring your tortious  
8 interference claim.

9 Now, what they've done, Your Honor, is they  
10 essentially say -- they say in paragraph 86, SPSO is a  
11 subsidiary of DISH, EchoStar. Okay. Well, if it's a  
12 subsidiary of DISH, EchoStar, then you're bringing a breach of  
13 contract action in Count II against a subsidiary of DISH,  
14 EchoStar, and then you're trying to bring a tortious  
15 interference case against, I guess, the parent or maybe just  
16 another subsidiary of the Charlie Ergen enterprise in para --  
17 in Count V. And just basic black letter law is you can't do  
18 that. There's an inconsistency in the pleading in that  
19 on the one hand, they want to say that SPSO is a subsidiary.  
20 They want to bring a breach of contract claim in Count II.  
21 Then, in Count V, by sort of just dropping SPSO from 109 and  
22 110, they want to --

23 THE COURT: No, SPSO is in 109.

24 MR. GIUFFRA: It's --

25 THE COURT: SPSO is not --

1 MR. GIUFFRA: -- is dropped in 110.

2 THE COURT: -- in 110.

3 MR. GIUFFRA: So --

4 THE COURT: Okay?

5 MR. GIUFFRA: -- so they want to try to bring sort of  
6 a different tortious interference claim against SPSO in Count  
7 V, but then, they want to bring sort of a more broad tortiously  
8 interfering with the credit agreement claim in --

9 THE COURT: Okay. But --

10 MR. GIUFFRA: -- Count --

11 THE COURT: -- so is what you're saying then that -- I  
12 mean, the simply answer to what you're saying -- and it's not  
13 at all simple -- is that you would simply strike Count V as  
14 it's alleged against SPSO?

15 MR. GIUFFRA: And also against DISH, EchoStar --

16 THE COURT: Why? They're not --

17 MR. GIUFFRA: -- because DISH -- because the  
18 allegation in 86 is that SPSO is a subsidiary of --

19 THE COURT: Right. So there's different causes of  
20 action. This is what our -- what we spent the whole day  
21 talking about.

22 MR. GIUFFRA: I don't believe, Your Honor, as a matter  
23 of law, you can have a tortious interference claim against a --  
24 bring a breach of contract action --

25 THE COURT: Again --

1 MR. GIUFFRA: -- against a subsidiary of the same  
2 entity, and then have another one against another subsidiary  
3 for a tortious interference.

4 THE COURT: Why not?

5 MR. GIUFFRA: I think they're conflicting, because if  
6 the theory --

7 THE COURT: If you've got a --

8 MR. GIUFFRA: -- of the case --

9 THE COURT: -- if you've got a contract party --  
10 you've got a contract party at the sub. The sub is a contract  
11 counterparty --

12 MR. GIUFFRA: Correct. That's the claim.

13 THE COURT: -- and the parent directs the sub to  
14 breach the contract.

15 MR. GIUFFRA: And then, you have a breach of contract  
16 against the subsidiary and whatever claims --

17 THE COURT: Right.

18 MR. GIUFFRA: -- flow from that. You don't have a --

19 THE COURT: And --

20 MR. GIUFFRA: -- separate --

21 THE COURT: Why don't you have a separate tortious --

22 MR. GIUFFRA: I don't --

23 THE COURT: -- interference claim against the parent?

24 MR. GIUFFRA: -- I don't think you would that, because  
25 if your theory is that they're one in the same, which is, I

1 think, the theory that they're asserting, you can't do --

2 THE COURT: Well, they're pleading -- I'm trying not  
3 to blue pencil the complaint because I don't think it's  
4 appropriate for me to do that. But I'm not following the --

5 MR. GIUFFRA: Okay. Let me see if I can restate it.

6 THE COURT: No, I understand the point that you're  
7 making. I'm just not sure that it's correct that you could not  
8 have -- you have a breach of contract claim against the  
9 contract counterparty. Period. Full stop. You don't have a  
10 breach of contract claim against somebody who's not a part to  
11 the contract. But if another party procures the breach or  
12 tortiously interferes with the rights, then you can state a  
13 tortious interference against that other party even though  
14 they're the parent of the breaching party.

15 MR. GIUFFRA: Your Honor, I don't believe you can,  
16 because I think that if the parent controls the subsidiary,  
17 which is the theory of their complaint, they're essentially one  
18 and the same. It's not like -- usually tortious interference  
19 claims are third parties interfering with contracts on behalf  
20 of another party. Here, they're basically saying the parent is  
21 interfering in a contract that the subsidiary is breaching  
22 because the parent is helping the subsidiary execute the  
23 breach. Okay, what's the claim here? That Mr. Ergen directs  
24 all of this with the assistance of Mr. Kiser, through SPSO,  
25 which they claim is a subsidiary. So it's the fact that Mr.

1 Kiser works for DISH --

2 THE COURT: Mr. Giuffra, aren't you listening to  
3 the -- this is -- the notion that this should be disposed of on  
4 a motion to dismiss is just -- it's extremely -- it's extremely  
5 difficult. We have allegations -- specific allegations about  
6 conduct that occurred here. You've all pointed to me and not  
7 pointed to me about things that are going on in Nevada.  
8 Everybody selectively uses Nevada when it's in their interest.

9 The fact of the matter is that there are predicate  
10 allegations here that involve conduct by the treasurer of DISH.  
11 There are communications that refer to the desire of EchoStar  
12 to purchase the debt. Maybe the answer is these folks come in  
13 and they say I was speaking loosely; I didn't mean that. And  
14 that's fine. But on a motion to dismiss, where I'm supposed to  
15 draw every inference most favorably to the plaintiff, just on  
16 the four corners of the complaint, I'm just having a very hard  
17 time getting there.

18 MR. GIUFFRA: My only point, Your Honor, is they can't  
19 bring -- they can't allege a parent-subsidary relationship,  
20 sue the subsidiary for breach of contract, and then bring a  
21 tortious interference claim against the parent. They could  
22 bring the breach of contract against the subsidiary. My point  
23 is that they're trying to drag -- drag the parent into a case  
24 where they have, on their pleading, a claim against the  
25 subsidiary. That's my only point. I don't believe that you

1 can bring -- you would agree, Your Honor -- I mean, I think  
2 it's fair; they couldn't bring a tortious interference claim --

3 THE COURT: And a contract --

4 MR. GIUFFRA: -- and a breach of contract claim --

5 THE COURT: Correct.

6 MR. GIUFFRA: -- against SPSO.

7 THE COURT: Right, and --

8 MR. GIUFFRA: My point is that just -- if you accept  
9 the allegation that SPSO is DISH/EchoStar -- that's the  
10 allegation they've made -- they're essentially trying to do the  
11 same thing that they can't do --

12 THE COURT: At the end of the day, if I find that DISH  
13 and SPSO are not one and the same, though, but I find that DISH  
14 directed SPSO to engage in the trades and to secure the  
15 advantage for DISH so that it subsequently could bid, why might  
16 that not support a tortious interference claim against DISH?

17 MR. GIUFFRA: The reason would -- well, that's a  
18 different claim, and it's a different claim than the one that  
19 they're pleading, because the claim they're pleading is that  
20 DISH and EchoStar and SPSO are all one and the same. I mean,  
21 I'm -- look, my only point is I don't think you can do that.  
22 You clearly can't bring a tortious interference claim and a  
23 breach of contract claim against the same entity.

24 THE COURT: That --

25 MR. GIUFFRA: I don't believe you can do it vis-a-vis

1 parent and sub; that's my only point.

2 THE COURT: Okay.

3 MR. GIUFFRA: Now, the other point, Your Honor, is on  
4 this question of pleading. In Your Honor's decision on  
5 November 21st, at pages 31 and 32, at the bottom of the page,  
6 you made the point about how -- and essentially the same  
7 allegations that were made by Harbinger were -- have been  
8 restated here by LightSquared, with the addition of the Kiser  
9 e-mail; that's really the only difference.

10 And so at that point in time, in Your Honor's  
11 decision, you made the point you didn't understand, as a matter  
12 of law, how Ergen could be both an agent and a principal. And  
13 then you talked about how Harbinger's theory of agency fails  
14 because there's no other -- they don't allege alter ego; they  
15 don't allege veil piercing.

16 Our point is -- and it's the same point and not to  
17 repeat it again -- this complaint doesn't have any specifics  
18 that would justify veil piercing. It doesn't have any  
19 specifics that would justify board approval on a billion-dollar  
20 transaction that would -- there's no disclo -- they sort of  
21 throw out, oh, this was DISH's money that was used. They have  
22 no support for that.

23 Now, a point that Mr. Dugan made earlier is, well,  
24 what's the relevance of the Nevada complaint. What's the  
25 relevance of the Nevada information is they have a Rule 11



1 obligation to basically have well-pled complaints before Your  
2 Honor and to do an investigation. They've got to take into  
3 account the facts in Nevada and what everyone has said in  
4 Nevada. And they've got to square what's been said in Nevada  
5 with what they're pleading in this complaint. They can't just  
6 sort of make a -- well, you know -- they can't make this that  
7 SPSO is a subsidiary of DISH and this was all directed by DISH,  
8 but they're aware of what's alleged in Nevada. So --

9 THE COURT: And they believe -- and they believe that  
10 what's been alleged in Nevada supports their theory. That's  
11 the problem that I'm having. That's what's fascinating about  
12 this. You're each looking at pleadings and facts and drawing  
13 different inferences. So they're looking at things that have  
14 been filed and pled in Nevada and taking the position that it  
15 supports them, and you're saying that it doesn't.

16 MR. GIUFFRA: No, my point, Your Honor, is they have  
17 nothing in the complaint that supports the notion that this  
18 billion-dollar debt purchase was an authorized transaction.  
19 And Mr. Ergen is obviously -- he's a multi-billionaire -- is  
20 free to engage in all kinds of transactions. And it can't be,  
21 as a matter of law, that just the pure allegation that he's the  
22 executive chairman of DISH and EchoStar means that all of his  
23 actions in the telecommunications space are suddenly the  
24 actions of DISH/EchoStar without anything more. And that's  
25 essentially what they've done.

1           My only point is in making that bare conclusory  
2 pleading, they have to also take into account, as a matter of  
3 Rule 11 and their investigation responsibility, the allegations  
4 in Nevada which, in our view, are completely to the contrary  
5 and basically make the point he's not authorized to engage in a  
6 billion-dollar debt transaction. That's my only point.

7           To turn to another --

8           THE COURT: But they're also looking at what occurred  
9 with respect to the process that the special committee  
10 underwent, right? I mean, I'm just trying to follow where  
11 you're going with this because if you --

12           MR. GIUFFRA: My first point is that in terms of the  
13 pleading of the complaint, they have nothing more than what  
14 Harbinger had when Your Honor said it was insufficient back in  
15 November, other than the Kiser allegations, because Kiser's  
16 just a mere tool of -- if you accept the allegations of the  
17 complaint, he's someone who's executing Mr. Ergen's directions,  
18 right? They alleged that Mr. Ergen was directing all of this  
19 back in the Harbinger complaint. Your Honor said that was not  
20 enough --

21           THE COURT: Right, and now we have --

22           MR. GIUFFRA: -- public company, and the only  
23 difference that they have now is the Kiser allegations. My  
24 point being, I don't think that gets --

25           THE COURT: That's a difference.

1 MR. GIUFFRA: It's a difference, but I don't think  
2 it's a difference that gets them over to the point of pleading  
3 plausibly --

4 THE COURT: That the treasurer of a public company is  
5 spending this time executing hundreds of millions of dollars of  
6 trades is not something that is different from what Harbinger  
7 pled?

8 MR. GIUFFRA: Well, they haven't pled that he was  
9 doing so in his capacity as the treasurer of DISH. It's the  
10 same, basically, agency theory based on titles, which is  
11 legally insufficient.

12 THE COURT: Well, anything else?

13 MR. GIUFFRA: Yes. On the issue of contracts  
14 interpretation and large S and small S in "subsidiary", I think  
15 it's correct that on a motion to dismiss, in my experience,  
16 courts interpret contracts on motions to dismiss unless those  
17 contracts are ambiguous. No one has come into this court and  
18 said there's some drafting history about what small s and big S  
19 means. So I think Your Honor should interpret the contract on  
20 a motion to dismiss. It's something that, in my experience,  
21 courts routinely do. We cite cases where that is done.

22 Just one last point and then I'll be done. They also  
23 have to plead damages and an injury, and there's been a lot of  
24 speculation here about damages and injury. I have not heard --  
25 well, just look at the complaint; there's nothing but

1 conclusory allegations of injury and damage. It's about things  
2 that might happen in the future or things that happened in the  
3 past. To the extent it's with respect to things that happened  
4 in the past, that's things that are within their knowledge and  
5 they should be able to put it in a complaint. They haven't  
6 done so. So Your Honor, I don't think they've pled injury,  
7 damage, and that's an element of a tortious interference claim.

8 THE COURT: Okay. Thank you.

9 MR. GIUFFRA: Thank you.

10 THE COURT: Anything else?

11 MR. DUGAN: Your Honor, I don't have any argument, but  
12 I just wanted to amend something --

13 THE COURT: Sure.

14 MR. DUGAN: -- to point something out. I know you had  
15 questions about the release, and what -- the release clearly  
16 was troubling, in some respect, to Your Honor. We just wanted  
17 to invite Your Honor -- I'll give you the docket number of the  
18 release, if you -- I don't know if you've looked at it any time  
19 recently, but it's docket number 970. It's exhibit to the  
20 disclosure statement -- Exhibit F to the disclosure statement  
21 of the ad hoc, I think, secured lenders group. And I think,  
22 Your Honor, if you look at the release and the language of the  
23 release, our view is it doesn't show an identity of interest  
24 between LBAC and SPSO, but I don't want to argue it; I just  
25 wanted to point out that that's where it is.

1 THE COURT: I don't know what that statement means,  
2 Mr. Dugan. So if you want to unpack it, that's fine, but I  
3 don't understand what the point is of what you just said.

4 MR. DUGAN: Well, it's just -- the point is, Your  
5 Honor, the release is a very standard release. It doesn't  
6 spell out any disallowance claim. It doesn't highlight any  
7 disallowance claim.

8 THE COURT: Well, I don't know what to do about this,  
9 because this issue comes up about every four hours like  
10 clockwork. And I've asked before if that means that it means  
11 an affirmative -- a release of affirmative claims, damage  
12 claims, or if it means that as a condition to the LBAC bid,  
13 SPSO's claims must be allowed in full. And I was told before  
14 that it means the latter; it means both. So I don't know now  
15 if you're trying to tell me something different from that.

16 MS. STRICKLAND: Your Honor, may I address this?

17 THE COURT: Sure.

18 MS. STRICKLAND: Because I addressed this the first  
19 time.

20 THE COURT: Yes.

21 MS. STRICKLAND: So when Your Honor asked me the  
22 question of what does the release mean, I wanted to answer you  
23 to let you know all of the possible effects of the drafting.  
24 What I heard Your Honor to say today was you infer something  
25 from the fact that LBAC was drafting to get the affirmative

1 allowance of SPSO's claims. That is not what the release says.

2           However, in the same way that "claim", as broadly  
3 defined under 101(5) of the Code, can encompass a whole lot of  
4 things, I didn't want Your Honor to feel that we had misled you  
5 when you say does it include this, does it include this, does  
6 it include this, if we later came back and said, yes, it's a  
7 super-broad general release; it includes all of those things,  
8 that you would not think, well, that's not what you told me  
9 before. But when LBAC, as far as Your Honor drawing an  
10 inference about drafting implies a relationship between those  
11 parties because LBAC was drafting to protect parties it had an  
12 identity of interest with, I think that goes too far.

13           THE COURT: But --

14           MS. STRICKLAND: It is a very broad --

15           THE COURT: But here's the part --

16           MS. STRICKLAND: -- general release --

17           THE COURT: Here's the part that I don't understand,  
18 that -- and I mean, you're inviting me to go there, so I'm  
19 going to go there with you. Mr. Ergen forms LBAC, right?

20           MS. STRICKLAND: Correct.

21           THE COURT: Okay. LBAC makes the bid on behalf of --  
22 it's going to be some --

23           MS. STRICKLAND: LBAC submitted an offer letter on May  
24 15th --

25           THE COURT: Right.

1 MS. STRICKLAND: -- Your Honor.

2 THE COURT: And it's going to be some combination of,  
3 right?

4 MS. STRICKLAND: It leaves the possibility open.

5 THE COURT: Cor --

6 MS. STRICKLAND: At the time he bids --

7 THE COURT: Right.

8 MS. STRICKLAND: -- he's letting the target know  
9 that --

10 THE COURT: That --

11 MS. STRICKLAND: -- at some point --

12 THE COURT: Right.

13 MS. STRICKLAND: -- the situation may change, but as  
14 of right now --

15 THE COURT: It --

16 MS. STRICKLAND: -- LBAC is entirely owned by Mr.  
17 Ergen.

18 THE COURT: Entirely owned by him.

19 MS. STRICKLAND: Correct.

20 THE COURT: Right. And before that bid gets put in,  
21 right, the release means that his debt claim gets paid in full.

22 MS. STRICKLAND: Your Honor, at the time that the May  
23 15th letter went in, it was merely a letter. There was no  
24 asset purchase agreement.

25 THE COURT: Okay.

1 MS. STRICKLAND: There was no --

2 THE COURT: Then skip forward to when there is an  
3 asset purchase agreement.

4 MS. STRICKLAND: -- document whatsoever. So at the  
5 point in time that there is an asset purchase agreement, there  
6 is a -- prior to the submission of the bid, DISH decides that  
7 it wants to acquire LightSquared. It transfers the ownership  
8 interest in the acquisition vehicle, which is LBAC, for a  
9 dollar.

10 THE COURT: Right.

11 MS. STRICKLAND: And a purchase agreement comes into  
12 being that has a broad general release --

13 THE COURT: Right.

14 MS. STRICKLAND: -- and a broad general release says  
15 against the debtors' claims against the LP debtors' sellers, is  
16 the way its drafted -- the LP debtors' claims, as broadly as  
17 that could be defined, and it has that long litany of chose as  
18 an action and all of these other --

19 THE COURT: Right.

20 MS. STRICKLAND: -- words that lawyers include in  
21 these broad general releases, against the purchaser or  
22 purchaser's affiliates. And it's just binding on sellers.

23 THE COURT: Right.

24 MS. STRICKLAND: It's not -- on the LP debtors. It's  
25 not binding --



1 THE COURT: Right.

2 MS. STRICKLAND: -- on anyone else.

3 THE COURT: Right.

4 MS. STRICKLAND: But it's this broad general release.

5 So when Your Honor said, well, could the release do this, could  
6 the release do this, could it bar all of these things, the  
7 answer is yes, it could, because it's a very broad --

8 THE COURT: But the ques --

9 MS. STRICKLAND: -- broadly worded agreement.

10 THE COURT: But the --

11 MS. STRICKLAND: But that's different from is it a  
12 condition that the claim be allowed. There's nothing in the  
13 release, whatsoever, that says SPSO, that talks about debt,  
14 that talks about allowance at all.

15 THE COURT: But if I were to say right now --

16 MS. STRICKLAND: Um-hum.

17 THE COURT: -- I am separating out the claims  
18 allowance process, I'm separating out the 502(b)(1) proceeding  
19 from the bidding, you're not going to know until next June  
20 whether or not that claim is allowed. The bids not going to go  
21 forward. The facts on the ground are that the bid, as I  
22 understand it, requires that the claim be allowed in full.  
23 That's what -- I mean, if that's not the case, somebody ought  
24 to tell me. I keep asking the same question over and over  
25 again.

1 MS. STRICKLAND: Your Honor, that's why I think Mr.  
2 Dugan was pointing you to the language of the release itself,  
3 and the docket number, which is on your docket --

4 THE COURT: I know --

5 MS. STRICKLAND: -- before Your Honor, because there  
6 are -- as an example, the LP debtors are the only parties  
7 giving a release. If the LP debtors want the bag of money that  
8 LBAC is offering, they have to agree to the agreement, or they  
9 have to negotiate a different agreement. But there's not any  
10 other way around that.

11 THE COURT: Right, and the question is --

12 MS. STRICKLAND: You are correct.

13 THE COURT: -- as it relates to what we're talking  
14 about now and not the auction, the question is, is why is a bid  
15 of DISH, which is a separate entity from SPSO -- say, the  
16 defendants -- why does the bid of DISH care about whether or  
17 not SPSO gets its claim in full? DISH has determined that it  
18 wants to pay 2.2 billion dollars for the spectrum. It  
19 shouldn't care what happens to that 2.2 billion dollars after  
20 it gets into the debtors' hands, whether or not -- whoever's  
21 claims are allowed. DISH wants the spectrum; it's going to pay  
22 2.2 billion dollars, and there's going to be that switch. And  
23 what happens after that should be of no concern to DISH.  
24 That's the theory. That's what I'm focused on --

25 MS. STRICKLAND: I understand, Your Honor.

1 THE COURT: -- only insofar as it relates to the  
2 allegations of identity of interest.

3 MS. STRICKLAND: And Your Honor is well aware that  
4 when parties draft general releases, they say, me, my  
5 affiliates --

6 THE COURT: Sure.

7 MS. STRICKLAND: -- successors, assigns. That's what  
8 the document says.

9 THE COURT: But now that all of this has shaken out,  
10 it's still in there, and query whether taking it out now would  
11 matter, because it was in there. In other words, when LBAC  
12 went from being owned by Mr. Ergen to being owned by DISH,  
13 nothing happened. So it's in there, it was in there, it still  
14 is in there, and I'm not so sure taking it out now makes any  
15 difference. But I'm just not --

16 MS. STRICKLAND: Right, Your Honor, obviously you're  
17 not negotiating a credit agreement with me, and were you asking  
18 me to negotiate that provision --

19 THE COURT: Right.

20 MS. STRICKLAND: -- I would refer you to someone else,  
21 because as a result of the injunction in Nevada, I would not be  
22 the lawyer having that --

23 THE COURT: Right.

24 MS. STRICKLAND: -- negotiation. However, this isn't  
25 a negotiation. This is a question about whether or not facts

1 as pled infer something --

2 THE COURT: Right.

3 MS. STRICKLAND: -- or don't infer something. And my  
4 only reason for rising at all is I don't think that you can  
5 infer that because as of a moment in time in July a company  
6 wrote a general release that said affiliates, successors,  
7 assigns, claims, broad, broad, broad, broad, broad, broad, that  
8 that means that there was an identity of interest with  
9 everybody in that broad release.

10 THE COURT: Sure. I --

11 MS. STRICKLAND: That was --

12 THE COURT: I agree with you.

13 MS. STRICKLAND: -- my only point, and not --

14 THE COURT: I --

15 MS. STRICKLAND: And to distinguish from your prior  
16 question of me of what is the effect of this broad general  
17 language, I didn't want Your Honor to think that there was a  
18 gotcha somewhere in there. A broad release is a broad release,  
19 as opposed to it demonstrates an identity of interest or an  
20 intent, frankly, for LBAC to get something for SPSO, as opposed  
21 to the contract says what it says, it's been public, it's been  
22 there all along, and it's very, very broad, because of routine  
23 language, not because of a sneaky conspiracy identity of  
24 interest. So it's merely about the inference. And if there  
25 becomes an appropriate point in time for anyone to negotiate

1 with LBAC regarding any aspect of the agreement, I'm sure  
2 they'll ask all of the things they want to ask, and the  
3 appropriate lawyers, who are permitted under various legal  
4 orders, will respond. But that's not --

5 THE COURT: Okay.

6 MS. STRICKLAND: -- where we are today. Today we're  
7 merely concerned about the inferences, and I didn't want Your  
8 Honor to think that the release said I require SPSO's --

9 THE COURT: Look, I mean everybody --

10 MS. STRICKLAND: -- claims to be allowed; it doesn't.

11 THE COURT: We keep -- we're all talking about Nevada,  
12 and then we're not talking about Nevada. And what I've tried  
13 to do here, which I think is my job, is to look at the  
14 complaint, and to look at reasonable inferences that can be  
15 drawn from the complaint, and apply Iqbal versus Twombly and  
16 all the very standard issue Second Circuit law on whether and  
17 when you let a complaint survive a motion to dismiss.

18 So I'm not sure how -- if you went back and look over  
19 this transcript, probably a law professor would say that ninety  
20 percent of what we talked about has nothing to do with the  
21 motion to dismiss. And I just want to say back to you, I  
22 appreciate what you're saying, and I'm trying very hard to not  
23 get distracted by things that really aren't in the complaint.  
24 To your point -- right? You're making this point because you  
25 don't want me to be distracted by something that's not in the

1 complaint, right?

2 MS. STRICKLAND: That's correct. But Your Honor, the  
3 only reason why Nevada came in here -- because I was also the  
4 lawyer that stood before you, not that long ago, and said  
5 Nevada is totally irrelevant. The reason why Nevada was so  
6 prominent today is because when plaintiffs pled their  
7 complaints, they attached things like reports that got filed in  
8 Nevada, e-mails about Nevada, and facts from Nevada in their  
9 complaint. And our only point, on this side of the table, is  
10 you can't plead something and say please only look at one  
11 one-hundredth of it. If they're going to use it, they have to  
12 be comfortable with the entire record they're introducing. If  
13 they're not going to use it -- I mean, Mr. Stone was perhaps  
14 exaggerating a bit when he said there were a couple of bullet  
15 points. If you look at the exhibits, which are also attached  
16 to the complaint, there's reams of Nevada. And they were not  
17 new facts introduced by any defendant. They were all facts  
18 introduced by plaintiff. And all the defendants have said, in  
19 our pleadings and today, is if you're going to allow this  
20 snippet and that snippet, you can't take it out of context.  
21 That's part of their complaint; they have to live with the  
22 whole complaint.

23 THE COURT: Okay. All right. Anyone else?

24 All right. What I'd like to do is take another break  
25 and have you come back at 5 o'clock, and I need to give you a

1 disposition, I think. Is that -- why don't we make it ten  
2 minutes to 5, okay? And if I keep you waiting for a few  
3 minutes then I'll keep you waiting for a few minutes, okay?

4 (Recess from 4:27 p.m. until 4:55 p.m.)

5 THE COURT: Have a seat. Please have a seat. I  
6 realize that I'm hitting up against the 5 o'clock deadline  
7 around here, so let me see if I can get you folks out of here.

8 First of all, thank you for a long afternoon. It was  
9 very well done.

10 Just let me briefly state the law, which I know you  
11 all know, but for the purposes of making a record. Under Rule  
12 12(b)(6), to survive a motion to dismiss, a complaint must  
13 allege facts sufficient "to state a claim to relief that is  
14 plausible on its face." Bell Atlantic Corp. v. Twombly, 550  
15 U.S. 544 (2007).

16 A claim is plausible "when the plaintiff pleads  
17 factual content that allows the Court to draw the reasonable  
18 inference that the defendant is liable for the misconduct  
19 alleged". Ashcroft v. Iqbal, 556 U.S. 662 (2009). On a motion  
20 to dismiss, the Court must "accept as true all factual  
21 allegations set out in the plaintiff's complaint, draw  
22 inferences from those allegations in the light most favorable  
23 to the plaintiff, and construe the complaint liberally".  
24 Rescuecom Corp. v. Google, 562 F.3d 123 (2nd Cir. 2009).  
25 Dismissal is only appropriate when "it appears beyond doubt

1 that the plaintiff can prove no set of facts which will entitle  
2 him or her to relief". Sweet v. Sheahan, 235 F.3d 80, (2d Cir.  
3 2000).

4 So against that backdrop, I've reviewed both the  
5 Harbinger second amended complaint and the LightSquared  
6 complaint, and also taken into account, I think, what is also  
7 pretty standard law in the Second Circuit as to what is a  
8 court's mission when interpreting a written agreement.

9 And I can give you the following cites. First -- and  
10 this is a quote -- "A written agreement that is clear,  
11 complete, and subject to only one reasonable interpretation  
12 must be enforced according to the plain meaning of the language  
13 chosen by the contracting parties." Brad H. v. City of New  
14 York, 951 N.E.2d 743 (N.Y. 2011).

15 But a court does not read the words of a contract in a  
16 vacuum and must give "due consideration to the surrounding  
17 circumstances and apparent purpose which the parties sought to  
18 accomplish". Thompson v. Gjivoje, 896 F.2d 716 (2d Cir. 1990),  
19 quoting William C. Atwater & Co. v. Panama R. Co., 159 N.E. 418  
20 (N.Y. 1927), quoting Development Specialists, Inc. v. Peabody.  
21 Energy Corp. (In re Coudert Bros.), 487 B.R. 375, stating that  
22 in analyzing a contractual text a court need not turn a blind  
23 eye to context.

24 Based on that, the following is the disposition of the  
25 motions to dismiss. Consistent with my colloquy with Mr.



1 Friedman, Counts I and II of the Harbinger complaint are  
2 dismissed. Harbinger's not a party to the contract. These  
3 are, in essence, derivative claims. Moreover, as was pointed  
4 out by some of the opposing parties, there was no permission  
5 granted to bring these claims. So those are dismissed, and the  
6 dismissal is with prejudice.

7 Let me skip Count III of the Harbinger complaint.

8 With respect to Count IV, equitable disallowance,  
9 that's dismissed, again, with prejudice again. It's not to be  
10 repleaded again.

11 With respect to Count V, equitable subordination, I  
12 think that the best thing to do with respect to the equitable  
13 subordination is have it be reflected in a plan of  
14 reorganization, if that's what Harbinger decides it wants to  
15 pursue.

16 And I think for the neatness of the record, then,  
17 Count III of the Harbinger complaint is going to stand, and the  
18 motion to dismiss Count III is denied. So what will be left of  
19 the Harbinger complaint will be Count III only. The reason for  
20 letting it stand and not completely folding it into the  
21 LightSquared complaint, there are some different allegations, I  
22 believe, that were made. So that's what that complaint is  
23 going to look like going forward.

24 With respect to the LightSquared complaint, the motion  
25 to dismiss is denied as to Counts I, II, and III, so those will

1 stand. Count IV, the equitable disallowance, is dismissed,  
2 again, with prejudice. And Count V is dismissed as to SPSO,  
3 but will stand as to DISH, EchoStar, and Mr. Ergen.

4 I think that disposes of the motions to dismiss with  
5 respect to both complaints.

6 So in the few minutes remaining, and not to put you on  
7 the spot, but I want to talk about next steps. And maybe the  
8 right next step is just to let you all get some sleep before  
9 the auction kicks off tomorrow. But sooner rather than later,  
10 I want to talk about how this is going to unfold, now that  
11 we've gotten past this stage.

12 And one thing that I do want to float is I saw some  
13 reference in some paper to motions for summary judgment. There  
14 are not going to be motions for summary judgment. There's  
15 going to be a trial. So when it's appropriate -- and I've said  
16 this every time I've seen you for the last couple of weeks --  
17 you need to get together and decide what it's going to look  
18 like, what issue's going to go first, if there are stages at  
19 which you would ask the Court to render a ruling on certain  
20 matters. In other words, are we going to have a phase 1, a  
21 phase 2, a phase 3? I have my own ideas. I'd rather -- I said  
22 this before verbatim. I'd rather you tell me how you want it  
23 to look, and if you can't agree, I'll tell you how I expect it  
24 to go. But this is not an easy thing to figure out, and all  
25 the parts may not stop moving until we're beyond the auction

1 and closer to the confirmation hearing date. And people are  
2 going to scatter for the holidays. Now, did you want to keep  
3 the January 3rd date as a pre-trial?

4 MR. BARR: Yes, Your Honor, if we can. That would be  
5 great. And we'll work, as we mentioned last time --

6 THE COURT: Is that --

7 MR. GIUFFRA: -- with all the other parties.

8 THE COURT: I mean, that's only -- that's the Friday  
9 before the Thursday that we're going to start, right? Can you  
10 help me out at all by telling me how much time you think I  
11 ought to reserve?

12 MR. BARR: On the 3rd, Your Honor?

13 THE COURT: No, in the month of January. So you start  
14 on the 9th. So far I've reserved the whole week of the 13th.

15 MR. BARR: Your Honor, of course none of us can  
16 predict exactly how it plays it out --

17 THE COURT: Right.

18 MR. BARR: -- but I think that's a very good idea.

19 THE COURT: Okay. All right. Well, why don't I let  
20 you go, if people are traveling --

21 MR. BARR: Thank you.

22 THE COURT: -- and --

23 MR. BARR: Can I ask one housekeeping --

24 THE COURT: -- I need someone to draft an order or  
25 two.

1 MR. BARR: That's what I was going to ask, Your Honor.  
2 We'll take care of that, Your Honor. Thank you.

3 THE COURT: Okay. Ms. Strickland?

4 MS. STRICKLAND: Judge, it may be appropriate, if Your  
5 Honor has four more minutes or five more minutes, for us to  
6 have even an off-the-record conference --

7 THE COURT: Sure.

8 MS. STRICKLAND: -- about next steps.

9 THE COURT: Sure. Okay. All right. I think I'd like  
10 to do that off the record, and we'll just end today's session  
11 right there.

12 And Ms. Strickland, Mr. Barr and Mr. Sussberg, why  
13 don't you determine who should come in for the discussion?  
14 We'll go back here.

15 MR. BARR: Thank you, Your Honor.

16 (Whereupon these proceedings were concluded at 5:04 p.m.)  
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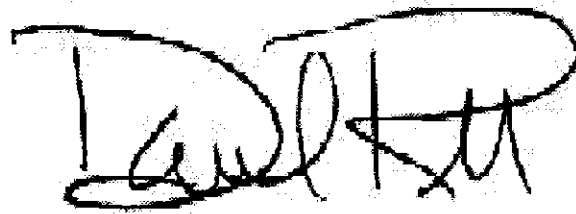
## I N D E X

## RULINGS

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## C E R T I F I C A T I O N

I, David Rutt, certify that the foregoing transcript is a true and accurate record of the proceedings.



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# EXHIBIT 3

# EXHIBIT 3

**In Re:**  
*LIGHTSQUARED INC., et al.*  
*Case No. 12-12080-scc; Adv. Proc. No. 13-01390-scc*

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*May 8, 2014*

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK  
Case No. 12-12080-scc; Adv. Proc. No. 13-01390-scc  
- - - - -x  
In the Matter of:  
LIGHTSQUARED INC., et al.,  
Debtors.  
- - - - -x  
HARBINGER CAPITAL PARTNERS LLC, et al.,  
Plaintiffs,  
- against -  
ERGEN, et al.,  
Defendants.  
- - - - -x  
United States Bankruptcy Court  
One Bowling Green  
New York, New York  
May 8, 2014  
1:01 PM  
B E F O R E:  
HON. SHELLEY C. CHAPMAN  
U.S. BANKRUPTCY JUDGE

1

2 Hearing: Bench decision in Adv. Proc. 13-01390-scc

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4 Hearing: Bench decision on confirmation of plan of debtors  
5 (12-12080-scc)

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

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

3 How is everybody today?

4 All right. Thank you all for coming down, and thanks  
5 to everybody who's dialed in. I have four pages of folks who  
6 are listening on the phone, but I'm not going to go through and  
7 identify them.

8 As I said a couple of days ago when I outlined this  
9 event or this procedure, I absolutely do not hold it against  
10 anybody who is not here personally. I understand that people  
11 have other things to attend to and that's perfectly fine.

12 Let me take moment, though, before I formally start  
13 reading to say a few things. One is to make sure that  
14 everybody understands why I'm doing this somewhat unorthodox  
15 procedure. So in a normal case, the Court would simply issue a  
16 decision that would be filed on the docket.

17 This is a bench decision that I am going to read.  
18 It's not a tentative ruling. It's the decision. The  
19 difference between this and a formal decision which will  
20 eventually be filed on the docket rests in the fact that there  
21 is a tremendous amount of detail work that has to go into a  
22 published decision. For example, the decision in the adversary  
23 proceeding, which is what I will read first, now runs to 170  
24 pages and is up to 201 footnotes, and it includes a lot of  
25 detailed findings.

1           So the work that's involved in order to get it to what  
2 we consider to be perfect and publishable is a lot. And I felt  
3 very strongly that the time that it takes to do that was not  
4 something that should cost the estate money.

5           Similarly with respect to the confirmation decision,  
6 there will be a longer version of that, complete with findings,  
7 footnotes, full citations, et cetera, that will, as soon as we  
8 can finish it, will be published.

9           So I'm not doing this today because this case is  
10 particularly special and important. Yes, it is both of those  
11 things, but there is no significance to reading today other  
12 than because I felt very strongly that I needed to get you  
13 decisions so that the companies' funds were not depleted while  
14 I did the work that I have to do. And that's the reason that  
15 I'm doing it this way.

16           There is not going to be a copy of this available  
17 other than the transcript that you will produce. And  
18 eventually when the published decision and orders are ready,  
19 what I say today will be superseded in all respects by those.

20           So I just wanted to set the table.

21           That being said, I apologize in advance for the fact  
22 that you're going to have to listen to me talk for several  
23 hours. And if anybody needs to take a break, just get up and  
24 take a break. It's no problem.

25           I will take a break between the two decisions. The



1 first one is approximately -- I'm going to read about seventy  
2 pages, take a break and then I'll read the second one which is  
3 about fifty pages.

4 And it's great that I've got a musical accompaniment.  
5 All right.

6 This is post-trial findings of fact and conclusions of  
7 law in the adversary proceeding.

8 Between April 13th, 2012 and April 26, 2013, Charles  
9 Ergen, through an entity named SPSO, purchased approximately  
10 844 million dollars of the senior secured debt of LightSquared  
11 LP, a debtor in these Chapter 11 cases.

12 Mr. Ergen, the founder, chairman of the board of  
13 directors, and controlling shareholder of DISH, bought the  
14 debt, he says, without any strategic intent to benefit DISH.  
15 Rather, he was interested in acquiring LightSquared debt  
16 personally because he "liked the investment" and because he had  
17 been advised that DISH itself was not eligible to purchase the  
18 debt, due to the restrictions in the LightSquared LP credit  
19 agreement.

20 The "diligence" on the purchaser eligibility issue,  
21 such as it was, was conducted by Mr. Ergen's long-time friend  
22 Jason Kiser, the treasurer of DISH, who from time to time  
23 worked on personal matters for Mr. Ergen. Mr. Kiser also  
24 arranged the trades on behalf of Mr. Ergen on his own time  
25 while at work at DISH.

1           Promptly after Mr. Ergen's initial debt purchases in  
2     the face amount of 5 million dollars, on April 13th, 2012, and  
3     particularly after his significant debt purchase in the face  
4     amount of 247 million dollars on May 4th, 2012, the press began  
5     to speculate about the identity of the SPSO purchaser,  
6     publishing stories with headlines such as "LightSquared term  
7     loan trades north of 70 as Ergen enters the picture," and  
8     "Ergen builds cash pile amidst LightSquared restructuring  
9     talks."

10           The trades in the press reports did not go unnoticed  
11    by LightSquared, especially after the news that it was Carl  
12    Icahn who had sold his nearly quarter billion dollar position  
13    in the debt to SPSO. Philip Falcone, the founder and principal  
14    owner of Harbinger Capital Partners, which is the principal  
15    shareholder of LightSquared, reacted to the news swiftly and  
16    strategically, writing in an e-mail message: Well, I'm working  
17    on giving him a nice surprise," referring to Mr. Ergen and to  
18    LightSquared's May 9th, 2012 modification of its credit  
19    agreement's disqualified company's list to include DISH.

20           The game was afoot. Almost two years of moves and  
21    countermoves has ensued with LightSquared's other stakeholders  
22    sometimes watching from the sidelines and sometimes entering  
23    the fray, all under the watchful gaze of the Federal  
24    Communications Commission, which to this day, has not taken not  
25    definitive action to clarify the status of LightSquared's

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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Clerk of Supreme Court

**JOINT APPENDIX  
VOLUME 15 of 44**

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Date	Document Description	Volume	Bates No.
2014-08-29	Affidavit of Service re Second Amended Complaint Kyle Jason Kiser	Vol. 18	JA004272 – JA004273 <sup>1</sup>
2014-08-29	Affidavit of Service re Second Amended Complaint Stanton Dodge	Vol. 18	JA004268 – JA004271
2014-08-29	Affidavit of Service re Second Amended Complaint Thomas A. Cullen	Vol. 18	JA004274 – JA004275
2013-08-22	Affidavit of Service re Verified Shareholder Complaint	Vol. 1	JA000040

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<sup>1</sup> JA = Joint Appendix

<b>Date</b>	<b>Document Description</b>	<b>Volume</b>	<b>Bates No.</b>
2013-08-22	Affidavit of Service re Verified Shareholder Complaint	Vol. 1	JA000041
2013-08-22	Affidavit of Service re Verified Shareholder Complaint	Vol. 1	JA000042
2013-08-22	Affidavit of Service re Verified Shareholder Complaint	Vol. 1	JA000043
2013-08-22	Affidavit of Service re Verified Shareholder Complaint	Vol. 1	JA000044
2013-08-22	Affidavit of Service re Verified Shareholder Complaint	Vol. 1	JA000045
2013-08-22	Affidavit of Service re Verified Shareholder Complaint	Vol. 1	JA000046
2013-08-22	Affidavit of Service re Verified Shareholder Complaint	Vol. 1	JA000047
2013-08-22	Affidavit of Service re Verified Shareholder Complaint	Vol. 1	JA000048
2016-01-27	Amended Judgment	Vol. 43	JA010725 – JA010726
2014-10-26	Appendix, Volume 1 of the Appendix to the Report of the Special Litigation Committee of DISH Network Corporation (No exhibits attached)	Vol. 20	JA004958 – JA004962
2014-10-27	Appendix, Volume 2 of the Appendix to the Report of the Special Litigation Committee of DISH Network Corporation (No exhibits attached)	Vol. 20	JA004963 – JA004971

<b>Date</b>	<b>Document Description</b>	<b>Volume</b>	<b>Bates No.</b>
2014-10-27	Appendix, Volume 3 of the Appendix to the Report of the Special Litigation Committee of DISH Network Corporation and Selected Exhibits to Special Litigation Committee's Report: Exhibit 162 (Omnibus Objection of the United States Trustee to Confirmation dated Nov. 22, 2013); Exhibit 172 (Hearing Transcript dated December 10, 2013); and Exhibit 194 (Transcript, Hearing: Bench Decision in Adv. Proc. 13-01390-scc., Hearing: Bench Decision on Confirmation of Plan of Debtors (12-12080-scc), In re LightSquared Inc., No. 12-120808-scc, Adv. Proc. No. 13-01390-scc (Bankr. S.D.N.Y. May 8, 2014)); Exhibit 195 (Post-Trial Findings of Fact and Conclusion of Law dated June 10, 2014 (In re LightSquared, No. 12-120808 (Bankr. S.D.N.Y.)); Exhibit 203 (Decision Denying Confirmation of Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of Bankruptcy Code (In re LightSquared, No. 12-120808 (Bankr. S.D.N.Y.))	Vol. 20 Vol. 21 Vol. 22 Vol. 23	JA004972 – JA005001 JA005002 – JA005251 JA005252 – JA005501 JA005502 – JA005633
2014-10-27	Appendix, Volume 4 of the Appendix to the Report of the Special Litigation Committee of DISH Network Corporation (No exhibits attached)	Vol. 23	JA005634 – JA005642

<b>Date</b>	<b>Document Description</b>	<b>Volume</b>	<b>Bates No.</b>
2014-10-27	Appendix, Volume 5 of the Appendix to the Report of the Special Litigation Committee of DISH Network Corporation and Selected Exhibits to Special Litigation Committee's Report: Exhibit 395 (Perella Fairness Opinion dated July 21, 2013); Exhibit 439 (Minutes of the Special Meeting of the Board of Directors of DISH Network Corporation (December 9, 2013). (In re LightSquared, No. 12-120808 (Bankr. S.D.N.Y.)) <b>(Filed Under Seal)</b>	Vol. 23	JA005643 – JA005674
2014-10-27	Appendix, Volume 6 of the Appendix to the Report of the Special Litigation Committee of DISH Network Corporation (No exhibits attached)	Vol. 23	JA005675 – JA005679
2014-06-18	Defendant Charles W. Ergen's Response to Plaintiff's Status Report	Vol. 17	JA004130 – JA004139
2014-08-29	Director Defendants Motion to Dismiss the Second Amended Complaint	Vol. 18	JA004276 – JA004350
2014-10-02	Director Defendants Reply in Further Support of Their Motion to Dismiss the Second Amended Complaint	Vol. 19	JA004540 – JA004554

<b>Date</b>	<b>Document Description</b>	<b>Volume</b>	<b>Bates No.</b>
2013-11-21	Errata to Report to the Special Litigation Committee of Dish Network Corporation Regarding Plaintiff's Motion for Preliminary Injunction	Vol. 13	JA003144 – JA003146
2013-08-12	Errata to Verified Shareholder Complaint	Vol. 1	JA000038 – JA000039
2013-11-27	Findings of Fact and Conclusion of Law	Vol. 14	JA003316 – JA003331
2015-09-18	Findings of Fact and Conclusions of Law Regarding The Motion to Defer to the SLC's Determination That The Claims Should Be Dismissed	Vol. 41	JA010074 – JA010105
2013-09-19	Hearing Transcript re Motion for Expedited Discovery	Vol. 5	JA001029 – JA001097
2013-11-25	Hearing Transcript re Motion for Preliminary Injunction	Vol. 13 Vol. 14	JA003147 – JA003251 JA003252 - JA003315
2013-12-19	Hearing Transcript re Motion for Reconsideration	Vol. 14	JA003332 – JA003367
2015-07-16	Hearing Transcript re Motion to Defer	Vol. 41	JA010049 – JA010071
2015-01-12	Hearing Transcript re Motions including Motion to Defer to the Special Litigation Committee's Determination that the Claims Should be Dismissed and Motion to Dismiss <b>(Filed Under Seal)</b>	Vol. 25 Vol. 26	JA006228 – JA006251 JA006252 – JA006311



<b>Date</b>	<b>Document Description</b>	<b>Volume</b>	<b>Bates No.</b>
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2016-02-09	Notice of Appeal	Vol. 43 Vol. 44	JA010747 – JA010751 JA010752 – JA010918
2016-01-28	Notice of Entry of Amended Judgment	Vol. 43	JA010727 – JA010733
2015-10-02	Notice of Entry of Findings of Fact and Conclusions of Law re the SLC's Motion to Defer	Vol. 41	JA010106 – JA010142
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<b>Date</b>	<b>Document Description</b>	<b>Volume</b>	<b>Bates No.</b>
2015-02-20	Notice of Entry of Order Regarding Motion to Defer to The SLC's Determination that the Claims Should Be Dismissed	Vol. 26	JA006315 – JA006322
2016-01-08	Order Granting in Part and Denying in Part Plaintiff's Motion to Retax	Vol. 43	JA010712 – JA010715
2013-10-15	Order Granting, in Part, Plaintiffs Ex Parte Motion for Order to Show Cause and Motion to (1) Expedite Discovery and (2) Set a Hearing on Motion for Preliminary Injunction on Order Shortening Time and Plaintiff's Motion for Preliminary Injunction and for Discovery on an Order Shortening Time	Vol. 7	JA001557 – JA001561
2015-02-19	Order Regarding Motion to Defer to the SLC's Determination that the Claims Should Be Dismissed	Vol. 26	JA006312 – JA006314
2013-09-13	Plaintiff's Appendix of Exhibits to Motion for Preliminary Injunction and For Discovery on an Order Shortening Time	Vol. 1 Vol. 2 Vol. 3 Vol. 4 Vol. 5	JA00132 – JA00250 JA00251 – JA00501 JA00502 – JA00751 JA00752 – JA001001 JA001002 – JA001028
2013-10-03	Plaintiff's Appendix of Exhibits to Status Report	Vol. 5 Vol. 6	JA001115 – JA001251 JA001252 – JA001335
2014-06-06	Plaintiff's Appendix of Exhibits to Status Report	Vol. 14 Vol. 15 Vol. 16	JA03385 – JA003501 JA003502 – JA003751 JA003752 – JA003950

<b>Date</b>	<b>Document Description</b>	<b>Volume</b>	<b>Bates No.</b>
2013-11-13	Plaintiff's Appendix of Exhibits to Supplement to Motion for Preliminary Injunction Vol. 1 Part 1 ( <b>Filed Under Seal</b> )	Vol. 7 Vol. 8	JA001607 – JA001751 JA001752 – JA001955
2013-11-13	Plaintiff's Appendix of Exhibits to Supplement to Motion for Preliminary Injunction Vol. 1 Part 2 ( <b>Filed Under Seal</b> )	Vol. 8 Vol. 9 Vol. 10	JA001956 – JA002001 JA002002 – JA002251 JA002252 – JA002403
2013-11-13	Plaintiff's Appendix of Exhibits to Supplement to Motion for Preliminary Injunction Vol. 1 Part 3 ( <b>Filed Under Seal</b> )	Vol. 10 Vol. 11 Vol. 12 Vol. 13	JA002404 – JA002501 JA002502 – JA002751 JA002752 – JA003001 JA003002 – JA003065
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2013-09-13	Plaintiff's Motion for Preliminary Injunction and for Discovery on an Order Shortening Time	Vol. 1	JA000095 – JA000131
2015-11-03	Plaintiff's Motion to Retax	Vol. 43	JA010589 – JA010601

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2014-09-19	Plaintiff's Opposition to the Director Defendants' Motion to Dismiss the Second Amended Complaint and Director Defendant's Motion to Dismiss the Second Amended Complaint <b>(Filed Under Seal)</b>	Vol. 18 Vol. 19	JA004453 – JA004501 JA004502 – JA004508
2014-12-10	Plaintiff's Opposition to the SLC's Motion to Defer to its Determination that the Claims Should be Dismissed <b>(Filed Under Seal)</b>	Vol. 24	JA005868 – JA005993
2014-09-19	Plaintiff's Opposition to the Special Litigation Committee's Motion to Dismiss for Failure to Plead Demand Futility	Vol. 19	JA004509 – JA004539
2015-11-20	Plaintiff's Reply in Further Support of its Motion to Retax	Vol. 43	JA010644 – JA010658
2015-12-10	Plaintiff's Response to SLC's Supplement to Opposition to Plaintiff's Motion to Retax	Vol. 43	JA010700 – JA010711
2013-10-03	Plaintiff's Status Report	Vol. 5	JA001098 – JA001114
2014-06-06	Plaintiff's Status Report	Vol. 14	JA003368 – JA003384
2014-10-30	Plaintiff's Status Report	Vol. 23	JA005680 - JA005749
2015-04-03	Plaintiff's Status Report	Vol. 26	JA006323 – JA006451
2013-11-18	Plaintiff's Supplement to its Supplement to its Motion for Preliminary Injunction	Vol. 13	JA003066 – JA003097

<b>Date</b>	<b>Document Description</b>	<b>Volume</b>	<b>Bates No.</b>
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2014-06-16	Plaintiff's Supplement to the Status Report	Vol. 16 Vol. 17	JA003951 – JA004001 JA004002 – JA004129
2014-12-15	Plaintiff's Supplemental Authority to its Opposition to the SLC's Motion to Defer to its Determination that the Claims Should be Dismissed	Vol. 24 Vol. 25	JA005994 – JA006001 JA006002 – JA006010
2015-06-18	Plaintiff's Supplemental Opposition to the SLC's Motion to Defer to its Determination that the Claims Should be Dismissed <b>(Filed Under Seal)</b>	Vol. 26 Vol. 27	JA006460 – JA006501 JA006502 – JA006511
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2014-07-25	Second Amended Complaint <b>(Filed Under Seal)</b>	Vol. 17 Vol. 18	JA004140 – JA004251 JA004252 – JA004267
2013-11-20	Special Litigation Committee Report Regarding Plaintiff's Motion for Preliminary Injunction <b>(Filed Under Seal)</b>	Vol. 13	JA003098 – JA003143
2015-01-06	Special Litigation Committee's Appendix of Exhibits Referenced in their Reply In Support of their Motion to Defer to its Determination that the Claims Should Be Dismissed	Vol. 25	JA006046 – JA006227

<b>Date</b>	<b>Document Description</b>	<b>Volume</b>	<b>Bates No.</b>
2015-07-02	Special Litigation Committee's Appendix of Exhibits to Supplemental Reply in Support of their Motion to Defer <b>(Filed Under Seal)</b> (Includes Exhibits: C, D, E, J and K)	Vol. 39	JA009553 – JA009632
2015-07-02	Special Litigation Committee's Appendix of Exhibits to their Supplemental Reply in Support of their Motion to Defer (Exhibits Filed Publicly) (Includes Exhibits: A, B, F, G, H, I, L and M)	Vol. 37 Vol. 38	JA009921 – JA009251 JA009252 – JA009498
2015-07-02	Special Litigation Committee's Appendix of SLC Report Exhibits Referenced in Supplemental Reply in Support of the Motion to Defer <b>(Exhibits Filed Under Seal)</b> (Includes SLC Report Exhibits 298, 394, 443, 444, 446, 447 and 454)	Vol. 41	JA0010002 – JA010048
2015-07-02	Special Litigation Committee's Appendix of SLC Report Exhibits Referenced in Supplemental Reply in Support of the Motion to Defer (Exhibits Filed Publicly) (Includes SLC Report Exhibits 5, 172, and 195)	Vol. 39 Vol. 40	JA009633 – JA009751 JA009752 – JA010001
2015-10-19	Special Litigation Committee's Memorandum of Costs	Vol. 41 Vol. 42 Vol. 43	JA010185 – JA010251 JA010252 – JA010501 JA010502 – JA010588
2014-11-18	Special Litigation Committee's Motion to Defer to its Determination that the Claims Should Be Dismissed	Vol. 23 Vol. 24	JA005750 – JA005751 JA005751 – JA005867

<b>Date</b>	<b>Document Description</b>	<b>Volume</b>	<b>Bates No.</b>
2014-08-29	Special Litigation Committee's Motion to Dismiss for Failure to Plead Demand Futility	Vol. 18	JA004351 – JA004452
2015-11-16	Special Litigation Committee's Opposition to Plaintiff's Motion to Retax	Vol. 43	JA010602 – JA010643
2014-10-02	Special Litigation Committee's Reply in Support of Their Motion to Dismiss for Failure to Plead Demand Futility	Vol. 19	JA004555 – JA004612
2015-01-05	Special Litigation Committee's Reply in Support of their Motion to Defer to its Determination that the Claims Should Be Dismissed	Vol. 25	JA006011 – JA006045
2013-10-03	Special Litigation Committee's Status Report	Vol. 6 Vol. 7	JA001336 – JA001501 JA001502 – JA001554
2015-04-06	Special Litigation Committee's Status Report	Vol. 26	JA006452 – JA006459
2015-12-08	Special Litigation Committee's Supplement to Opposition to Plaintiff's Motion to Retax	Vol. 43	JA010690 – JA010699
2015-07-02	Special Litigation Committee's Supplemental Reply in Support of the Motion to Defer to the SLC's Determination that the Claims Should Be Dismissed <b>(Filed Under Seal)</b>	Vol. 38 Vol. 39	JA009499 – JA009501 JA009502 – JA009552
2013-09-12	Verified Amended Derivative Complaint	Vol. 1	JA000049 – JA000094

<b>Date</b>	<b>Document Description</b>	<b>Volume</b>	<b>Bates No.</b>
2013-08-09	Verified Shareholder Derivative Complaint	Vol. 1	JA000001 – JA000034



# EXHIBIT 2

# EXHIBIT 2

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

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*December 10, 2013*

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK  
Case No. 12-12080-scc; Adv. Proc. No. 13-01390-scc

- - - - -x

In the Matter of:

LIGHTSQUARED, INC., et al.,  
Debtors.

- - - - -x

HARBINGER CAPITAL PARTNERS LLC, et al.,  
Plaintiffs,  
- against -  
ERGEN, et al.,  
Defendants.

- - - - -x

United States Bankruptcy Court  
One Bowling Green  
New York, New York  
December 10, 2013  
1:19 PM

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

1

2 Doc# 69 Motion to Dismiss the Complaint-In-Intervention  
3 (related document(s)66) filed by James C. Dugan on behalf of  
4 Charles W. Ergen, SP Special Opportunities, LLC.

5

6 Doc# 72 Motion to Dismiss Adversary Proceeding Notice of Motion  
7 to Dismiss the Complaint-In-Intervention.

8

9 Doc# 83 Notice of Motion to Dismiss Second Amended Complaint  
10 (related document(s)74) filed by James C. Dugan on behalf of SP  
11 Special Opportunities, LLC.

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

THE COURT: Good afternoon. How is everybody? Who'd like to start?

MR. DUGAN: Your Honor, that would be me. Thank you.

THE COURT: First order of business, Mr. Dugan, is to apologize to everybody for being twenty minutes late.

MR. DUGAN: Exactly. We are very sorry for that, Your Honor. We were stuck on the train and we do apologize, we very much do.

THE COURT: Second order of business is I'm going to identify who's on the phone. I have Ms. Iacob from DebtWire; Mr. Kronsberg from Cyrus Capital Partners; Mr. Pagels from Willkie Farr; Mr. Sanjana from Reorganization Research; Mr. Smalley from The Seaport Group; Mr. Wilson from Skadden Arps; and Mr. Brown from White & Case. Is there anyone else on the phone who wishes to note their appearance?

Okay, Mr. Dugan, we're ready for you.

MR. DUGAN: Thank you, Your Honor. Your Honor, thank you and good afternoon. Jim Dugan for Charles Ergen and SPSO. Your Honor, I do want to apologize again for how late we were in arriving to court this morning.

THE COURT: Okay.

MR. DUGAN: It is inexcusable. We felt very bad about it. We were stuck on a train, and that's no excuse.

THE COURT: Things happen.



1 MR. DUGAN: We're sorry. Yeah, sorry.

2 So, Your Honor, I just wanted to focus, because we've  
3 now been through several rounds of briefing, really in a death  
4 march of briefing, if you will, for the last several weeks --

5 THE COURT: Oh, let's not get that -- let's not be  
6 that dramatic.

7 MR. DUGAN: But it was quite intense. It was quite  
8 intense. And we've been through quite a lot of briefing and  
9 there's been a lot of pages submitted to the Court, and a lot  
10 of arguments --

11 THE COURT: Can I just -- I just want to make sure I'm  
12 going to do this for each of you. I just want to make sure  
13 that I have everything --

14 MR. DUGAN: Sure.

15 THE COURT: -- that you think I have.

16 MR. DUGAN: Right.

17 THE COURT: So I have the original memorandum of law  
18 in support of the motion to dismiss the LightSquared complaint,  
19 and then I have a memorandum of a law in support of the motion  
20 to dismiss the Harbinger complaint.

21 MR. DUGAN: Yes.

22 THE COURT: And then I have a reply for each of them.  
23 And I have a declaration that you submitted. Right?

24 MR. DUGAN: Yes, Your Honor --

25 THE COURT: Okay.

1 MR. DUGAN: -- that's right. There might have been a  
2 declaration in connection with both LightSquared --

3 THE COURT: Exact -- right.

4 MR. DUGAN: -- and Harbinger. Yeah. Okay.

5 THE COURT: Okay.

6 MR. DUGAN: So, Your Honor, let me just get right into  
7 it, and I'm going to focus first on the LightSquared claims and  
8 then on the Harbinger claims.

9 THE COURT: Okay.

10 MR. DUGAN: In essence, Your Honor, LightSquared  
11 asserts three claims for relief, although it's styled as four:  
12 breach of contract and declaratory relief I will treat as  
13 one --

14 THE COURT: Okay.

15 MR. DUGAN: -- because I think essentially, as a  
16 substantive matter, they are the same; tortious interference of  
17 contract --

18 THE COURT: Right.

19 MR. DUGAN: -- and equitable subordination. They do  
20 assert an equitable-disallowance claim, but I think Your Honor  
21 has noted that's been dismissed with prejudice.

22 THE COURT: Right.

23 MR. DUGAN: So --

24 THE COURT: Although they -- and I'll ask LightSquared  
25 about this when they stand; although there is an oddity that

1 there's a prayer for relief for equitable subordination but  
2 there's no count for equitable subordination.

3 MR. DUGAN: Your Honor, you're right. I'm going to  
4 assume that they intend to submit a claim for equitable  
5 subordination and that's what they meant to do or that's what  
6 in effect they have done, and address it in that way.

7 THE COURT: Okay.

8 MR. DUGAN: And we'll get to that in a moment.

9 But I did want to start off with the breach-of-  
10 contract allegations, and I think that those really are the  
11 most critical allegations that we're dealing with here,  
12 because, in essence, almost all of the allegations that  
13 LightSquared makes and all the claims that they assert come  
14 back down to the notion that SPSO and Mr. Ergen breached the  
15 contract -- or I should say SPSO is the one against whom the  
16 claim is made -- but that they breached the contract when they  
17 bought the loan debt.

18 And in essence, LightSquared looks at two, basically,  
19 prongs to get there. I mean, the question really is, was SPSO  
20 a subsidiary of a disqualified company? We obviously  
21 concede --

22 THE COURT: Well, that's one formulation of how they  
23 get there. I don't think that it's the only formulation of how  
24 they get there.

25 MR. DUGAN: Exactly, Your Honor. I think that the

1 contract itself, under its terms, would preclude SPSO from  
2 buying the debt or being an eligible assignee if it is a  
3 disqualified company. And the way they get to that is by  
4 saying that it was a subsidiary of a disqualified company,  
5 which is DISH.

6 The other allegation they make -- and this may be what  
7 you're suggesting, Your Honor; the other allegation they make  
8 is that Mr. Ergen and Mr. Kiser were agents of DISH and that  
9 when they were trading for SPSO and acting for SPSO, they were  
10 acting as agents of DISH. And that's what I wanted to start  
11 with, Your Honor; I wanted to --

12 THE COURT: Okay.

13 MR. DUGAN: -- start with that allegation, because I  
14 think, when we look at the facts that are alleged and the  
15 inferences that can be reasonably drawn from those facts, we  
16 have to look not just at the allegations in the complaint. We  
17 certainly have to start with the allegations of the complaint  
18 but, Your Honor, as this litigation has progressed, and as the  
19 briefing has progressed, more and more, Harbinger and  
20 LightSquared have submitted into the court -- into the record  
21 before Your Honor, documents from other proceedings, in  
22 particular a Nevada proceeding.

23 THE COURT: But I'm not going to pay attention to  
24 them.

25 MR. DUGAN: Well, Your Honor, I think the law is, on

1 this, that to the extent that the allegations of that  
2 proceeding and the facts that are established in that  
3 proceeding are put before Your Honor by the debtors to shore up  
4 the claims in their complaint -- and that is what they've  
5 done -- Your Honor, I think the law is clear that it is fair  
6 for you to consider those documents as being part of the record  
7 before you on this motion. I think the law is clear that when  
8 a plaintiff attempts to attach documents from other  
9 litigations, and attempts to augment their allegations by  
10 inviting the Court's attention to allegations in other cases,  
11 that those allegations in other cases that the plaintiff  
12 themselves asked the Court to consider and entertain --

13 THE COURT: But then you're talking about --

14 MR. DUGAN: -- become part of their allegations.

15 THE COURT: Then you're talking about something that  
16 feels more like a motion for summary judgment, because if I do  
17 that, then I get into things that everybody has pointed to me  
18 outside of a complaint, and then I don't know what I'm doing on  
19 a 12(b)(6) motion anymore. So what I've been doing these past  
20 couple weeks is reading a complaint and looking at what  
21 inferences can be drawn from the face of the complaint and,  
22 frankly, ignoring everything that all of you have to say about  
23 Nevada, because, except to the extent that underlying facts are  
24 alleged in the complaint, I'm not really interested.

25 MR. DUGAN: Well, Your Honor, I understand your

1 position on that, but I'd like to be heard at least --

2 THE COURT: Okay.

3 MR. DUGAN: -- on what we think we now have before us,  
4 because we now have on this motion a pretty full record that  
5 includes their allegations, the documents that they have  
6 submitted -- and by "they" I mean both LightSquared and  
7 Harbinger -- for the Court's consideration. And we also have  
8 the findings that are in those documents, the allegations that  
9 are in those documents, that they themselves are saying, Your  
10 Honor, please consider this.

11 Now, the reason why I think it's relevant, the reason  
12 why we should look at it, is because the point of a motion to  
13 dismiss really is a gatekeeping function. The point is, has a  
14 question of fact been raised that requires a trial? The  
15 question really is, has a question of fact been raised with  
16 respect to whether Mr. Ergen and Mr. Kiser were agents for DISH  
17 when SPSO bought the debt? Has a fact been raised that would  
18 require a trial on that point?

19 And we can look at, Your Honor -- in addition to the  
20 allegations that LightSquared has made, they quote e-mails. We  
21 can look at those e-mails. The law is clear that when a  
22 plaintiff quotes an e-mail in their complaint -- quotes a  
23 document --

24 THE COURT: Right, I --

25 MR. DUGAN: -- in their complaint --

1 THE COURT: I --

2 MR. DUGAN: -- you can look at that document.

3 THE COURT: Right.

4 MR. DUGAN: You can look in those e-mails.

5 THE COURT: I agree with that. That's in the  
6 complaint, though.

7 MR. DUGAN: Right.

8 THE COURT: Right?

9 MR. DUGAN: Right, that is. But -- and also, let's  
10 for a moment consider Harbinger. Harbinger has itself filed a  
11 complaint in this matter, which they say they've done to  
12 enhance -- to further the allegations of LightSquared. In that  
13 complaint, Harbinger quotes from deposition testimony in the  
14 Nevada proceeding; they quote from a report that the special  
15 litigation committee filed in that proceeding; they quote from  
16 court orders proceedings in that case that make certain  
17 representations.

18 And I think, when you look at the overwhelming weight  
19 of those matters, which the plaintiffs themselves -- and by  
20 that I mean LightSquared and Harbinger --

21 THE COURT: Right.

22 MR. DUGAN: -- when you look at those documents that  
23 the plaintiffs themselves have said, please rely on this, it is  
24 part of our complaint, it is part of our theory, when you look  
25 at those things, they completely undermine the claim that Kiser

1 and Ergen were agents for DISH, because the entire Nevada  
2 proceeding is predicated on the fact -- and it's all over the  
3 documents that they quote; it's all over the report that they  
4 quote; it's all over the testimony that they quote -- it's  
5 predicated on the fact that the board of DISH did not know that  
6 Mr. Ergen was buying debt.

7 THE COURT: But that doesn't answer the question at  
8 all, Mr. Dugan, because -- and I really was hoping to avoid  
9 having to delve into the matters having to do with the Nevada  
10 litigation, because I believe that, as between Mr. Ergen and  
11 the DISH shareholders, that's the business of the Nevada court  
12 and not here.

13 But I could articulate a theory under which that fact  
14 doesn't matter one way or the other to the question that I  
15 might have to decide, which is the identity of interest,  
16 agency -- I can come up with any number of legal  
17 formulations -- the relationship between Mr. Ergen -- again,  
18 acting through SPSO here -- on the one hand, and DISH and  
19 EchoStar on the other hand.

20 So if you're citing to me the fact that Mr. Ergen did  
21 not inform the board until some date in whenever it was, as  
22 evidence of the fact that there was no agency, that's not  
23 persuasive.

24 MR. DUGAN: Well, Your Honor --

25 THE COURT: So that doesn't get you over the finish



1 line.

2 MR. DUGAN: Well, let me just put it this way, then,  
3 Your Honor: I mean, if it were the case that Mr. Ergen was  
4 acting as the agent for DISH, he would have had to -- and the  
5 case law says this: the allegations have to show he would have  
6 had to be authorized by DISH to do something for DISH. DISH  
7 would have had to authorize him to buy this billion dollars'  
8 worth of debt.

9 THE COURT: And perhaps by a course of conduct in the  
10 past, he knew that he had the authority to do that, that he  
11 knew that he had the authority ultimately to have whatever  
12 series of transactions that he felt were in the best interests  
13 of DISH, to occur.

14 MR. DUGAN: Well, Your Honor, I don't understand  
15 exactly what conduct that necessarily was. I don't think that  
16 LightSquared has pled a course of conduct involving Mr. Ergen  
17 purchasing distressed-debt investments using --

18 THE COURT: You're defining it that way --

19 MR. DUGAN: -- his money.

20 THE COURT: -- I'm not, Mr. Dugan.

21 MR. DUGAN: But that is the conduct that we're looking  
22 at now, Your Honor. That is the conduct where he's alleged to  
23 have engaged in.

24 Frankly, I think the law is clear on this that the  
25 titles of Mr. Ergen and the title of Mr. Kiser is not

1 dispositive of whether they were acting as agents for DISH. In  
2 fact, it's what is referred to as a conclusory allegation. It  
3 doesn't establish that they did anything at DISH's direction  
4 with respect to these particular investments.

5 Now, there are e-mails that LightSquared has -- had in  
6 its possession before they drafted this complaint, before they  
7 put these e-mails in the complaint and quoted them. There are  
8 e-mails -- and we can show them to Your Honor -- where  
9 Mr. Ketchum of Sound Point says to his boss, about Mr. Ergen,  
10 he is opening up a family account, family money to trade, his  
11 money to trade; it's a family office, he's going to be buying  
12 LightSquared -- he has bought LightSquared with this managed  
13 family account, he's got someone helping him with this family  
14 account. This is Ketchum.

15 In Harbinger's original pleading, they said he was in  
16 on it; they said he was part of the conspiracy. LightSquared  
17 doesn't use the term "conspiracy", but they're seeking  
18 equitable subordination, Your Honor. They're not just saying  
19 this was something that happened and it was a breach. They're  
20 saying this was a conspiracy, it was something that happened,  
21 it was bad, it was fraud. It has to be near that level; it has  
22 to be akin to fraud.

23 And when you look at the participants in that fraud,  
24 what they're saying -- they're not saying, this is for DISH and  
25 we need to be careful, it's for DISH, don't say it, but that's

1 true, don't say it. What they're saying is, this is for Ergen,  
2 there's a guy that's helping him, it's for his personal  
3 account. These are e-mails that LightSquared had; they quote  
4 from them. Do they quote from that part? No. But that's what  
5 those e-mails say.

6 So, Your Honor, I think it's only fair to consider  
7 that. When we're -- we're looking at the inferences --

8 THE COURT: Then I'm in --

9 MR. DUGAN: -- we ask them to make.

10 THE COURT: -- I'm in a summary judgment motion; I'm  
11 not on a motion to dismiss. I just don't -- I don't know how  
12 you -- I don't know how I go where you're inviting me to go,  
13 and draw a reasonable line. This is quintessentially a  
14 situation, then, where we move beyond a motion to dismiss and  
15 we just have a factual record. And there's going to be a  
16 winner and there's going to be a loser.

17 MR. DUGAN: I understand that that's your position,  
18 Your Honor. And I just -- since I'm here, to be heard out on  
19 the point --

20 THE COURT: Of course.

21 MR. DUGAN: -- yeah, I mean, that certainly there is  
22 law, and we've cited it to Your Honor -- it's obviously Your  
23 Honor's call. There is law, and we've cited it to Your Honor,  
24 that when a plaintiff refers to a document, quotes a document  
25 like they quote these e-mails, you can look at those e-mails

1 that the plaintiffs quote.

2 THE COURT: Well --

3 MR. DUGAN: It doesn't transform --

4 THE COURT: -- even --

5 MR. DUGAN: -- the motion into a motion for summary  
6 judgment; it does not.

7 THE COURT: For the purposes of argument and moving  
8 along, I'll accept your premise. But even if I accept your  
9 premise, I don't believe that that compels the granting of the  
10 motion to dismiss on that basis. So --

11 MR. DUGAN: Understood, Your Honor. Now, when we were  
12 looking at Twombly and Iqbal, just to --

13 THE COURT: Right.

14 MR. DUGAN: -- bring those cases back into focus, I  
15 mean, essentially what those cases say is that, yes, we'll give  
16 you the benefit of inferences, but the inferences have to be  
17 reasonable, they can't be conclusory and they can't be  
18 contradicted by other documents in the record or that you  
19 invite into the record by quoting them and referencing them.

20 There can be no question, Your Honor -- putting aside  
21 how you feel about what we should do in terms of fact-finding,  
22 which I totally understand and appreciate, there can be no  
23 question that what these plaintiffs have done here is quote and  
24 refer to -- but by the way, not point out -- the parts that  
25 contradict their allegations in their complaints. There is no

1 question that the documents that they keep asking you to look  
2 at -- which I understand you don't want to, but they keep  
3 asking you to -- completely contradict the allegations that  
4 they're making.

5           These documents and these findings say, without  
6 question, not only that the board didn't know; they say, when  
7 the board found out, they had an investigation done,  
8 independent counsel, independent financial advisors. They had  
9 a special committee, too, that they created to look into the  
10 issue of corporate opportunity. What did this guy do? But --

11           THE COURT: But, Mr. Dugan, are you really inviting me  
12 to take a look at how that all played out in Nevada? Because  
13 last time you didn't want me to look at that.

14           MR. DUGAN: Your Honor, they're inviting you.

15           THE COURT: So if you -- do you want -- but are you  
16 telling me right now that I should accept their invitation to  
17 look at what happened in Nevada? Because --

18           MR. DUGAN: Yes, Your Honor, you should --

19           THE COURT: You are?

20           MR. DUGAN: -- accept their invitation, and here's  
21 why: because they want to have a whole trial on something that  
22 their own documents show is completely made up. And here's  
23 what I'm saying is made up, Your Honor. What is made-up is the  
24 notion that Mr. Ergen and Mr. Kiser got together and had a  
25 conspiracy where Mr. Ergen and Mr. Kiser were going to buy debt

1 for DISH.

2 THE COURT: That --

3 MR. DUGAN: That's what's made up.

4 THE COURT: That's not what they're saying. That's  
5 not what they're saying.

6 MR. DUGAN: They can't support an equitable-  
7 subordination claim without fraud, Your Honor. Their  
8 equitable-subordination claim can't be based on an innocent  
9 breach of contract; it doesn't work that way.

10 THE COURT: That -- I agree with that.

11 MR. DUGAN: But --

12 THE COURT: But that's a completely different point  
13 from the --

14 MR. DUGAN: Well, we'll get to that point.

15 THE COURT: -- from the three or four that you just  
16 made.

17 MR. DUGAN: We'll get --

18 THE COURT: But that much I agree with you.

19 MR. DUGAN: We'll get to that point. But let me ask  
20 you -- let me make this --

21 THE COURT: Although Mr. Friedman might disagree with  
22 me --

23 MR. DUGAN: I'm sure he'll disagree with me.

24 THE COURT: -- but I can't tell.

25 MR. DUGAN: I have no doubt.

1 THE COURT: I'm going to start to pick on him early  
2 today.

3 MR. DUGAN: I have no doubt he'll disagree with me.

4 UNIDENTIFIED SPEAKER: Take your time.

5 MR. DUGAN: I have no doubt he'll disagree with me,  
6 Your Honor, and he should.

7 But the point is that -- I mean, when we talk about  
8 agency -- I want to be clear about this -- I really think the  
9 agency allegations are more relevant to the equitable-  
10 subordination piece than to the breach-of-contract piece.  
11 Here's how I get there: you have to have words in a contract  
12 that you don't comply with, to have a breach. Words in a  
13 contract have to be breached, to have a breach.

14 So what are the words in the contract that say DISH  
15 and EchoStar and their agents can't buy this debt? The words  
16 don't say that. Hear me on this. The words do say  
17 "subsidiary". I know we've been up and down --

18 THE COURT: No, the word says that, subsequent to the  
19 amendment, that DISH cannot buy the debt.

20 MR. DUGAN: That's true.

21 THE COURT: Right?

22 MR. DUGAN: Or any subsidiary of it.

23 THE COURT: Or any subsidiary. Put the subsidiary to  
24 one side. It says DISH can't buy the debt, right?

25 MR. DUGAN: Right.

1           THE COURT: So in one of the first rounds of this, we  
2 had some diagrams in a complaint that showed basically  
3 Mr. Ergen controls SPSO, Mr. Ergen controls DISH, therefore,  
4 DISH controls SPSO. It was triangular, if I'm remembering it.

5           MR. DUGAN: Right.

6           THE COURT: Okay. So put that to one side. So now at  
7 least what I'm reading in the complaint is that they do argue  
8 they're a subsidiary, that SPSO is a subsidiary, with a lower-  
9 case S. I don't think they've entirely abandoned the upper-  
10 case S definition, so --

11          MR. DUGAN: I agree, Your Honor.

12          THE COURT: -- there's those arguments. But I think  
13 what they're saying now is Mr. Ergen/SPSO -- because clearly --  
14 and I think there was some argument that, because he can't hold  
15 the debt as a natural person, therefore, you should disregard  
16 SPSO; but people form those vehicles all the time, so I'm not  
17 interested in that -- but that Mr. Ergen is DISH; he's DISH.  
18 This is Pepper v. Litton, ironically, and there's an identity  
19 of interest and he is DISH and, therefore -- therefore, there  
20 was a breach. Not that there's an equitable basis to disallow  
21 it, but he's (sic) a breach, because he says he's SPSO but he's  
22 really DISH. That's what they're saying. That's what they're  
23 saying.

24               So whether he's an agent or there's an identity of  
25 interest or they really are the same or it's a sham, that's



1 what they're trying to say. And in response to that in the  
2 last couple of rounds -- and you'll forgive me, I can't  
3 remember each time who exactly was here; I'm not sure if it was  
4 you or Ms. Strickland or one of the folks from Sullivan &  
5 Cromwell -- that, look, it's a public company, it's a public  
6 company. They have filings, they would have to have disclosed  
7 this, you can't say that a controlling shareholder is  
8 necessarily same as the corporation. I agree with all of that.  
9 But what they're saying in their complaint that they're asking  
10 me to give the favorable inferences to is that, under the  
11 circumstances here, Ergen is DISH, DISH can't buy, therefore,  
12 he couldn't buy. And maybe I'm giving them too much credit,  
13 but that's the way I'm reading what they're saying.

14 MR. DUGAN: And, Your Honor, let's read it that way,  
15 then, and let's --

16 THE COURT: Okay.

17 MR. DUGAN: -- and let's unpack that, because there  
18 are a number of elements to "DISH is Ergen, and Ergen is DISH".  
19 I mean, there are a number of elements to that; the first is,  
20 there's a piercing-the-corporate-veil argument, or an element  
21 to that. I mean, it is not easy to allege a pierce-the-  
22 corporate-veil claim. It's not easy to prove a pierce-the-  
23 corporate-veil claim.

24 For DISH to be Ergen in the sense that Your Honor is  
25 referring to and in the sense that you are positing that they

1 have alleged, they have to allege a pierce-the-corporate-veil  
2 claim. And how do you allege a pierce-the-corporate-veil  
3 claim? You have to allege a unity of interest not just on an  
4 abstract metaphysical level but concretely: same bank  
5 accounts, not really respecting the corporate separateness.

6 Here we have no allegation of same bank accounts. We  
7 have no allegation that Ergen treated DISH like it was himself.  
8 We don't have an allegation that anything Ergen wanted to do,  
9 DISH had to do. We don't have an allegation that DISH always  
10 did what Ergen wanted. In fact, it's quite the opposite;  
11 that's why, Your Honor, I keep sort of referring to Nevada,  
12 because they've put in their -- and also because, far from  
13 Ergen being DISH, when Ergen told the board of DISH what he had  
14 done, they said, hold on a second, you did what? And they  
15 formed a special committee, not because they thought it was  
16 great that he had done this thing to help them; it was because  
17 they didn't know what he had done, and they needed to figure it  
18 out. That's not an identity of interest.

19 Now, they hired independent legal advisors; they hired  
20 independent financial advisors. They investigated it. They  
21 did a report -- this is what the plaintiffs put in their papers  
22 before you -- a report that was based on interviews, that was  
23 based on an interview of documents with fact-finding and all  
24 this other stuff.

25 Now, I know Your Honor is leery to go there but, on

1 the point of "DISH is Ergen, and Ergen is DISH", I don't see  
2 how you can get there on that record, the record that they have  
3 put before you. It just doesn't add up. Not only have they  
4 not put in their allegations the "DISH is Ergen, Ergen is DISH"  
5 predicate; they've put stuff in that undermines it completely.  
6 And that is the problem with that claim. It's a claim that  
7 they can't support, with their inferences that are plausible  
8 and reasonable to make, on the record that they have created on  
9 this motion. And that is our ultimate endpoint on that point.  
10 I mean --

11 THE COURT: And it shouldn't give me any pause that  
12 the treasurer of DISH was doing this for Mr. Ergen?

13 MR. DUGAN: Well, I think, Your Honor, what they  
14 allege is that Mr. Kiser was acting on Mr. Ergen's behest.  
15 Should it give you pause? You know, Your Honor, obviously it's  
16 a fact; it's a fact that they point to. But it's one fact in a  
17 sea of facts. It's one inference in a sea of inferences. If  
18 you're going to single out that one inference, you have to do  
19 it in the --

20 THE COURT: I'm trying not to --

21 MR. DUGAN: -- context of what else is there.

22 THE COURT: -- single out that one inference, but  
23 that's why you have trials, because --

24 MR. DUGAN: Understood, Your Honor.

25 THE COURT: -- you have no dispute that the fellow who

1 was the treasurer of DISH was executing these trades. In  
2 addition, you have allegations made repeatedly that there was  
3 something going on with respect to the timing of the closing of  
4 the trades at a critical time in this Chapter 11 proceeding.  
5 You've got allegations that reasons were being given for the  
6 fact that trades weren't closing, despite entreaties from the  
7 counterparties on the trades. And those strike me as  
8 allegations that call out for the development of a factual  
9 record.

10 MR. DUGAN: Understood, Your Honor. Now, because  
11 we've talked a lot about agency, I do want to address the  
12 manipulation of trades for a moment. Clearly the manipulation-  
13 of-trade allegation is not going to whether the contract was  
14 breached, because there's nothing in the contract, even if  
15 we're talking about whether it was DISH or it was Ergen.

16 THE COURT: No, we can assume for that purpose that  
17 he's an eligible assignee.

18 MR. DUGAN: So then let's ask ourselves where are they  
19 going with that and what exactly do those allegations show. I  
20 mean, where they appear to be going -- where they have to be  
21 going with it is equitable subordination, because what else  
22 would it really be relevant to? It's not relevant to the  
23 tort --

24 THE COURT: It'd be relevant to a damage claim.

25 MR. DUGAN: But only if those allegations attach

1 themselves to a claim -- to a cause of action. In other words,  
2 those allegations, to give rise to a damages claim, have to  
3 attach themselves to a cause of action. They don't attach  
4 themselves to breach of contract, because they don't have to do  
5 with the contract and, as you say, we can assume he was an  
6 eligible assignee, before we get to those.

7           So what exactly are those allegations attached to?  
8 They're not attached to tortious interference, because that  
9 claim is limited to the very first trade Ergen did, for five  
10 million dollars in April of 2002. Weeks before -- maybe over a  
11 month before -- LightSquared was even in bankruptcy, he did a  
12 trade for five million dollars. That's their tortious-  
13 interference claim; it's based on that trade and only that  
14 trade.

15           The only claim that's left that the manipulation of  
16 trades can possibly be relevant to is equitable subordination.  
17 And what we have to ask ourselves is this: do these  
18 allegations of manipulation of trades -- do they really equate  
19 to -- do they support to an equitable-subordination claim? Are  
20 they anything like the kinds of allegations that we've seen  
21 support an equitable-subordination claim? They don't use the  
22 term "fraud". They don't say that there was fraud here, that  
23 somehow there was an attempt to commit a fraud when Ergen or  
24 SPSO didn't close the trades on time. Harbinger did allege  
25 that, by the way, but that was thrown out. That claim couldn't

1 be supported. It couldn't support a fraud claim. They don't  
2 allege fraud.

3           They don't allege tortious interference of creditors.  
4 That was a claim Harbinger made. That was a claim Harbinger  
5 made that got thrown out. The debtors didn't come in and say,  
6 by the way, this manipulation of trades has caused us to lose  
7 an expectancy of closing a contract that was firm enough to  
8 give rise to a tortious-interference claim. They don't make  
9 that allegation. They don't connect it that way. They just  
10 put it out there that they think the trades took a long time to  
11 close, that there's e-mail traffic that shows that the other  
12 side of that trade asked to close and it couldn't get it closed  
13 for weeks, sometimes, yes, for a month, sometimes for two  
14 months. Yes, there are allegations, there are complaints,  
15 there are e-mails about that.

16           Do the e-mails say the reason why these trades aren't  
17 closing is because we want to screw up the debtors' ability to  
18 negotiate with its creditors? No, the e-mails don't say that.  
19 They have all the e-mails, but they would have quoted those  
20 parts if they had those. They don't say that. All they say is  
21 that these trades took a long time to close. And I don't see  
22 that, Your Honor, under the law, as giving rise to the type of  
23 fraud, to the type of breach-of-fiduciary-duty-like --

24           THE COURT: There's --

25           MR. DUGAN: -- allegations --

1 THE COURT: There's --

2 MR. DUGAN: -- that they need.

3 THE COURT: There's no way of knowing that. If we  
4 take as a given that there was a delay in the closing of the  
5 trades for a strategic purpose, I think that's something I'm  
6 entitled to know.

7 MR. DUGAN: But they don't allege that, Your Honor.  
8 They say it had the effect. They say it had the effect of  
9 interfering with their creditor negotiations. They don't  
10 say -- I looked hard for a part where it says they had the  
11 purpose, the reason why these trades took so long to close is  
12 because Ergen had the purpose, SPSO had the purpose, of  
13 interfering with our negotiation with trades. No, they said it  
14 had the effect. Effect and purpose --

15 THE COURT: Mr. Dugan --

16 MR. DUGAN: -- are very different things.

17 THE COURT: -- you have to remember that I was  
18 actually here during this period of time, so I independently  
19 have a recollection of what was occurring as those weeks  
20 unfolded.

21 MR. DUGAN: Well, Your Honor, now you exactly know why  
22 it is that we keep asking for matters that are not just in  
23 their pleading to be considered, because there's a big mosaic  
24 of facts that we're all dealing with here. It's a big mosaic.  
25 I mean, now, Your Honor can't look at all of it, because the

1 law doesn't let you look at all of it. But Your Honor can look  
2 at more than just what they say in their complaint, because  
3 that's the record that they've invited and created. Your Honor  
4 could also consider the record in the bankruptcy proceeding,  
5 because, after all, you were here for that, as you say, Your  
6 Honor. So yes, all that --

7 THE COURT: Well --

8 MR. DUGAN: -- you can consider.

9 THE COURT: -- it'd be a neat trick for me not to  
10 consider what happens here, so --

11 MR. DUGAN: Yeah. I would agree.

12 THE COURT: But that's a different -- that's different  
13 from importing everything that happens --

14 MR. DUGAN: Right, and --

15 THE COURT: -- in Nevada.

16 MR. DUGAN: -- I understand that but, if we're going  
17 to look at what's happened in the bankruptcy proceeding on the  
18 issue of manipulation of trades itself, we should consider what  
19 happened in May of 2013 -- I'm sure Your Honor will recall --  
20 when the debtor had a seemingly very different perspective on  
21 SPSO and was actually actively monitoring the closing of trades  
22 and was making arguments to try to get the benefit of  
23 provisions in the exclusivity stipulation that were based on  
24 SPSO's trading, and arguments based on SPSO's position.

25 THE COURT: That sounds like a defense. That doesn't



1 have a bearing on whether or not SPSO was intentionally  
2 declining to close trades that were otherwise ready to close,  
3 because there was a strategic advantage --

4 MR. DUGAN: But --

5 THE COURT: -- in doing so.

6 MR. DUGAN: But, Your Honor, if the relevance of  
7 manipulation of trades is the equitable-subordination claim,  
8 which is my supposition but I don't know what else it's  
9 relevant to, then the debtors' conduct with respect to those  
10 trades and the timing of those trades and the positions they  
11 took certainly is relevant to whether or not it would be  
12 equitable to subordinate --

13 THE COURT: Right, but --

14 MR. DUGAN: -- SPSO's claim.

15 THE COURT: -- I'm not having a trial on the merits of  
16 equitable subordination right now.

17 MR. DUGAN: Well, I understand, Your Honor. We're  
18 talking about inferences from facts. But in the world of  
19 inferences from facts, we can discuss these things.

20 I'm sorry, Your Honor.

21 Okay, so, Your Honor, just one other thing about the  
22 trade timing that I think is relevant to consider, which is,  
23 the way that the debtors have set up their cause of action,  
24 they make it appear that there is some right, during the  
25 exclusivity period, to have creditors not trade, that they have

1 some right, during their exclusivity period, to --

2 THE COURT: No, that's --

3 MR. DUGAN: -- lock everything into place.

4 THE COURT: -- that's absolutely incorrect as a matter  
5 of law.

6 MR. DUGAN: It is absolutely incorrect as a matter of  
7 law. But if Your Honor were to find in their favor on this  
8 claim of manipulation of trades, in effect, what would you be  
9 saying -- what would the Court be saying to the participants in  
10 the distressed-debt market, with respect to trading during an  
11 exclusivity period? Are they always going to be open to the  
12 claim that, by trading, they somehow made the identity of  
13 creditors less knowable, more uncertain, to the extent where a  
14 debtor can come in and say, you interfere with my ability to  
15 negotiate with my creditors; I didn't know who they were; you  
16 kept trading?

17 THE COURT: All right, well, that -- you're inviting  
18 me down the slippery slope and I'm not going to follow you,  
19 so --

20 MR. DUGAN: Your Honor, it's relevant to consider for  
21 the claim that they're asserting. That's why we're making --

22 THE COURT: Okay.

23 MR. DUGAN: -- that argument.

24 THE COURT: Does it make any difference, Mr. Dugan, on  
25 the issue of Nevada, if -- and I have no idea what the current

1 posture is, other than what you folks have told me in terms of  
2 the limited injunctive relief that was entered, I think, the  
3 day before Thanksgiving. But if that were to proceed and  
4 ultimately the Nevada court were to rule that the profit that  
5 Mr. Ergen gains on the debt holdings goes to the DISH  
6 shareholders, is that any relevance to the issues that are  
7 before me?

8 MR. DUGAN: I don't think so, Your Honor, because the  
9 question then would be -- I think the question would be --  
10 since we're talking about a present act affecting past conduct,  
11 I think the question would be whether the Court's order in some  
12 sense would be the equivalent of a ratification, if you will,  
13 that the trades were for DISH in some way or for the DISH  
14 shareholders in some way. And I think that theory is self-  
15 defeating, Your Honor, because for there to be a ratification,  
16 you have to start with the premise that when the trades first  
17 happened, they were not for DISH. Ratification is backward-  
18 looking.

19 So for some court to say, after the fact, you know,  
20 looking back at these things that happened now a while ago, I'm  
21 going to grant relief that would have the effect now of making  
22 the economic benefit of those trades the benefit for DISH, that  
23 almost has as its predicate that when the trades happened, they  
24 didn't happen for DISH. It's a backward-looking -- in fact, it  
25 changes things. It changes things.

1 THE COURT: But it also --

2 MR. DUGAN: So we don't --

3 THE COURT: -- it also highlights the fact that,  
4 again, looking back in the beginning of the trading, way before  
5 the bankruptcy, right?

6 MR. DUGAN: Right.

7 THE COURT: Because of Mr. Ergen's economic interest  
8 in DISH, it kind of wasn't going to matter whether or not  
9 ultimately he got to keep the spread or not. He either was  
10 going to get to keep the spread for his own account, or the  
11 spread was going to go to DISH shareholders, and maybe he got a  
12 share of it that way.

13 MR. DUGAN: Well, what Your Honor is saying is  
14 logical. I mean, I would think that as someone who spent a  
15 billion dollars of his own money, he would have preferred to  
16 get the benefit of it, but what Your Honor is saying is  
17 logical.

18 THE COURT: Okay.

19 MR. DUGAN: Your Honor, I wanted to touch on a few  
20 other claims that LightSquared makes. I mean, I do want to  
21 note, Your Honor -- I mean, I know we've talked about a lot  
22 about subsidiary. I think it's worth saying, because it just  
23 seems like it is, that the position that LightSquared lays out  
24 in their brief with respect to subsidiary kind of proves what  
25 we're saying on that piece, just in the following sense.

1           What they're saying is, subsidiary in almost every  
2 instance -- they certainly say it with respect to the  
3 definition in the credit agreement, which is broader than  
4 Merriam's, which is broader than Black's. They say -- looking  
5 at the broadest definition of subsidiary in the credit  
6 agreement, it's downstream looking. Downstream looking:  
7 that's what makes it a subsidiary. You're always looking  
8 downstream, as opposed to affiliate, which they say is  
9 different, because it's upstream and downstream. It's both  
10 ways. It's all directions.

11           Well, Your Honor, we think that proves our point on  
12 the subsidiary piece of it, putting aside whether DISH is Ergen  
13 and Ergen is DISH, and we think there are serious problems with  
14 that, as I've said. But putting aside that one, we think that  
15 proves our point, because unless DISH is Ergen and Ergen is  
16 DISH, you have to go up before you go down. So you can't be in  
17 the control situation that they're setting forth, unless Ergen  
18 is DISH and DISH is Ergen. You have to go from DISH --

19           THE COURT: Go up, right.

20           MR. DUGAN: -- to Ergen and then back down. So it  
21 can't be a subsidiary under their own argument. So I just  
22 wanted to point that out on that piece, before I move to  
23 tortious interference, unless you have other questions about  
24 the breach of contract.

25           THE COURT: So you folks concede that an affiliate of

1 DISH could have bought the debt, correct?

2 MR. DUGAN: That an affiliate of DISH could buy the  
3 debt.

4 THE COURT: Could buy the debt?

5 MR. DUGAN: Yes. As long as that affiliate is not a  
6 subsidiary, because subsidiaries --

7 THE COURT: Okay, so 51 --

8 MR. DUGAN: -- are a form of affiliate.

9 THE COURT: Fifty-one, forty-nine, right? So an  
10 Entity, capitalized, owned forty-nine percent by DISH, and  
11 fifty-one percent by Mr. Ergen or SPSO could have bought the  
12 debt, right?

13 MR. DUGAN: You know, I don't know that I would go  
14 that far, because --

15 THE COURT: Why not?

16 MR. DUGAN: -- because I think if you're talking about  
17 one entity being under another, you're kind of in a zone.  
18 You're kind of in a zone. We're not talking here about one  
19 entity being under another. We're talking about one entity  
20 being under another who you have to go up to, to get down from.

21 THE COURT: The --

22 MR. DUGAN: There's a reason why we define terms the  
23 way we do. I mean, affiliate is no -- by, without question,  
24 broader than subsidiary. And frankly, Your Honor, I don't  
25 think that -- I mean, it would be interesting how it would turn

1 out if it happened the way you're suggesting. But I don't  
2 think that anyone on the Ergen side is necessarily interested  
3 in playing with those kinds of ownership structures. I mean --

4 THE COURT: I'm just trying to --

5 MR. DUGAN: Yeah.

6 THE COURT: I'm just trying to understand --

7 MR. DUGAN: Right.

8 THE COURT: -- what the appropriate vehicles would  
9 have -- are for having purchased the debt. So SPSO is an  
10 affiliate of DISH?

11 MR. DUGAN: Well, by definition it has to be, because  
12 Mr. Ergen controls it. I mean, so -- I think not just by the  
13 definition in the credit agreement, but by the definition in  
14 Webster's.

15 THE COURT: Okay.

16 MR. DUGAN: So, Your Honor, if I can move on to  
17 tortious interference.

18 THE COURT: Sure.

19 MR. DUGAN: Now, there are a lot of problems with this  
20 claim. Let's start out with the fact that I don't -- it's not  
21 quite clear what relevance it has. I mean, it is addressing --  
22 unless I'm missing something -- a very small piece of this debt  
23 puzzle. It's addressing a five million dollar trade. So even  
24 if the debtors were to prevail on it, it's far from clear what  
25 their damages might be or what consequence it can have, given

1 that a five-million-dollar piece of debt in this big picture  
2 doesn't have any leverage, doesn't have any real meaningful  
3 impact on anything. But that is their claim.

4 THE COURT: Can you help me out, and show me where it  
5 is that's it's limited to that?

6 MR. DUGAN: Okay, Your Honor.

7 THE COURT: I may have missed that.

8 MR. DUGAN: And maybe I'm misreading it, but it's also  
9 in their motion --

10 THE COURT: Okay.

11 MR. DUGAN: -- to dismiss. But what I am looking  
12 at -- I have to get there. I'm sorry, Your Honor. Give me one  
13 moment.

14 Okay, so what I'm looking at is the cause of action  
15 for tortious interference, which is the --

16 THE COURT: It's paragraph 10 --

17 MR. DUGAN: -- fifth claim for relief.

18 THE COURT: Paragraph 109?

19 MR. DUGAN: It's paragraph 109, I think. Maybe it's  
20 not that one. Let's see. Oh, here it is. I think it's --  
21 yeah, okay, it is paragraph 109. "SPSO, DISH, EchoStar, and  
22 Mr. Ergen" --

23 THE COURT: Right.

24 MR. DUGAN: -- "intentionally caused GPS to breach the  
25 credit agreement before SPSO itself became a party to that



1 agreement." That's what it says. That's the sentence that I'm  
2 focusing on.

3 THE COURT: Okay, and then -- I'm sorry; I was reading  
4 the subsequent paragraphs as additional acts.

5 MR. DUGAN: I thought that the subsequent paragraph  
6 was referring to the misrepresentation and the assignment and  
7 assumption that referred back to that first purchase, because  
8 the documentation tends to come months later. So he's -- I  
9 think what it's saying is on September 6th, 2012, Ergen  
10 represented in the assignment and assumption about that trade  
11 on April 13th, 2012. It's going back to April, which is when  
12 the first purchases occurred. I mean, to the extent, Your  
13 Honor, that --

14 THE COURT: But there's a -- I'm sorry; I just  
15 completely -- I missed that. I read this as being relating to  
16 the entire suite of trades because it refers to the LP debt  
17 trades.

18 MR. DUGAN: And Your Honor, I'm sure LightSquared can  
19 clarify what they meant, but they said it here, and they also  
20 said in their brief, that this related to when -- before SPSO  
21 became -- arguably became a party to the credit agreement. And  
22 the reason why they would say it that way, Your Honor, at least  
23 to my way of thinking, is pretty obvious, once you get into the  
24 law, which is --

25 THE COURT: Right.

1 MR. DUGAN: -- you can't be a party to a contract,  
2 breach it, and tortious interfere with it all at the same time.

3 THE COURT: At the same time, right.

4 MR. DUGAN: Right. Which I think the law is pretty  
5 clear about.

6 THE COURT: Okay. All right. Mr. Stone, you can  
7 clarify this at some point.

8 MR. STONE: Okay.

9 THE COURT: Okay.

10 MR. DUGAN: Okay. So, but Your Honor, that was one  
11 reason why we thought the tortious interference claim didn't  
12 work.

13 THE COURT: Okay, I got you; thank you.

14 MR. DUGAN: The other reason why we thought it didn't  
15 work is that when you talk about the UBS breach, the  
16 hypothetical UBS breach -- it's far from clear that there was  
17 any obligation by UBS under this credit agreement to have a  
18 gatekeeping function. They say they breached the gatekeeping  
19 function.

20 THE COURT: Well, to that extent, also it's a --  
21 there's not a claim against UBS.

22 MR. DUGAN: Well, there's no claim against UBS.

23 THE COURT: Right.

24 MR. DUGAN: And there's also no obligation that UBS  
25 has to be a gatekeeper, under the credit agreement, because UBS

1 is entitled to rely on the representations of those two --  
2 submit documents to it. And the agreement expressly exculpates  
3 them from doing so. So I think that they're high and dry on  
4 the breach by UBS argument which I just wanted to underscore  
5 for Your Honor.

6 The 502(b) claim, if I can touch on that. I mean, we  
7 have cited law that I think is very clear. That if, as they're  
8 alleging, their position is this breach -- the acquisition of  
9 debt by SPSO -- the result of it should be that their claim is  
10 disallowed. That they get nothing.

11 New York law is clear, I think, that for you to argue  
12 that transfer has that effect, if a transfer in violation of an  
13 agreement -- a transfer restriction and agreement -- to have  
14 that effect, it has to be clearly set forth in the agreement  
15 itself, in language that is very clear.

16 The clearest language you can have is, this transfer  
17 is null and void. In fact, that language is in the credit  
18 agreement. But it's not talking about a transfer to a  
19 noneligible assignee. It's talking about a transfer involving  
20 a borrower, not a transfer involving a noneligible assignee.  
21 There's nowhere in this credit agreement that says a transfer  
22 to a noneligible assignee is null and void. In fact, it says  
23 it should be treated as participation, which is a whole  
24 different thing, but --

25 THE COURT: Right, but then that takes us down another

1 rabbit warren, because the participation section pulls in the  
2 eligible assignee language. So that doesn't help. There is  
3 nothing that says that a transfer in violation of 10.04 -- I  
4 don't know if I have the section right -- is void or voidable.  
5 Nothing. It doesn't say that.

6 MR. DUGAN: It doesn't, Your Honor.

7 THE COURT: Right.

8 MR. DUGAN: That's the point we're making there.

9 THE COURT: Right. But the fact that it says that the  
10 transfer in violation of that prohibition doesn't effect the  
11 obligations of the borrower, that doesn't get you there. That  
12 just says that the money lent is still --

13 MR. DUGAN: Right.

14 THE COURT: -- owed.

15 MR. DUGAN: Right. But --

16 THE COURT: The company has to pay it back.

17 MR. DUGAN: But if under New York law, the credit  
18 agreement is not clear enough to avoid the transfer, then in  
19 some sense it must remain a transfer.

20 THE COURT: Well, I think that they -- and I think  
21 that there is case law to the effect that you're citing,  
22 clearly says that you have a claim for breach against the  
23 transferor, original assignor. But the question then is, well,  
24 maybe there's a claim for damages for the breach, right? In  
25 other words, it's --

1 MR. DUGAN: Right. Well, Your Honor --

2 THE COURT: So if the claim is allowed, perhaps  
3 there's a damage claim -- there's a damage claim for the  
4 breach. Maybe that damage claim is for the same amount as the  
5 transferred debt.

6 MR. DUGAN: Well, Your Honor, that's entirely  
7 possible. I mean, the claim we're specifically addressing is  
8 the equitable disallowance claim -- I'm sorry --

9 THE COURT: Right.

10 MR. DUGAN: -- the 502(b) disallowance claim as pled.

11 THE COURT: Right.

12 MR. DUGAN: I didn't see that damages theory pled in  
13 the complaint. It's an interesting one. I guess one could ask  
14 in a situation where the debtor is under any circumstance being  
15 either recapitalized or the assets being sold, I guess it's  
16 unclear to me how you can mount an argument that they've been  
17 damaged to the extent of a billion dollars by a billion dollars  
18 of debt in the hands of a competitor. I know that they hate  
19 competitors in their capital structure, because they say it so  
20 many times.

21 But it's unclear in the context of where we are in  
22 this reorganization/sale setting that a competitor in the  
23 capital structure is a serious concrete harm to them.

24 THE COURT: Right. But then again, that's another  
25 defense fact to be developed at trial, not something that it's

1 appropriate for me to rely on in granting a motion to dismiss.

2 MR. DUGAN: Right. Well, Your Honor, I hear you on  
3 that, but I think again, we're in the -- where you and I have a  
4 disconnect, and I understand we have it, is the issue of what  
5 are the inferences that can be drawn and how reasonable they  
6 are. And I think part of the issue really is, when I say, what  
7 are the inferences that can be drawn, I'm looking at A plus B  
8 plus C. And the only reason why I'm looking at A plus B plus C  
9 is because they put B and C in, not because I'm saying go look  
10 at B and C.

11 So we're starting off with that issue, but I totally  
12 get where you're coming from, Your Honor.

13 THE COURT: I mean, they do make a claim -- the second  
14 count in the LightSquared complaint is for damages. And it's  
15 been said before when I've pointed out that, as you said, I  
16 have an auction process now; we have a bidding process now, and  
17 the best and the highest bid will win. The suggestion was  
18 made, well, maybe all of this conduct made it more expensive  
19 for an alternative bidder plan proponent to prevail. That was  
20 suggested as a measure of damages, as opposed to the complete  
21 disallowance of the claim.

22 And again, so when you go there, that suggests  
23 something that would be a matter for trial, not something I  
24 could determine now.

25 MR. DUGAN: And Your Honor, just so I'm clear on what

1 you're suggesting. Are we referring back now to the  
2 manipulation of trade issue? In other words, the lack of --  
3 their alleged lack of knowing who their creditors were?

4 THE COURT: And the fact -- that and the fact that an  
5 ineligible assignee got into the capital structure, and  
6 therefore, rendered it harder to put a deal together at an  
7 earlier part. I'm not saying I'm saying that any of this is  
8 meritorious. I'm repeating to you what's been said to me --

9 MR. DUGAN: Right.

10 THE COURT: -- about a theory of recovery when I've  
11 questioned before causation and damages, right? If you --

12 MR. DUGAN: Well, Your Honor, once you accept the fact  
13 that I guess that there was some attempt to do something for  
14 the purpose of interfering with creditors, which we think is a  
15 hard stretch to make. I guess you can theorize things that  
16 could hypothetically come from that. But we're not disagreeing  
17 about that, Your Honor. I think what we're disagreeing about  
18 is whether, in fact, the allegations that we have before us get  
19 us over the hurdle on DISH being Ergen and Ergen being DISH on  
20 the one hand --

21 THE COURT: Well, what about the --

22 MR. DUGAN: -- or a subsidiary.

23 THE COURT: -- what about the existence of the release  
24 in the LBAC bid. So LBAC began life being fully owned by Mr.  
25 Ergen and then was transferred to DISH for a dollar. And as

1 far as I know, there are certain provisions -- I don't want to  
2 wander into anything that I shouldn't be, since we have an  
3 ongoing auction, but there are certain provisions in the bid  
4 that suggest a link.

5 MR. DUGAN: Well, Your Honor, I -- and I'm not sure  
6 that I know what those provisions are other than the only one  
7 that we've discussed in this room has been the release, which  
8 frankly is a little, I guess -- we can understand why there's a  
9 discussion, but it's not unusual in an asset purchase  
10 agreement --

11 THE COURT: I'm not interested --

12 MR. DUGAN: -- to have that kind of release.

13 THE COURT: I know fully well what's usual and not  
14 unusual. In this context, it's been made clear that a  
15 condition is that there be a claim allowance and a release of  
16 affirmative claims. So everybody knows the drill that  
17 purchasers don't want to be sued after the fact. But given the  
18 backdrop of the allegations as far as connection, identity of  
19 interest, et cetera, that's in particular why I'm interested in  
20 that provision in this case.

21 MR. DUGAN: Right. Well, Your Honor, I guess what I  
22 could suggest to Your Honor, I mean there is a claim that's  
23 been put out there, and I think that's an element of it, that  
24 SPSO, LBAC and DISH are inextricably linked. You know, again,  
25 it seems like that might be wandering into the equitable



1 subordination zone, maybe that's why that's out there. I don't  
2 believe that's relevant to the breach of contract claim, but  
3 let's just look at it.

4           You know, essentially, when they say inextricably  
5 linked the conflict that we have here is SPSO in buying debt.  
6 I know you don't want to look at Nevada, Your Honor, I  
7 understand you don't. But if we have a trial in this case, and  
8 it may be inevitable, but if we do, you're going to hear the  
9 story. But be that as it may, the timing and how things  
10 evolved, and it's a matter of public record as well, is that  
11 when Ergen was buying this trade, when he was buying this  
12 LightSquared debt, DISH was not considering LightSquared; it  
13 was considering Clearwire and Sprint as acquisition vehicles.  
14 Those were twenty billion dollars investments.

15           THE COURT: Okay. I'm going to stop you, because I  
16 started this question being a question about the release.  
17 And --

18           MR. DUGAN: Well, and the linkage, Your Honor. The  
19 linkage --

20           THE COURT: Okay.

21           MR. DUGAN: -- between SPSO, LBAC and DISH. Whether  
22 that linkage is adequately alleged on this record.

23           And the release, just to be clear about that, you  
24 know, although we don't think there is linkage, to focus on the  
25 release, that was included in this APA before there was any

1 cause of action that was made. It was publicly filed in this  
2 case in July, before any claim by Harbinger. In other words,  
3 it was part of this deal before there was anything to be  
4 released from. It's been part of this deal from way before  
5 there was any claims.

6 THE COURT: No, it -- well, that's fine, but the  
7 release, as it's been explained to me, it's not just a release  
8 of affirmative claims, it requires the full allowance of the  
9 SPSO debt.

10 MR. DUGAN: Well, I think it would require a release  
11 of claims for disallowance, right, yes.

12 THE COURT: Yes, claims for disallowance. So even  
13 before there were allegations there was a clear link between  
14 the desire of the bidder to proceed with the assurance that the  
15 debt owner was going to be paid back in full.

16 Ms. Strickland --

17 MR. DUGAN: Ms. Strickland is refreshing my  
18 recollection on something.

19 THE COURT: Okay.

20 MR. DUGAN: Because just in fairness, I was  
21 misstating something to Your Honor.

22 The release -- I mean, just to get to your point,  
23 there's nothing specific in the release, she refreshed my  
24 recollection, about disallowance specifically; it's a broad  
25 general release.

1 THE COURT: Yes. But, Mr. Dugan, I asked the question  
2 repeatedly and pointedly one or two hearings ago, and it was  
3 clarified to me that, in fact, what the release means is not  
4 just a release of affirmative claims, which I agree with you  
5 had not been alleged, but it requires that the debt claim be  
6 allowed in full.

7 MR. DUGAN: I think that's a conclusion that was  
8 reached because it is a broad release. It's a release of all  
9 claims. It doesn't specifically require what Your Honor just  
10 said. But I think because it is a broad release of all claims,  
11 it arguably covers it, I mean, but it doesn't carve that out  
12 and specifically recover it.

13 THE COURT: Mr. Dugan, now I'm going to start to a  
14 little bit lose my patience.

15 MR. DUGAN: Okay.

16 THE COURT: It's in the document that LBAC put forward  
17 as a bid. So somebody wrote it. And if somebody didn't  
18 understand what they meant at the time, subsequent events have  
19 forced them to clarify it. And it's been clarified to me  
20 before that, in fact, it includes a full allowance, such that I  
21 cannot just say you know what, we'll proceed on the bid, we'll  
22 deal with the claims allowance later, that would not satisfy  
23 the condition of the release.

24 MR. DUGAN: I -- I --

25 THE COURT: So if that's wrong you can tell me, but

1 that's what my understanding is of how that works.

2 MR. DUGAN: I understand, Your Honor.

3 THE COURT: And that fact, whether or not that changes  
4 now, that fact is a fact that's out there, and that may or may  
5 not have a bearing on the identity of interest inextricably  
6 linked argument.

7 MR. DUGAN: I understand what you're saying, Your  
8 Honor. And forgive me for the disconnect.

9 THE COURT: That's okay.

10 MR. DUGAN: I don't think I'm --

11 THE COURT: You all are working very hard and sharing  
12 the responsibility; I understand. But it's not -- I have to  
13 hold you to prior statements that were made when, perhaps, you  
14 weren't standing at the podium.

15 MR. DUGAN: I understand perfectly, Your Honor. Let's  
16 just move on if we may.

17 THE COURT: Sure.

18 MR. DUGAN: I don't know if you have any other  
19 questions about the LightSquared complaint and what our  
20 arguments are with respect to them.

21 THE COURT: Let me look at my notes if you don't mind.

22 MR. DUGAN: Sure.

23 THE COURT: I think most of my notes relate to  
24 questions I want to ask the other folks.

25 MR. DUGAN: Okay.

1 THE COURT: So you can finish up what you have and  
2 reserve for rebuttal.

3 MR. DUGAN: You don't know how happy I am to hear  
4 that, Your Honor. I'm very happy to hear that, Your Honor.

5 Let me just, if I can, briefly touch on Harbinger --

6 THE COURT: Okay.

7 MR. DUGAN: -- if that's okay.

8 THE COURT: Sure.

9 MR. DUGAN: Just as long as I'm up here.

10 THE COURT: Sure.

11 MR. DUGAN: This will be brief.

12 Your Honor, our motion to dismiss Harbinger's claims  
13 is to some extent procedural. We kind of think that when we  
14 got their pleading we didn't understand exactly where it was  
15 coming from given what we thought your order had --

16 THE COURT: Me too.

17 MR. DUGAN: -- Your Honor had ordered. It seemed like  
18 a little bit --

19 THE COURT: Right.

20 MR. DUGAN: -- of left field lob, and maybe Hail Mary  
21 pass and a combo of those. And so we would just posit before  
22 you, first, that it doesn't appear to comply with what Your  
23 Honor ordered.

24 THE COURT: I'm going to sort it out with them.

25 MR. DUGAN: Okay. We also believe that there's

1 some -- I mean, to the extent their complaint -- and it's  
2 confusing -- alleges that they're not really seeking to  
3 vindicate any rights for relief that they have themselves, it  
4 appears to be pled derivatively which raises another host of  
5 issues that I don't think they adequately explain in their  
6 briefing, so I don't want to belabor that point.

7 And the only other thing I would say on that is to the  
8 extent they've got the 502(b) claim which Your Honor I think  
9 did say they could re-plead, our position on that claim is the  
10 same as the one that we've asserted for LightSquared.

11 THE COURT: Okay. Okay. All right, thank you, Mr.  
12 Dugan.

13 MR. DUGAN: Okay, thank you.

14 MR. GIUFFRA: Good afternoon, Your Honor.

15 THE COURT: Good afternoon.

16 MR. GIUFFRA: Robert Giuffra, Sullivan & Cromwell, for  
17 DISH and EchoStar.

18 THE COURT: All right, Mr. Giuffra, let me just follow  
19 along here and make sure I have everything that you filed.

20 I have a memorandum of law in support of the motion to  
21 dismiss the LightSquared complaint and a reply.

22 MR. GIUFFRA: That's correct, Your Honor.

23 THE COURT: And you filed nothing with respect to the  
24 Harbinger, correct?

25 MR. GIUFFRA: No, Your Honor.

1 THE COURT: Okay.

2 MR. GIUFFRA: We're not a party to that complaint.

3 THE COURT: Okay.

4 MR. GIUFFRA: Your Honor, this is a motion pursuant to  
5 Rule 8 of the Federal Rules of Civil Procedure, and it focuses  
6 on the plausibility of the complaint as pled. In our view,  
7 they have not pled the single claim that they brought against  
8 DISH and EchoStar, and that's a tortious interference with  
9 contract claim.

10 Now, a tortious interference with contract claim  
11 requires certain elements. You have to have a --

12 THE COURT: Can I just stop you for a minute?

13 MR. GIUFFRA: Yes, Your Honor.

14 THE COURT: Now I'm confused. So DISH and EchoStar  
15 are defendants in the Harbinger complaint.

16 MR. GIUFFRA: Not in the Harbinger complaint; we're  
17 defendants --

18 THE COURT: No.

19 MR. GIUFFRA: -- in the LightSquared complaint.

20 MR. FRIEDMAN: Your Honor, we only objected to the  
21 plan and we joined in the subordination of the SPSO, but we're  
22 not suing anybody.

23 THE COURT: Okay. So we're --

24 MR. GIUFFRA: One less thing for us to do today, Your  
25 Honor. So we're only a defendant in the LightSquared

1 complaint --

2 THE COURT: Okay.

3 MR. GIUFFRA: -- Count V, which is the tortious  
4 interference claim --

5 THE COURT: Hold on.

6 MR. GIUFFRA: -- which is a very specific claim that  
7 has to be pled, and they've got to allege a breach of a  
8 contract.

9 THE COURT: I got it, you're right.

10 MR. GIUFFRA: They've got to allege that DISH and  
11 EchoStar intentionally --

12 THE COURT: Right.

13 MR. GIUFFRA: -- caused in the complaint, and this is  
14 important, Your Honor, in paragraph 109 --

15 THE COURT: Right.

16 MR. GIUFFRA: -- that they say DISH -- "SPSO, DISH,  
17 EchoStar and Mr. Ergen intentionally caused UBS to breach  
18 Section 10.04 of the credit agreement." So that's what they've  
19 got to plead. And then they've also go to plead some sort of  
20 an injury and some sort of damages.

21 THE COURT: Right.

22 MR. GIUFFRA: Now, we believe, Your Honor, that  
23 there's no basis to infer from this complaint that Ergen or Mr.  
24 Kiser were acting as agents for DISH and EchoStar. And I  
25 talked about this the last time I stood before Your Honor --



1 THE COURT: Right.

2 MR. GIUFFRA: -- about the fact that DISH is a public  
3 company with 35,000 employees, more than 10,000 shareholders,  
4 same for EchoStar, and there's virtually nothing in this  
5 complaint about EchoStar at all.

6 And I think if Your Honor looks at paragraph 86 of the  
7 complaint, because I think that paragraph may be -- we could  
8 sort of speed up some of the points that Mr. Dugan was making,  
9 and maybe look at them in a slightly different way.

10 Paragraph 86, which is in the breach of contract  
11 claim, and I think the reason that they pled this in sort of an  
12 odd way against DISH and EchoStar was because they wanted --  
13 LightSquared wanted to bring a breach of contract claim against  
14 Mr. Ergen and against SPSO, and they couldn't allege they were  
15 tortiously interfering with the same contract, because you only  
16 get one bite at the apple.

17 THE COURT: Right.

18 MR. GIUFFRA: You can only do a breach of contract  
19 claim, or you can bring a tortious interference claim, which is  
20 why they've come up with this sort of oddball claim involving  
21 UBS, so they can basically drag everybody into a tortious  
22 interference claim, and get their cake and eat it too.

23 But if you look at paragraph 86, and, again, it's a  
24 Rule 8 motion, Twombly, Iqbal, you've got to plead it in a  
25 plausible way.

1           Now, they plead in the complaint it's a public  
2 company; there's no question about that. And they say -- they  
3 just -- they have one sentence: "SPSO is a subsidiary of DISH  
4 and EchoStar." That's a conclusory allegation in our view.

5           Then they go on to say "DISH and EchoStar controlled  
6 SPSO, among other reasons because their executive chairman, Mr.  
7 Ergen, acting within the scope" -- "and the treasurer, Mr.  
8 Kiser, acting within the scope of their agency for the benefit  
9 of DISH and EchoStar, directed the management in investment  
10 policies of SPSO, specifically it's purchase of interest in LP  
11 debt." That's the only allegation that I see in this entire  
12 complaint supporting the notion that SPSO is a subsidiary of  
13 DISH and EchoStar.

14           Now, what are we talking about here? We're talking  
15 about a billion dollars of debt. And Your Honor hit on the  
16 point before that public companies can't go buy a billion  
17 dollars in debt in secret. They have boards of directors; they  
18 have auditors; they've got obligations with the SEC. And in  
19 particular, if they're using their own money, purchases of the  
20 debt -- and here we're talking about purchases that went back  
21 in time -- would be reflected in the financial statements of a  
22 company that would have to be disclosed.

23           They obviously can't cite anything like that, and  
24 maybe to put a different spin on what Mr. Dugan was saying,  
25 there are no allegations in the complaint of board approval of

1 this conduct; there's no allegations in this complaint of a  
2 board authorization of the conduct.

3 THE COURT: That's true, but I think their theory is  
4 that because of the extent of the control that Mr. Ergen  
5 exercises over DISH; fifty-three percent economic control,  
6 ninety percent, almost, voting control, it didn't matter.

7 MR. GIUFFRA: Okay, but --

8 THE COURT: Just as it -- might I finish?

9 MR. GIUFFRA: Yeah, I'm sorry, Your Honor.

10 THE COURT: Okay. It just doesn't matter, so that --

11 MR. GIUFFRA: But that --

12 THE COURT: -- therefore, when the debt's purchased,  
13 it doesn't matter because at the end of the day the chairman  
14 knows that the company will just do what he wants them to do.  
15 I'm not saying I'm finding that as a fact. I'm saying that  
16 that's what their theory is, that that's what their theory is:  
17 that at that point when the debt was purchased there was an  
18 optionality about it. He could use it for his own account, or  
19 if he subsequently decided that DISH would become involved,  
20 then DISH would become involved. I mean, I think that's what  
21 their theory is.

22 MR. GIUFFRA: That is their theory, Your Honor, but  
23 it's not a plausible theory as a matter of law. And the reason  
24 why it's not a plausible theory is if you accept that theory  
25 and take it to its logical extreme, and let's look again at the

1 allegations of the compliant. If Mr. Ergen goes out with the  
2 assistance of Mr. Kiser and buys a million acres of land in the  
3 west, okay, and just uses his own money and buys that land, is  
4 that suddenly that whatever that vehicle --

5 THE COURT: But it's context. It's context.

6 MR. GIUFFRA: Con --

7 THE COURT: I mean, if Mr. Ergen goes out and buys a  
8 large flat screen TV, I mean, it's context, right? So he's  
9 buying the debt of a -- distressed debt of a telecommunications  
10 company, it's in the neighborhood of what DISH and EchoStar do.

11 MR. GIUFFRA: But, again, if he buys a billion dollars  
12 of distressed debt he can't do it in secret. And if you read  
13 the allegations of the complaint they go back to the same  
14 arguments that Harbinger made that Mr. Ergen is DISH or Mr.  
15 Ergen is EchoStar, and it's all sort of one and the same  
16 without any specific pleadings, how in this particular case  
17 there was some authorization by some principal to someone other  
18 than the fact that Mr. Ergen is the executive chairman.

19 MR. GIUFFRA: That's the only --

20 THE COURT: Well, you have the treasurer --

21 MR. GIUFFRA: -- allegation they have.

22 THE COURT: The treasurer of DISH is executing the  
23 trades.

24 MR. GIUFFRA: But there's no allegation that -- people  
25 have multiple hats in this world, particularly corporate

1 executives and people who are involved in companies -- in  
2 multiple companies, because the allegation is oh, he works for  
3 EchoStar, too, and they just sort of plead it in a conclusory  
4 way. They don't plead any specifics. I'm not disputing that  
5 he is the treasurer; I'm not disputing the e-mails that they  
6 attach in the complaint. But the point is there's no  
7 allegation that they were authorized to engage in the conduct  
8 that they are alleged to have engaged in here and specifically  
9 buying the debt. Okay? There's got to be some authorization  
10 to do something that big. Okay?

11 I could be the CEO of a major company; even if I  
12 control it, I can't just go out and buy a billion dollars worth  
13 of debt and have it be ascribed to the company that I'm a CEO  
14 of. People have multiple hats. They don't allege in this  
15 complaint, for example, that that debt is owned by DISH or  
16 EchoStar. Those are public companies. That's an asset of a  
17 public company. You would have to use -- if Mr. -- they don't  
18 allege that money from DISH or EchoStar was used to buy the  
19 debt. One could talk about optionality as much as one wants  
20 but that still doesn't mean that in connection with these  
21 purchases that DISH or EchoStar had authorized them. They're  
22 not small purchases.

23 Now, let me focus, Your Honor, just on the elements.  
24 Again, in Count V they focus on UBS, and I believe that was a  
25 tactical decision because they could not allege that DISH or

1 EchoStar had tortiously interfered with LightSquared's debt  
2 agreement because they wanted to be able to bring the claim  
3 against Ergen for an act -- the Count II claim for breach of  
4 the credit agreement. So they come up with this theory that  
5 there is a breach by UBS in some way because that's what they  
6 allege in paragraph 109 that "intentionally caused UBS to  
7 breach 10.04." And again, tortious interference is an  
8 intentional tort. It's not just a negligence based and they've  
9 got to intentionally cause UBS to breach Section 10.04.

10 Now, they've got to allege some facts that support the  
11 notion that UBS breached the credit agreement Section 10.04.  
12 But UBS under the credit agreement itself, Section 9.03,  
13 Section 9.04, Mr. Dugan talked about it, was under no  
14 obligation to ascertain the accuracy of representations that  
15 were made to UBS. And then in paragraph 9.04 it says, "No  
16 liability for relying upon representations that are made."

17 So you need as a precursor to going back to basic  
18 building-block pleading rules, you need to establish a breach  
19 by UBS. That's what they pled in paragraph 109. If you can't  
20 establish a breach by UBS, they've got no claim against DISH or  
21 EchoStar for tortiously and intentionally causing UBS to breach  
22 an agreement.

23 Now, number one, UBS could not have breached the  
24 credit agreement because it had no obligation to ascertain the  
25 bona fides of people who claim to be eligible assignees, and

1 that's straight out of the credit agreement.

2 Second, in our opinion Your Honor, in our view, SPSO  
3 was an eligible assignee in any event and Your Honor, not to  
4 beat an argument that's been made, just look to footnote 39 --  
5 37, excuse me, of Your Honor's initial opinion on the last go  
6 round we had. Your Honor made the point that -- and we think  
7 it's correct -- that the Court did not find the argument that  
8 subsidiary, small "s," and subsidiary, big "S," made the same  
9 thing in a contract that was negotiated by separate folks.

10 So number one, I don't think that DISH and EchoStar  
11 are an ineligible assignee. Even if they were, they haven't  
12 pled that UBS breached any agreement and they haven't pled --  
13 again it's very conclusory and they've got a Twombly-Iqbal  
14 obligation -- they don't allege, Your Honor, that in some way  
15 DISH or EchoStar, as they must, were the but-for cause for any  
16 breach by UBS and that there was some intentional conduct by  
17 DISH or EchoStar to cause that. And that goes back in part to  
18 the agency argument that I've made before which is that you're  
19 dealing with a public company. It's not plausible to say that  
20 just because someone is the executive chairman -- and that's  
21 really what they do; they take the titles and they say the  
22 titles mean for all purposes, actions they take and I guess  
23 Your Honor's point would be in the neighborhood, are actions of  
24 the public companies.

25 And we don't believe, Your Honor, that's plausible

1 pleading when you're dealing with public companies that have  
2 independent --

3 THE COURT: Well, what if I were to dismiss out DISH  
4 and EchoStar and the rest of the complaints, in some fashion,  
5 went forward or enough of the core allegations went forward and  
6 at the end of the day, at the end of the trial, hypothetically,  
7 I were to find that there is an identity of interest -- putting  
8 aside the subsidiary upper case/lower case issue -- I were to  
9 find for the plaintiffs on their theory that Mr. Ergen and DISH  
10 have an identity of interest and, therefore, SPSO couldn't buy  
11 the debt, just hypothetically, but I've let DISH and EchoStar  
12 out. Isn't that problematic?

13 MR. GIUFFRA: No, they would still have a claim under  
14 their breach of contract claim against Mr. Ergen. The only  
15 claim they pled against DISH and EchoStar is this tortious  
16 interference claim which is clearly just a convoluted theory  
17 that's being put together --

18 THE COURT: But I guess the question that I am asking  
19 you in terms of the efficiency, then, if there were to be a  
20 finding that Ergen and DISH are one and the same, right, but we  
21 don't have DISH as a party in the proceeding anymore, wouldn't  
22 that require yet another trial of some kind? That's what I am  
23 trying --

24 MR. GIUFFRA: Well, theoretically --

25 THE COURT: -- I'm just appealing to your



1 sophistication as a litigator to help me out.

2 MR. GIUFFRA: A couple of points; obviously they can  
3 only have us participate in this party if they've pled a claim  
4 against us.

5 THE COURT: Sure.

6 MR. GIUFFRA: We don't think they have. If the claim  
7 is, okay, we bring a claim against Mr. Ergen for breach of  
8 contract, they get a claim against Mr. Ergen for damages,  
9 okay -- and I don't think they can for all the reasons that are  
10 in all the papers, but let's just as a theoretical matter, they  
11 would try to enforce a judgment against Mr. Ergen if you found  
12 that Ergen and DISH were the same. Presumably they could try  
13 to enforce that judgment against DISH or EchoStar. We would  
14 make all the arguments about how we maintained separate  
15 corporate ownership.

16 THE COURT: Right.

17 MR. GIUFFRA: There's no piercing of the corporate  
18 veil, which they haven't pled in this complaint. So you're  
19 talking about a theoretical issue and I think it's -- Mr.  
20 Ergen, you would have to get past Mr. -- you would have to be  
21 able to establish breach by Mr. Ergen, Mr. Ergen not paying on  
22 the judgment and then you would have to be able to establish  
23 that there was a basis for piercing the corporate veil between  
24 Ergen and DISH and EchoStar: public companies with  
25 shareholders, directors, accountants. And presumably if you're

1 a noncontrolling, he owns about fifty-two percent of the  
2 company, you've got another forty plus percent of those  
3 companies --

4 THE COURT: All right, but that's economic. That's  
5 not -- voting is much higher; he's much higher.

6 MR. GIUFFRA: But you're focused on, well, they've got  
7 a claim against Mr. Ergen. It's a money damages claim, right?  
8 So the question is who pays the money if there's a judgment and  
9 does DISH or EchoStar and its noncontrolling shareholders have  
10 a -- are they on the hook for this, which is part of the  
11 problem with what we're dealing with and that's why we're  
12 fighting this battle with Your Honor which is the mere fact  
13 that someone is the executive chairman of a public company  
14 doesn't make the noncontrolling shareholders, the passive  
15 shareholders and their investment part of a litigation.  
16 There's got to be some control that's been -- or some  
17 authorization by the principal, the board of directors,  
18 particularly given -- and again going back to plausibility -- a  
19 transaction that involves a billion dollars.

20 So I don't see a problem if you went down that road.  
21 I don't think you'll ever get there, but just as an academic  
22 exercise, you would still -- you would go first to Mr. Ergen.  
23 Then you would have to establish some sort of piercing of the  
24 corporate veil and then you would try to go to the shareholders  
25 of -- and the assets of DISH and EchoStar, I guess as a

1 theoretical matter.

2 So one, we don't think there's a breach by UBS. Two,  
3 we don't think that DISH and EchoStar are the but-for cause of  
4 that breach and they've got nothing other than this basically  
5 agency theory by title.

6 And then the other point, Your Honor, which I just  
7 want to talk about for a second, is they haven't alleged any  
8 damages as a matter of law, any injury. And they come back and  
9 they make the point, well, LightSquared alleges that they were  
10 harmed by the fact that SPSO was in the capital structure and  
11 had a blocking position. And there's no specific allegations  
12 in this complaint. And they speculate in their brief about  
13 impacts during the exclusivity period but there's no allegation  
14 and as I -- going through the records, Your Honor, there was a  
15 number of extensions on that exclusivity period; there's no  
16 allegation that whatever plan was going to be put forward by  
17 LightSquared or by Harbinger was going to succeed. There was  
18 obviously a lot of contingencies like exit financing, creditor  
19 votes, board approval. And there's a lot of reasons why  
20 LightSquared was unable to negotiate a plan during the  
21 exclusivity period. Your Honor's more aware of them even than  
22 I am.

23 And in fact, Your Honor, at page 41 of the last  
24 decision you issued in this case, you made the point that  
25 there's no allegation in Harbinger's complaint that

1 LightSquared would have fared better in the plan negotiations  
2 but for the purported interference by having -- whether DISH or  
3 EchoStar and you in fact used those -- that example; the so-  
4 called missed opportunity.

5 Same problem with this complaint; they haven't cured  
6 that problem and then there's going to be an auction tomorrow  
7 and then a plan confirmation in January. And as I understand  
8 how Your Honor has set this up, the way it's set up is LBAC is  
9 a stalking horse bidder, 2.2 billion dollars, bottom four.  
10 It's a market test. If someone comes in with more money, and  
11 Your Honor said that when Mr. Dugan raised the question, if  
12 there's some future harm, well, the market's going to take away  
13 their future harm. I mean, if there's an auction before Your  
14 Honor, there's a process before Your Honor --

15 THE COURT: So let's go there now. Let's go back to  
16 the subject of the release which I think I asked you about when  
17 we were all together last time. You've got a bid by LBAC which  
18 is now owned by DISH and that bid contains a release and a  
19 condition that the debt holdings of SPSO be allowed in full.  
20 And that condition was in the bid -- in the deal before DISH  
21 acquired LBAC, was in from the very beginning and then DISH  
22 acquired LBAC and that didn't fall away. And then you get to  
23 the question of how much -- because I get conflicting signals  
24 on this from all of you -- how much you want me to take into  
25 account of what may or may not have occurred in Nevada because

1 that fact, that stubborn fact keeps reappearing and I'd like to  
2 understand the path that I get that takes me away from that  
3 fact in analyzing whether or not I should keep DISH and  
4 EchoStar in here, the link between DISH via -- in its status as  
5 the owner of the bidder for the spectrum with the condition  
6 that the chairman have his debt claim be allowed in full.

7 MR. GIUFFRA: Okay. Several responses to that; first,  
8 again Your Honor and not to beat a point again, the question is  
9 have they pled a claim or have they not pled a claim? They  
10 can't just be left in the case if they haven't pled a claim,  
11 and Your Honor obviously knows that.

12 Second, and again I don't want to start -- now I am  
13 sort of moving out of my hat as the -- on this motion and  
14 bringing things in from Nevada, but the Nevada judge has  
15 obviously issued an injunction as to how that should all be  
16 dealt with with respect to the release and we intend to comply  
17 with that. In addition, EchoStar intends to comply with that  
18 injunction.

19 THE COURT: But that doesn't answer the substantive  
20 question of what the release reflects or one can infer from the  
21 release, vis-a-vis the relationship between Mr. Ergen and DISH.  
22 I mean, I respect the Nevada court's ruling and you folks are  
23 conducting yourselves consistent with that. Other than that,  
24 it doesn't affect me. I'm doing what I'm doing and Nevada's  
25 doing what they're doing.

1 MR. GIUFFRA: Well, in terms of the complaint that's  
2 before the Court, there's nothing about the release in the  
3 complaint that I see. So I don't think it's relevant to the  
4 claim that's presently being pled. And how the release gets  
5 dealt with and what the release said is something that would be  
6 decided down the line.

7 THE COURT: But this is the part that I find  
8 confusing. There are allegations that -- in essence, that  
9 there's an identity of interest between Mr. Ergen and DISH and  
10 you're not required to -- it's notice pleading, right? You're  
11 not required to marshal every point of evidence that you'd  
12 introduce. You're not required to win on the merits.

13 MR. GIUFFRA: You do have an obligation, though, to  
14 plead sufficient facts to plausibly state a claim, and to  
15 plausibly state a claim in connection with a one billion dollar  
16 debt purchase, you have to do more than just say he's the  
17 executive chairman and Kiser is the treasurer of the company,  
18 which is all they say in this complaint at paragraph 86.

19 So the issue Your Honor is asking about the release is  
20 I think is an issue for another day and I'm not trying to evade  
21 the question but it's a complicated question vis-a-vis we've  
22 got the Nevada injunction and I don't want to make a statement  
23 to Your Honor that suddenly becomes ascribed to DISH or  
24 EchoStar given that injunction as to what our position is with  
25 respect to that release.

1           We intend to comply with the Court's injunction in  
2 terms of how that release gets negotiated and that's something  
3 that I think is an issue for another day but if there's no  
4 mention of the release in the complaint, unless I missed it.

5           THE COURT: No.

6           MR. GIUFFRA: And I think -- but I go back to what I  
7 said before again, they've got to -- Your Honor, you were  
8 consistent both today and the last time I was here. On a  
9 motion to dismiss, you look to the allegations of the  
10 complaint, you don't look to things that are outside of the  
11 complaint, and you ask has someone plausibly pled based on the  
12 factual allegations in the complaint, a claim.

13           The only claim against DISH or EchoStar is this  
14 tortious interference with UBS' contractual obligations as to  
15 the credit agreement. We don't think there were any  
16 contractual obligations. We don't think they were breached.  
17 We don't think there's any injury. We don't think there's any  
18 damages.

19           So as a technical legal matter, they have not pled a  
20 tortious interference claim, and while yes, oh, it's nice to  
21 have everybody in the courtroom or in the case, I think that  
22 you have to, I think, under Rule 12(b)(6) grant the motion to  
23 dismiss.

24           THE COURT: Okay.

25           MR. GIUFFRA: Okay.

1 THE COURT: Thank you.

2 MR. GIUFFRA: Thank you, Your Honor.

3 THE COURT: Does anybody need a break before we keep  
4 going?

5 MR. GIUFFRA: Sure, we'll take a short break.

6 THE COURT: Ms. Strickland?

7 MS. STRICKLAND: On a completely unrelated note, we  
8 have not been advised whether or not an auction is happening  
9 tomorrow and I need to advise people whether to get on a plane  
10 and fly through weather or not. So if we can just get that  
11 answer, we must notify people before they decide whether to fly  
12 across the country.

13 THE COURT: Okay. Mr. Sussberg?

14 MR. SUSSBERG: Yes, Your Honor, Joshua Sussberg from  
15 Kirkland Ellis. We are planning to have an auction tomorrow.

16 THE COURT: All right.

17 MR. SUSSBERG: If --

18 THE COURT: If people can't get here because of the  
19 weather, we're going to have to do something about that. I'm  
20 not going to have something as important as the auction be  
21 affected by the weather over which obviously none of us has any  
22 control.

23 MS. STRICKLAND: They can get here. This is just the  
24 first time -- we've been asking all morning and all week  
25 whether or not it was happening and the answer was we don't



1 know. So that -- I just needed that definitive answer and then  
2 they'll get on the plane.

3 THE COURT: Mr. Sussberg?

4 MR. SUSSBERG: Your Honor, if Your Honor would like to  
5 get into more specifics and details, I'm happy to do that in a  
6 closed session. There's a lot of --

7 THE COURT: I don't.

8 MR. SUSSBERG: -- things happening.

9 THE COURT: I don't. We're having a hearing on a  
10 motion to dismiss now. I'm taking Ms. Strickland's inquiry at  
11 face value. She's trying to tell people whether or not to get  
12 on a plane.

13 MS. STRICKLAND: That's it, yes.

14 THE COURT: So if the answer is yes, but --

15 MR. SUSSBERG: That is our plan.

16 THE COURT: -- it's a fluid situation and I think it's  
17 safe to say that if something were to happen and there was a  
18 delay, this wouldn't be the first time that there are fits and  
19 starts with respect to an auction. I have no idea what's  
20 happening. He's telling you they should get on a plane. You  
21 have to take that at face value. I don't know what else to  
22 say.

23 MR. SUSSBERG: Your Honor, you said it well.

24 THE COURT: I would like to keep going on the motion  
25 to dismiss, so that I don't -- I'm a simple sort -- I don't

1 lose my train of thought, okay? So would anybody like a brief  
2 break, though, before we start? Mr. Stone, would you want a  
3 brief break to collect your thoughts as to what everybody's  
4 just said or no?

5 MR. STONE: I'm happy to have one but I don't need  
6 one, Your Honor.

7 THE COURT: Okay. All right. Let's keep going.

8 MR. STONE: Okay.

9 THE COURT: Why don't you start by addressing Mr.  
10 Giuffra's arguments about letting DISH and EchoStar out because  
11 of the slim nature of the allegations that are in the complaint  
12 against them.

13 MR. STONE: Sure. I'm happy to, Your Honor. And for  
14 the record, Alan Stone, Milbank Tweed here on behalf of the  
15 debtors.

16 Your Honor, I apologize, I guess, although I thought  
17 our complaint was clear. In fact, paragraph 110 does allege  
18 that DISH, EchoStar and Mr. Ergen intentionally interfered with  
19 the credit agreement by controlling, directing, authorizing and  
20 executing the LP debt trades that caused and resulted in the  
21 breach of the credit agreement.

22 So the paragraph 109 looks at the first trade because  
23 at that time, none of those parties were actual parties to the  
24 contract. So the theory is that they caused UBS, which was a  
25 party to the contract, to breach the agreement. But once SPSO

1 became a party to the contract, and as you can see, SPSO is not  
2 listed in paragraph 110, they directly breached and the other  
3 parties tortiously interfered with the contract by causing that  
4 breach.

5           So I must say that when we briefed this in response to  
6 their memorandum in support of the motion to dismiss, we  
7 addressed the arguments that were contained in their brief and  
8 it was a bit curious to us that they didn't address the other  
9 breaches, and it only became clear to us when we got the reply  
10 brief that they were really focused only on paragraph 109 and  
11 not paragraph 110.

12           So we think that there's ample allegations in the  
13 complaint to keep DISH and EchoStar in because for every single  
14 one of the trades that happened after the first one, our theory  
15 is they tortiously interfered.

16           THE COURT: Well, that's one part of it, but the other  
17 part of it was that there's no allegation of -- specifically of  
18 the creation of an agency or the authorization, and --

19           MR. STONE: Well, let me turn to that, Your Honor.

20           THE COURT: Okay.

21           MR. STONE: I'm actually quite surprised by the cases  
22 that they cited in their reply brief because they're just  
23 directly contrary to the authority that's out there.

24           THE COURT: Okay. Can you point me to which ones you  
25 mean?

1 MR. STONE: I can, Your Honor. They cited two cases;  
2 Cromer I and --

3 THE COURT: Are you in the main memorandum or the  
4 reply?

5 MR. STONE: The reply, Your Honor.

6 THE COURT: Okay.

7 MR. STONE: They cited a case called Cromer I and  
8 another case, Imburgio (ph.), for the proposition that, in  
9 fact, at the pleading stage, you had to allege an actual  
10 manifestation of intent on the part of the principal. That's  
11 not the law at all, Your Honor.

12 In fact, our theory is that these purchases of debt  
13 were disguised purchases, and so as for actual authority, we  
14 don't yet have the facts. The true facts were hidden. That's  
15 how disguises work. And the case law bears out, in fact, that  
16 exact point. There's a case called Amusement Industry v. Stern  
17 which is at 693 F.Supp 327. The Court held there -- this is  
18 the Southern District of New York -- because "an outsider will  
19 not be privy to the details of what conversations took place  
20 between a principal and the agent," the plaintiff only need  
21 raise an inference of the agency relationship.

22 THE COURT: But that's exactly the point. I mean in a  
23 smaller, more ordinary situation that might be true, but the  
24 point that DISH and EchoStar is making -- and it can't be  
25 heightened to be a bootstrap argument, but the point that