IN THE SUPREME COURT OF THE STATE OF NEVADA

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

JOINT APPENDIX
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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
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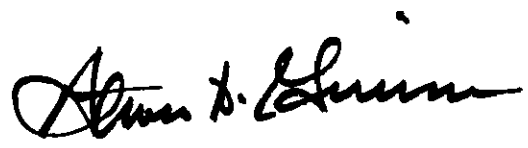

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DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE DISH NETWORK CORPORATION DERIVATIVE LITIGATION

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

PLAINTIFF'S OPPOSITION TO THE SLC'S MOTION TO DISMISS FOR FAILURE TO PLEAD DEMAND FUTILITY

Date of Hearing: October 28, 2014
Time of Hearing: 8:30 a.m.

Plaintiff Jacksonville Police and Fire Pension Fund ("Plaintiff"), by and through its undersigned counsel, respectfully submits its Opposition to the SLC's Motion to Dismiss for Failure to Plead Demand Futility (the "Motion" or "SLC Br."). As discussed below, the Motion should be denied in its entirety.

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This Opposition is further supported by the Memorandum of Points and Authorities below, Plaintiff's Opposition to the Director Defendants' Motion to Dismiss the Second Amended Complaint (the "Board Br.") and Defendants Charles W. Ergen and Cantey M. Ergen's Motion to Dismiss the Second Amended Complaint (the "Ergen Br.") that is filed concurrently with this Opposition and incorporated by reference hereto, the papers and pleadings on file herein, and such oral argument that may be adduced at a hearing of this matter.[1]

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff took for granted that Ergen and the Board would move to dismiss, no matter what the SAC alleged. Plaintiff, however, was quite surprised to see the SLC also move to dismiss, before its investigation is complete and nearly two months before it will file its inevitable whitewash "report." At the June 19, 2014 status conference, in its status reports, and when the Court set the motion to dismiss schedule, the SLC insisted it needs well into October to investigate and assess Plaintiff's claims. When Plaintiff suggested that the SLC would benefit from considering the full motion to dismiss briefing before taking a position on the claims, SLC counsel agreed, seeking another two weeks to digest the competing arguments. Nevertheless, the SLC moved to dismiss at the same time as Ergen and the Board, long before issuing its report. The SLC's premature Motion wastes the resources of DISH, the parties, and the Court, and should be denied.

It is unusual for an SLC to move to dismiss the very claims it is supposedly investigating. No SLC, having prejudged claims from the outset, will adequately protect the company's interest. Here, by arguing that the SLC members – including Defendants Ortolf and Brokaw, who directly participated in the Board's challenged conduct – do not face any real risk of personal liability, the Motion gives up the proverbial farm. Having taken this position, how could the SLC ever turn around and sue Ergen and other faithless directors, including its own members? The answer is simple: ***the SLC will never pursue these claims***, despite the massive

[1] Unless otherwise indicated, all defined terms retain the definition set forth in the Second Amended Derivative Complaint (the "SAC"). All references to "¶__" are to paragraphs of the SAC. All emphasis is added unless otherwise indicated.

harm to DISH and its public shareholders.

Courts do not defer to SLCs that prejudge the outcomes of their investigations. Although obviously not binding on this Court, the Delaware Chancery Court recognized in *Kaufman v. Computer Associates, Inc.*, that an SLC moving to dismiss while simultaneously purportedly investigating its fellow defendants deserves no deference: "[A] sham SLC that is established merely as a device for delaying litigation will receive little respect from the court."[2] Likewise, when the chairman of the HealthSouth SLC suggested its targets' innocence before completing its investigation, court ruled that it would never defer to that committee, because "[e]ven if the SLC later issues a report in favor of dismissal that reads well and that appears to be factually supported, there will always linger a reasonable doubt that its investigation was designed to paper a decision that had already been made."[3]

Perhaps the SLC's Motion should come as no surprise. The SLC's words rarely reflect its own actions, much less reality:

What the SLC Told the Court	**The Truth**
Despite extensive business ties with Ergen, SLC member Ortolf was independent. ¶204.	The SLC concealed that Ortolf's children worked for Ergen at DISH ¶307.
That it would spend "approximately four months" from October 3, 2013 investigating the claims. ¶203.	In June 2014, the SLC said it needs another four months to investigate the claims. (June 19 Tr. at 12:14-16.)
Instructed its counsel to attend all bankruptcy hearings to protect DISH's interests. ¶211.	Did nothing when Ergen's lawyers threatened to pull DISH's bid if claims against Ergen proceeded. SLC Br. at 29.
Concluded by November 20, 2013 that "DISH and any subsidiary of DISH were Ineligible Transferees at the time that the secured debt was transferred to Mr. Ergen." ¶88.	Until May 2012, DISH was not an Ineligible Transferee, ¶80, and even after DISH itself was listed as ineligible, "on the words of the contract," DISH could buy LightSquared debt through an affiliate, "as long as that affiliate is not a subsidiary." ¶84.

[2] *Kaufman v. Computer Associates, Inc.*, No. Civ.A. 699-N., 2005 WL 3470589, at *4 (Del. Ch. Dec. 21, 2005).
[3] *Biondi v. Scrushy*, 820 A.2d 1148, 1166 (Del. Ch. 2003).

What the SLC Told the Court	The Truth
Represented to this Court that DISH did not threaten to pull its bid unless Ergen was paid in full on his LightSquared debt claims. ¶244; see also ¶¶245-47 (same substance from other defense counsel).	SLC member and counsel were in court when the Bankruptcy Court said that the release required that Ergen's debt claims be paid in full, and Ergen's counsel threatened to withdraw DISH bid unless Ergen insulated from liability. ¶¶232-45, 248.
Will respect Court's November 27 Injunction and December 19 instructions. ¶¶249-51.	Let Ergen's counsel continue to control handling of release issues and represent LBAC. ¶252.

This SLC is not independent, will not protect the interests of the Company and its public shareholders, and warrants no deference. Indeed, when Plaintiff asked the only independent director on the Board, Steven Goodbarn, why he refused to be on the SLC, he was clear: "I wasn't going to be on a committee that could not be independent." ¶204. The SLC is just another advocate for Ergen, not a good-faith, credible investigative body.

The SLC's October 3, 2013 report showed that from day one, the SLC prejudged the entire matter on the merits. The SLC proclaimed unconditionally that Ergen had no "material personal interest that might induce him to make decisions for DISH that are not in DISH's best interest" and that "Ergen's participation [in the bid] does not threaten to impair DISH's efforts to acquire LightSquared." ¶203. The SLC's November 20, 2013 brief concluded unequivocally that "the transaction will be fare," squarely rejecting the vanquished Transaction Committee's ("STC") refusal to declare DISH's bid for LightSquared's spectrum as fair in light of Ergen's potential windfall. ¶206. SLC counsel took the lead for all Defendants at oral argument, announcing that: "***There's not a breach of duty*** if you have an independent valuation that you accept; there's not a breach of fiduciary duty to terminate the transaction committee, because its job was done…." ¶208. And, with the Court displeased with Ergen's disregard for its November 27, 2013 injunction order, SLC counsel acted as Ergen's shield, assuring the Court that all Defendants would thereafter respect the Court's instructions. ¶¶210-11, 243-48. Instead, the SLC facilitated Ergen's continuing breaches. The SLC's unyielding alignment with Defendants was evident to the Court last fall. At oral argument, Plaintiff's counsel observed that "Defendants

incorporated the SLC brief before it was even out." ¶209. The Court responded: "You think maybe they're working together? ... I recognized that, too." *Id.*

In short, the SLC does Ergen's bidding, and will not do otherwise. As the Bankruptcy Court stated in no uncertain terms, "No one crosses or even questions the actions of the Chairman. Charles Ergen is, in every sense, the controlling shareholder of DISH and wields that control as he sees fit." ¶2. No SLC resolution (or even this Court's Order) will alter that. When the STC challenged Ergen, he shut it down. The SLC and its counsel surely know what will happen to them if they ever cross Ergen.

The SLC's Motion mischaracterizes Plaintiff's allegations and mangles the law. First, the SLC asserts that Plaintiff "must make a demand on the SLC or establish that such demand would have been futile." SLC Br. at 4. That argument is baseless. Under Nevada law, the demand analysis ***applies only to the entire board***, not SLCs or any other committees. *See* Section III. C below. The SLC's rule would improperly shift the burden of proof. Under established precedent, when even an ostensibly independent SLC seeks dismissal (invariably ***after*** completing its report), the Court will scrutinize its independence under the standard set forth in *Zapata Corp. v. Maldonado*.[4] ***The SLC***, not Plaintiff, bears the burden of establishing its independence "by a yard-stick that must be like Caesar's wife –above reproach."[5] *See* Section III. E. 1 below.

Even if the Court accepts the SLC's made-up rule of law and applies the demand futility test to the SLC in isolation of the Board, the Court should excuse demand. While the SLC tries to complicate the standards of *Aronson v. Lewis* and *Rales v. Blasband*, they are fairly clear: at bottom, the question of independence turns on whether a director is, ***for any substantial reason***, incapable of making a decision with only the best interests of the corporation in mind.[6] *See* Section III.E below.

By any measure, the SLC lacks independence of Ergen. Its premature Motion itself undermined its position. Moreover, Defendant Brokaw admittedly chose Defendant Cantey

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[4] *Zapata Corp. v. Maldonado,* 430 A.2d 779, 789 (Del. 1981).
[5] *London v. Tyrell*, Civil Action No. 3321-CC, 2010 WL 877528, at *12 (Del. Ch. Mar. 11, 2010) (citing Zapata, 430 A.2d 779).
[6] *In re Oracle Deriv. Litig.* 824 A.2d 917, 938 (Del. Ch. 2003).

Ergen to be godmother to his son. This deeply personal relationship and dependence excuses demand.[7] Defendant Ortolf has already misled the Court once, failing to disclose in the SLC's October 3, 2013 report his children's employment by Ergen. ¶204. Moreover, Ortolf's thirty-plus year business and social relationship with Ergen is just the type that excuses demand. ¶¶203-295, 306-07.[8] The SLC added Lillis in late 2013. ¶31. Lillis's twenty years partnering with Defendants Vogel and Cullen, both of whom do Ergen's bidding and face their own risk of personal liability, also excuses demand as to Lillis. ¶310. Moreover, the SLC's own conduct – evidencing blind devotion to Ergen and facilitating his breaches at the expense of DISH and its investors – exposes its members to a substantial risk of personal liability, thus excusing demand.

In sum, while the SLC asks this Court to dismiss this action, Plaintiff makes a simple request of the SLC: identify a single SLC, ever, that was as transparently partisan as the DISH SLC and was nevertheless afforded deference by a court. Plaintiff submits that, if this Court must respect this SLC's actions, every case that has rejected an SLC for far lesser misconduct must have been wrongly decided.

II. PERTINENT FACTUAL BACKGROUND[9]

A. THE INITIAL SLC SUBMISSION TO THE COURT: WITHHOLDING FACTS AND PREJUDGING THE MERITS

Plaintiff filed suit on August 13, 2013. The core allegations in the first and amended complaints, Plaintiff's earliest arguments to the Court, and every subsequent pleading and argument, focused on Ergen's misuse of corporate resources for personal profit, surreptitious debt purchases that placed DISH's spectrum bid at risk, and insistence on using DISH's bid to protect his personal interests.[10] While the past year has seen new relevant developments, Plaintiff's core theory of the case has remained constant.[11]

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[7] *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 639, 137 P.3d 1171, 1183 (Nev. 2006); *Grace Bros., Ltd. v. Uniholding Corp.*, Civ. A. No. 17612., 2000 WL 982401, at *10 (Del. Ch. July 12, 2000).

[8] *Kahn v. Tremont Corp.*, 694 A.2d 422, 429-30 (Del. 1997) (doubt of special committee members' independence raised by history of affiliating with, and receiving substantial compensation from serving as directors of companies controlled by, interested fiduciary); *Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, 889 (Del. Ch. 1999).

[9] The facts below focus on the SLC's creation and its conduct. The full recitation of the facts in Plaintiff's Opposition to Ergen's and the Board's Motions is incorporated herein.

[10] Am. Compl. ¶¶5, 8, 12, 18, 22; SAC ¶¶1, 5, 9, 14.

[11] Indeed, while the SLC attempts in vain to parse Plaintiff's counts in order to argue that the bulk of the SAC is

On September 18, 2013, the night before oral argument on Plaintiff's motion to expedite, the Board created the SLC. ¶198. The Board made clear its tactical purpose for creating the SLC, seeking a stay of the case pending the conclusion of the SLC's investigation. As the Board's counsel argued: "the key case is *Zapata* – that says that what you do with a special litigation committee is ***you test its independence after it reaches conclusions***. So we let the special litigation committee go forward with an investigation."[12] Notably, the Board never suggested that any demand on the SLC was required.

While the SLC now argues its independence, the only truly independent member of the DISH Board, former STC member Goodbarn, recognized the SLC for the sham it is, explaining: "I wasn't going to be on a committee that could not be independent." ¶204. Goodbarn testified that nobody on the Board acts independently of Ergen. ¶205.

Although the Court instructed Plaintiff to make a demand on the SLC, it made clear that its sole purpose was to let the SLC express a prompt view on the question of injunctive relief, not because Plaintiff was legally required to do so.[13] Plaintiff's September 23, 2013 letter to the SLC accordingly explained the basis for the claims and relief sought, and disputed the SLC members' independence.[14] When SLC counsel first called Plaintiff's counsel on September 30, 2013, the SLC did not raise the merits, and instead asked only if Plaintiff's counsel only if it had information to challenge the SLC's independence. ¶201. This made clear that the SLC had no intent to conduct a good-faith investigation.

Plaintiff's concerns were justified, as the SLC hid from the Court material information about its ties to Ergen. In its October 3, 2013 status report, the SLC disclosed Ortolf's 35-year business and social relationship with Ergen, but concealed that Ortolf's children were employed by Ergen at DISH. ¶¶203, 306-07. The SLC admitted Brokaw's selection of Cantey Ergen as godmother to his child, while laughably contending that he might sue the Ergen family on

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(continued)

somehow completely different from the prior complaint, *see* SLC Br. at 10-11, 20-21, the SLC's parsing does not match the counts, which rest on breach of fiduciary duty broadly and are not broken out in the manner that the SLC's arguments necessarily require.

[12] Transcript on Motion to Expedite Discovery at 40 (Sept. 19, 2013) (Sept. 19 Tr.).

[13] *Id.* at 66.

[14] SAC, Ex. 1 (Letter from M. Lebovitch to Messrs. G. Brokaw and T. Ortolf, Sept. 23, 2014) at 1-2 & n.2.

DISH's behalf. ¶308.

The SLC claimed that it would need "approximately four months" to investigate the claims. It also made clear its prejudgment of the outcome, stating that it had already determined, among other things, that Ergen had no "material personal interest that might induce him to make decisions for DISH that are not in DISH's best interests" and that "Ergen's participation does not threaten to impair DISH's efforts to acquire LightSquared." ¶¶203, 314-17. That same day, the SLC responded to Plaintiff's demand having already concluded that "the SLC does not believe that the requested action would serve the best interests of DISH." ¶202.

B. THE SLC'S NOVEMBER BRIEF AND ARGUMENT TO THE COURT PREJUDICE ANY FUTURE CLAIMS AGAINST ERGEN: CONTINUED INVESTIGATION IS JUST WINDOW DRESSING

All parties agreed that acquiring LightSquared's spectrum assets was important and beneficial to DISH.[15] Both Plaintiff and the disbanded STC had questioned the fairness of DISH's bid (regardless of the price paid for the spectrum) because of Ergen's resulting windfall. ¶206. Plaintiff and the STC contend that, if Ergen profits from his surreptitious debt purchases, then DISH should receive those profits. Undermining any prospect of DISH pursuing those claims, the SLC pronounced on November 20, 2013 that "[i]f the transaction is consummated on the basis of its current terms, the transaction will be fair." ¶206. Just a few days later, the SLC took its partisanship further, concluding that the core of Plaintiff's claims (including the core of the SAC it is supposedly investigating today) did not state claims:

> [T]here's not a breach of duty if the value was fair; there's not a breach of fiduciary duty if you have an independent valuation that you accept; there's not a breach of fiduciary duty to terminate the special transaction committee, because its job was done.... [N]one of these affect the fairness of the LightSquared spectrum by LBAC.... They want to focus on the termination of the special transaction committee and the importance of the special transaction committee to the process. Well, they had done their job. They had reached the value. There was nothing left for them to do unless it later came up whether or not there was an opportunity that existed. ¶¶208, 329-30.

The SLC also foreclosed any potential to later pursue claims arising from Ergen's debt purchases. On November 20, 2013, the SLC told the Court that "the SLC has determined that

[15] *See, e.g.*, ¶210 (SLC counsel saying that buying the spectrum was "a potentially transformative shift in DISH's business that could make DISH a Fortune 100 company."); ¶321 ("if DISH lost the LP Assets because of a misstep in bidding or negotiating, that injury would be irreparable").

DISH and any subsidiary of DISH were Ineligible Transferees at the time that the secured debt was transferred to Mr. Ergen." ¶88. That representation was flatly untrue. Debt purchases representing $115 million of Ergen's principal (*i.e.*, pre-interest) profit were made ***before May 2012***, when DISH was ***first listed*** as an "Ineligible Transferee" on the LightSquared debt agreement. ¶¶83, 90. As the SLC knows, the Board's counsel readily admitted to the Bankruptcy Court that DISH was not barred from buying debt when Ergen started his debt purchases and, even after DISH itself was listed as "Ineligible," it could have purchased debt through an affiliate, "as long as that affiliate is not a subsidiary." ¶¶80-84. Moreover, Ergen admitted under oath that he was aware of DISH's interest in buying LightSquared debt, and acknowledged his fiduciary duties to present that opportunity to DISH ¶76), yet he usurped that opportunity for himself while concealing his actions from the Board. ¶¶92-94. [16]

Just before the injunction hearing in this Court, both the Bankruptcy Court and the U.S. Bankruptcy Trustee challenged the scope of the release embedded in DISH's bid because it was overly broad and would release claims made against Ergen personally. ¶¶16, 215, 232-35. Pointing out that Ergen's personal investment and resulting liability should not affect DISH's bid, the Bankruptcy Court specifically asked:

> Why is a bid of DISH, which is a separate entity from SPSO – say, the defendants – why does the bid of DISH care about whether or not SPSO gets its claims in full? DISH has determined that it wants to pay 2.2 billion dollars for the spectrum. It shouldn't care what happens to that 2.2 billion dollars after it gets into the debtors' hands, whether or not – whoever's claims are allowed. ¶233.

The Bankruptcy Court also stated, in no uncertain terms, that it had previously been told that the release provided that, if LightSquared accepted DISH's bid, Ergen actually needed to be paid in full on his debt holdings. ¶¶211, 229, 232-34. SLC counsel was present in the Bankruptcy Court when Ergen asserted that he would cause DISH to pull its bid unless he received payment in full on his debt. ¶211. Rather than address the concerns of a federal judge, SLC counsel minimized the issue to this Court, stating that "the release of the disallowance claim is not likely to have any material impact" and, audaciously, accusing Plaintiff of breaching its own duties to

[16] As detailed in Plaintiff's Opposition to Ergen's and the Director Defendants' Motion filed herewith, Ergen's admission alone suffices to state disloyalty claims.

DISH by challenging Ergen's conduct. *Id.*; ¶¶324-28 (SLC minimizing the release issue to this Court). In contrast to the SLC's blasé attitude, the Board's counsel at least recognized that the release to Ergen was "potentially worth, I don't know, a couple hundred million maybe if they even get there." ¶220. In other words, even as this Court openly expressed suspicion and concern about Ergen's demanding a release admittedly worth hundreds of millions of dollars, the SLC defended Ergen while also telling this Court that "if DISH lost the LP Assets because of a misstep in bidding or negotiating, that injury would be irreparable." ¶321.[17]

C. THE SLC'S DECEMBER PROMISE TO TAKE ITS JOB MORE SERIOUSLY: MORE WORDS WITHOUT SUBSTANCE

Recognizing that the release issue was significant, and that Ergen threatened to derail DISH's bid as leverage to protect himself from personal liability, this Court enjoined Ergen's interference on November 27, 2013 and ordered the SLC to handle all issues relating to the release. ¶223. Despite that order, the SLC never contacted LightSquared to discuss the issue, or otherwise took any action to protect DISH and stop Ergen's misconduct. (*Id.*; ¶¶236-52.

DISH was the sole bidder at the December 11, 2013 LightSquared auction. All it had to do was limit the release of claims against Ergen, as was specifically made possible by this Court's November 27 injunction order. ¶¶238-39. Both Brokaw and SLC counsel were present, but inexplicably protected Ergen at DISH's severe expense. They did nothing, even when LightSquared representatives cancelled the auction because, under Ergen's view of the release, LightSquared didn't "have the option of keeping the bid and digging in on the litigation" against Ergen/SPSO. ¶¶240-41. Ironically, just a few days later, SLC counsel again chided Plaintiff for putting at risk "a potentially transformative shift in DISH's business that could make DISH a Fortune 100 company." ¶210.

When Plaintiff told this Court about DISH's bid being used to protect Ergen from personal liability, SLC counsel represented (incorrectly) that Plaintiff's assertion "that DISH said that it would pull its bid if the release is changed ... never ... that didn't happen." ¶244. After

[17] Notably, Ergen does not deny linking the bid with protection on his personal liability. To the contrary, and showing his utter inability ever to think like a fiduciary, Ergen asserts that his 53% control over DISH entitles him to abuse the Company for his personal benefit. *See* Ergen Br. at 2.

stating that its goal was "to let DISH, if it has an ability to, to buy that spectrum asset," the Court specifically instructed: "You cannot allow Ms. Strickland and Mr. Dugan to be the ones who are taking the laboring oar, because a large part of this adversary proceeding relates to the company's incestuous relationship with Mr. Ergen." ¶250. Both the Board and SLC promised to respect that instruction. Yet, over the next twenty bankruptcy hearings, Ergen's counsel continued to appear for LBAC, a 100%-owned DISH subsidiary. ¶¶251-52.

On January 7, 2014, LBAC terminated the Plan Support Agreement. ¶¶253-55. The Bankruptcy Court recognized Ergen's brinksmanship, as he had terminated the PSA but did not expressly withdraw the bid itself. Showing that Ergen was not bluffing, and ignoring this Court's order and instructions, Ergen's counsel stood and declared on behalf of DISH: "the stalking horse bidder hereby withdraws its bid." ¶¶256. It is easy to infer that Ergen would use the threat (and reality) of pulling DISH's bid to imperil the LightSquared reorganization process, and thereby gain leverage to protect his personal exposure to liability. It is inexplicable that the SLC would allow Ergen to deprive DISH of LightSquared's spectrum, especially given that the Bankruptcy Court found that the spectrum was worth over $7 billion to DISH, such that the $2.2 billion purchase price would have been a "freebie" to DISH, and Ergen's purported "technical issue" was a mere pretext. ¶¶80-81.

III. LEGAL ARGUMENT

As the U.S. Court of Appeals for the Ninth Circuit recently observed in *Rosenbloom v. Pyott*, "'the purpose of the derivative action [is] to place in the hands of the individual shareholder a means to protect the interests of the corporation from the misfeasance and malfeasance of "faithless directors and managers."'"[18] To distinguish frivolous suits from those challenging the "malfeasance of faithless directors and managers," a derivative plaintiff must either make a pre-suit demand on the company's board of directors, or plead with particularity the reasons why demand is excused. *See* SLC Br. at 15.[19] While Nevada law departs from

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[18] *Rosenbloom v. Pyott*, No. 12–55516, 2014 WL 4290625, at *7 (9th Cir. Sept. 2, 2014) (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95 (1991)).

[19] *Shoen*, 122 Nev. at 645, 137 P.2d at 1187; NRCP 23.1 ("[T]he complaint shall allege with particularity the efforts, if any, made by the plaintiff to obtain the action plaintiff desires ... or [the reasons] for not making the effort").

Delaware law in other ways, as the SLC concedes, "Nevada applies the pleading standards employed by the Delaware courts to determine whether demand was futile." SLC Br. at 15.[20]

A. THE BOARD DOES NOT DISPUTE THAT DEMAND IS FUTILE

Under Nevada law, in determining whether a derivative suit can proceed to trial, the Court must first determine whether demand on the Board is excused as futile. Where, as here, the pleadings "raise a reasonable doubt as to the directors' independence or their entitlement to protection under the business judgment rule," demand is excused.[21] Here, the Board itself, in its moving papers, did not dispute (and thus conceded) that demand would be futile.

Moreover, the SAC provides extensive particularized allegations about the futility of making a demand on the Board. ¶¶279-303. The SAC pleads that, except for former STC member Goodbarn, the Board comprises Ergen's family members, best friends, decades-long social and business colleagues, and current and former DISH executives who owe their livelihoods to Ergen. *Id.* As the Delaware courts have recognized at length, such longstanding, close relationships establish directors' lack of independence.[22]

The SAC also pleads that, because the handling of the LightSquared bid was a conflicted transaction for Ergen, the Board's decisions must be decided pursuant to the "inherent fairness" standard set forth in numerous Nevada cases. ¶¶279, 283-85. Furthermore, the affirmative actions and inactions of the Board reflect its members' own disloyalty and bad-faith preference of Ergen's personal interests ahead of the interests of DISH's public investors, creating a reasonable risk of personal liability. ¶¶281-82, 286-88. Because the Board does not contest the futility of demand, NRCP 23.1 and the Nevada law of demand futility ***should be*** inapplicable in this case. However, the SLC's motion to dismiss proposes a completely fabricated rule, purportedly requiring demand on the SLC. That rule does not exist as a matter of law, in Nevada

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[20] *Shoen*, 122 Nev. at 641 (citing *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984)) and *Rales*, 634 A.2d 927 (Del. 1993); *In re AMERCO Deriv. Litig.*, 252 P.3d 681, 697 (Nev. 2011).

[21] *Shoen*, 122 Nev. at 626-27, 137 P.2d at 1174-1175; *see also AMERCO*, 252 P.3d at 697 (adopting disjunctive test set forth by the Delaware Supreme Court in Aronson, 473 A.2d at 814).

[22] *See, e.g., Oracle*, 824 A.2d at 938 (in determining independence, law does not "ignore the social nature of humans [who are] deeply enmeshed in social institutions [with] norms, expectations that, explicitly and implicitly, influence and channel the behavior of those who participate in their operation"); *Parfi Holding AB v. Mirror Image Internet, Inc.*, 794 A.2d 1211, 1232 (Del. Ch. 2001) ("[T]he question of independence turns on whether a director is, for any substantial reason, incapable of making a decision with only the best interests of the corporation in mind").

or anywhere else, and should not exist as a matter of logic or policy. Moreover, even if the Court somehow imposes this new "demand on the SLC" rule, the SAC pleads far more detail than could ever reasonably be required to excuse such a demand.

B. NEVADA DOES *NOT* REQUIRE DEMAND UPON AN SLC

The SLC's entire motion rests on the baseless assertion that Plaintiff "must establish that demand on the SLC would have been futile." (SLC Br. at 17. This supposed rule, presented without legal citation, finds no support from any court. The best the SLC can muster is a single, inapplicable order from a Minnesota court. The premise of the Motion is false; the motion fails.

The SLC offers no authority requiring that a demand must be made upon an SLC, or even any authority discussing such an analysis, since none exists. The only authority the SLC offers is a single trial court order from nearly a decade ago, from an out-of-state court. (SLC Br. at 17) (citing *In re UnitedHealth Grp. Inc.*).[23] *UnitedHealth* does not support a different result. There, a derivative plaintiff in Minnesota state court first brought suit ***after*** the board had already created an SLC in response to different lawsuits that were commenced in federal court.[24] It was in that entirely different context – not applicable here – that the court stated that it would "consider whether it would have been futile for Plaintiffs to make a demand upon the SLC."[25] Moreover, the court applied an analysis analogous to *Zapata* and ***denied the motion to dismiss*** because "[a]s long as there is a possibility that the SLC lacked independence and good faith, this action should not be dismissed."[26]

The law, however, is that even when an SLC is created, any demand analysis focuses on the board as a whole. As Delaware law recognizes, a board on which demand is excused may create a committee of independent directors to investigate claims on the Company's behalf.[27] Where, as here, the conflicted board creates an SLC, the committee itself must establish not only its independence, but also that it has conducted its investigation in good faith. As set forth in *London v. Tyrell*, "the SLC has the burden of establishing its own independence by a yardstick

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[23] *In re UnitedHealth Grp. Inc.*, No. 27 CV 06-8085, 2007 WL 5557050 (D. Minn. Feb. 6, 2007).
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *See Zapata*, 430 A.2d at 779.

that must be like Caesar's wife – above reproach.... SLC members are not given the benefit of the doubt as to their impartiality and objectivity."[28]

In other words, there is no requirement of demand on an SLC, and no demand futility analysis with regard to such committee, because (i) the SLC has the burden to show it is independent and has conducted a good-faith investigation, and (ii) the court does not evaluate whether to defer to the SLC's conclusions ***until it has conducted its investigation and reached those conclusions***. "Ordinarily, and for obvious reasons, the inquiry whether the SLC's recommendation should be respected is usually made after the committee has concluded its investigation and issued its report."[29] This requirement both conserves judicial resources and allows SLCs – if they are truly independent – to conduct thorough, good faith investigations. Accordingly, any attempt by a special litigation committee to terminate claims raised by a derivative plaintiff must be evaluated on the merits, rather than on demand-futility grounds. "[U]nder *Zapata* and its progeny, a plaintiff who can establish demand futility [on the board] not only avoids the need to make a demand which the corporation may refuse, but ... also may be able to obtain judicial review of the *merits* of the case as part of the court's evaluation of any motion to terminate made by a special litigation committee."[30]

Where, as here, a special litigation committee has already determined not to pursue claims on behalf of the corporation, enhanced judicial scrutiny, including discovery, of the SLC's independence and process is both appropriate and necessary to ensure that the corporation's rights are adequately protected. As set forth in the seminal *Zapata* case, an SLC's motion to dismiss "is perhaps best considered as a hybrid summary judgment motion for

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[28] *See, e.g.*, *London*, 2010 WL 877528, at *12-13 ("[T]he SLC has the burden of establishing its own independence by a yardstick that must be like Caesar's wife-above reproach... SLC members are not given the benefit of the doubt as to their impartiality and objectivity") (quotation marks omitted); *Biondi*, 820 A.2d at 1164 ("As a prerequisite to determining whether to defer to the business judgment of a special litigation committee to terminate a derivative suit, a court must conduct an inquiry into the independence and good faith of the committee and the bases supporting its conclusions") (quotation marks omitted).

[29] *Biondi*, 820 A.2d at 1164; *Sutherland v. Sutherland,* C.A. No. 2399-VCL, 2008 WL 571253, at *1 (Del. Ch. Feb. 14, 2008) (SLC's motion to dismiss should be decided "on the basis of the extensive record developed in discovery into the SLC's independence and good faith").

[30] *Spiegel v. Buntrock*, 571 A.2d 767, 776 n.17 (Del. 1990) (citing D. Block, N. Barton & S. Radin, *The Business Judgment Rule: Fiduciary Duties of Corporate Directors*, 484 (3d Ed. 1989)).

dismissal."[31] Given that the SLC here has repeatedly shown that it does not intend to pursue any claims and, indeed, has moved to dismiss the SAC without having conducted its investigation, deferring to the SLC's conclusion without any judicial review of its transparent lack of independence and good faith would condone the SLC's own breaches of duty.

The fact that this "SLC demand" theory was recently fabricated, and is baseless, is supported by the Board's own argument when it first created the SLC. In seeking to stay Plaintiff's case the day after the SLC was created, the Board's counsel never suggested that a demand should be made on the SLC. Rather, the Board's counsel argued that "the key case is *Zapata* – that says that what you do with a special litigation committee is you test its independence ***after it reaches conclusions***. So we let the special litigation committee go forward with an investigation."[32] Mr. Rugg was correct. Even when a potentially objective and independent SLC is created, it is supposed to investigate and take a position on the substance of the claims before asking the Court to dismiss them (or permit them to proceed).[33] Plaintiff is entitled to discovery on the SLC's investigation and independence, such that a motion to dismiss is an improper vehicle in which to decide whether to let the SLC terminate Plaintiff's claims.[34] The SLC's motion is misplaced.

The SLC's citations to *Braddock v. Zimmerman*[35] and *Harris v. Carter*[36] are unavailing. Indeed, they affirmatively establish that demand on the Board – let alone the SLC – is excused. ***First***, both *Braddock* and *Harris* address whether, in the specific circumstance of a plaintiff filing an amended derivative complaint after control of a corporate board changed, demand ***on the new board*** is required. Neither case remotely suggests that an SLC (formed by the same conflicted board that remains in place, no less) can dismiss a suit for failure to make a demand.

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[31] *Zapata*, 430 A.2d at 787; *see also Sutherland*, 2008 WL 571253, at *1 ("both the independence of the SLC and the good faith of its inquiry would be the subject of close scrutiny if the investigation resulted in a recommendation that the litigation be dismissed.").

[32] Sept. 19 Tr. 40.

[33] *Sutherland*, 2008 WL 571253, at *1; *Biondi*, 820 A.2d at 1164.

[34] *See Zapata* 430 A. 2d at 788 ("[T]he moving party should be prepared to meet the normal burden under Rule 56 that there is no genuine issue as to any material fact and that the moving party is entitled to dismiss as a matter of law"); *Will v. Engebretson & Co.*, 213 Cal. App. 3d 1033, 1041-42 (1989) ("[T]he weight of authority holds that in this situation normal summary judgment rules are to be applied.").

[35] *Braddock v. Zimmerman,* 906 A.2d 776 (Del. 2006).

[36] *Harris v. Carter*, 582 A.2d 222 (Del. Ch. 1990).

Second, under *Braddock* and *Harris*, "neither Rule 23.1 nor the policy it implements requires that a court decline to permit further litigation of those claims upon the replacement of the interested board with a disinterested one .... Some tribute must be paid to the fact that the lawsuit was properly initiated."[37] Where, as here, an amended complaint "'elaborates upon facts relating to acts or transactions alleged in the original pleading, or asserts new legal theories of recovery based upon the acts or transactions that formed the substance of the original pleading,'" there is no basis to require a new demand, ***even when control of the board has changed*** and a majority of directors are no longer conflicted or beholden to a conflicted person.[38] While the SAC includes new events, those allegations "relate to" and are the historic consequence of Plaintiff's original allegations, and they "elaborate on" the facts initially alleged and state new theories that flow from the old ones.[39]

With Plaintiff having properly initiated this derivative action, "[t]here are good reasons not to go further and require that [the] derivative plaintiff interrupt litigation, when amending his pleading or otherwise, to make a demand."[40] If *Braddock* is applied in accordance with Nevada law (including the teachings of *Shoen*), then there can be no demand requirement here, whether or not the SLC is incorrectly treated like a new, independent Board: There is simply no basis to require a new demand on the Board and even less on the SLC.

C. EVEN IF DEMAND WERE SOMEHOW REQUIRED, IT IS EXCUSED

1. Consistent with *Zapata* and its Progeny, the Burden to Prove Independence Must Stay with the SLC

The SLC confuses the independence analysis for SLC members with the normal standard for an entire board. SLC Br. at 22-25 (citing twelve cases, only one concerning an SLC's independence).[41] If the Court nevertheless analyzes demand as to the SLC (which it should not),

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[37] *Braddock*, 906 A.2d at 785.
[38] *Id.* (quoting *Harris,* 582 A.2d at 231).
[39] As noted, the SLC artificially parses the claims in the SAC in unsupportable ways.
[40] *Id.* at 786 (quoting *Harris*, 582 A.2d at 231). *See also id.* ("We hold that, when an amended derivative complaint is filed, the existence of a new independent board of directors is relevant to a Rule 23.1 demand inquiry only as to derivative claims in the amended complaint that are not already validly in litigation.").
[41] The single case that the DISH SLC cites involving an SLC is *In re Oracle Sec. Litig.*, 852 F. Supp. 1437 (N.D. Cal. 1994). Even that decision, however, is of little probative value, as it concerns whether to defer to the SLC's unopposed motion to terminate the case ***as part of a settlement***. *Id.* at 1440.

the SLC must, at the least, bear the burden of proof. As the current Delaware Chief Justice held in *In re Oracle Corp. Derivative Litigation*: "I begin with an important reminder: the SLC bears the burden of proving its independence. It must convince me."[42]

In *Biondi v. Scrushy*, the judge explained that the creation of an SLC gives an otherwise conflicted or interested board the ability "to vest control of derivative litigation in a trustworthy committee of the board. Vesting such authority in a committee will protect the Company only where the makeup and actions of the committee are beyond reasonable question. The composition and conduct of a [SLC] therefore must be such as to instill confidence in the judiciary and, as important, the stockholders of the company that the committee can act with integrity and objectivity."[43] As the court explained in the *London* case:

> Unlike a board in the pre-suit demand context, ***SLC members are not given the benefit of the doubt as to their impartiality and objectivity***. They, rather than plaintiffs, bear the burden of proving that there is no material question of fact about their independence. The composition of an SLC must be such that it fully convinces the Court that the SLC can act with integrity and objectivity, because the situation is typically one in which the board as a whole is incapable of impartially considering the merits of the suit.[44]

The SLC provides no basis in law or reason – because none exists – why it should be entitled to any presumption of independence, or why its premature Motion should shift the burden to Plaintiff. The SLC itself must clearly establish its independence, and can do so only on a summary judgment record.[45] Here, this distinction does not matter, as the SLC has demonstrated that it cannot protect DISH's interest regardless of who bears the burden.

2. Any Demand on the SLC (Regardless of Burden) Would Be Excused

Even if the Court accepts the SLC's concocted rule of law, Plaintiff has pled futility of demand on the SLC members. And, critically, because Plaintiff has particularized the SLC's lack of independence, the SLC should be barred from re-arguing this issue in the future, when it

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[42] *In re Oracle Corp. Derivative Litigation*, 824 A.2d 917, 937 (Del. Ch. 2003).
[43] *Biondi*, 820 A.2d at 1166.
[44] *London*, 2010 WL 877528, **12-13; *see also Booth Family Trust v. Jeffries*, 640 F.3d 134, 146 (6th Cir. 2011) ("Delaware Courts hold special litigation committees to a very high standard of independence.").
[45] *See Zapata*, 430 A. 2d at 788 ("the moving party should be prepared to meet the normal burden under Rule 56 that there is no genuine issue as to any material fact and that the moving party is entitled to dismiss as a matter of law."); *Engebretson*, 213 Cal. App. at 1041-42 ("[T]he weight of authority holds that in this situation normal summary judgment rules are to be applied.").

clearly would bear the burden of proving its independence under *Zapata.*

The SLC misstates the pleading hurdles that plaintiffs must meet. In determining whether a plaintiff has adequately pled demand futility, the Court must consider the plaintiff's allegations in their totality.[46] Moreover, while the SLC repeatedly asks this Court to interpret allegations and inferences completely in its (and the other Defendants') favor, the Ninth Circuit Court of Appeals recently reversed a district court when failed to give the derivative plaintiff "all reasonable factual inferences that logically flow from the particularized facts alleged."[47] Similarly, the Seventh Circuit Court of Appeals reversed a derivative suit dismissal where the trial court "improperly ignore[d] the rule that 'any inferences reasonably drawn from the factual allegations of the complaint must be viewed in the light most favorable to the plaintiffs.'"[48]

Although the SLC tries to present demand-pleading standards as very complex, the question raised is straightforward: is there a particularized basis to doubt the director's willingness to pursue the claims at issue, whether because of a personal financial interest in the transaction, a lack of independence of someone who is personally interested, the director's personal interest in the underlying claims because pursuing those claims would expose the director to a substantial risk of personal liability, or otherwise.[49] As summed up in the *Oracle* case: "[a]t bottom, the question of independence turns on whether a director is, *for any substantial reason*, incapable of making a decision with only the best interests of the corporation

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[46] *Rosenbloom*, 2014 WL 4290625, at *14 (citing *McCall,* 239 F.3d at 823; *SAIC*, 948 F. Supp. 2d at 387; *Veeco*, 434 F. Supp. 2d at 276). *See also Brehm*, 746 A.2d 244 at 268 ("from the totality of the factual allegations in the complaint, a reasonable doubt that the business judgment rule precludes judicial inquiry already exists ..."); *In re Cendant Corp. Derivative Action Litig.*, 189 F.R.D. 117, 128 (D.N.J. 1999).

[47] *Rosenbloom*, 2014 WL 4290625, at *14 (quoting *Brehm,* 746 A.2d at 255. *See also Shoen*, 122 Nev. at 634, 137 P.3d at 1180; *Brown v. Kinross Gold U.S.A., Inc.,* 531 F. Supp. 2d 1234 (D. Nev. 2008); *Lynch v. Rawls*, 429 F. App'x 641, 644 (9th Cir. 2011).

[48] *Westmoreland Cnty. Emp. Ret. Sys. v. Parkinson*, 727 F.3d 719, 729 (7th Cir. 2013).

[49] *Rosenbloom*, 2014 WL 4290625, at *8 ("a director's interest may be shown by demonstrating a potential benefit or detriment to the director as a result of the decision") (quotation marks omitted). When a decision is challenged, under *Aronson v. Lewis*, demand is excused if the allegations raise a reasonable doubt that ***either***: (1) a majority of the board was disinterested and independent in the transaction; ***or*** (2) the challenged transaction was a product of the board's valid exercise of business judgment. *Shoen*, 12 Nev. at 637, 137 P.3d at 1182 (citing *Aronson*, 473 A.2d at 812); *see also Lynch*, 429 F. App'x at 643; *Aronson*, 473 A.2d at 814. A director lacks disinterestedness where he will receive a personal benefit from a transaction that is not equally shared by the stockholders, ***or*** the director lacks independence from a person who is personally interested in the transaction, ***or*** when the facts present a "substantial likelihood" of personal liability. *Aronson*, 473 A.2d. at 812; *see also Shoen*, 137 P.3d at 1184. When there is no board action, the standard set forth in *Rales v. Blasband* asks whether the board can fairly be expected to pursue the claims. 634 A.2d 927 (Del. 1993). The *Rales* standard is effectively the first prong of the *Aronson* standard, without reference to a specific board decision. *Id.*

in mind."[50]

Critically, personal financial interest in the underlying transaction is ***not*** the exclusive standard to determine a lack of independence, as the SLC asserts. SLC Br. at 19. Rather, as set forth in *AMERCO*, "director interestedness can be demonstrated through alleged facts indicating that [the SLC members] would be materially affected, either to their benefit or detriment, by a decision [to pursue the claims], in a manner not shared by the corporation and the stockholders."[51] Indeed, the SLC hides in a footnote the proper statement of the law, whereby a director is also personally interested (and demand excused) if the underlying claims present a substantial risk of personal liability. SLC Br. at 20 n.10.

In sum, to meet the demand-excused standard, Plaintiff is required only to "make 'a threshold showing, through the allegation of particularized facts, that their claims have some merit.'"[52] A derivative complaint should not be dismissed at the pleading stage if ***any*** set of facts can be discerned from the complaint showing demand futility.[53] The SAC states ***many*** particularized facts that show demand futility, as to the Board and SLC alike.

D. THE SLC'S PREMATURE MOTION TO DISMISS EXCUSES DEMAND AND SUPPORTS THE COURT REJECTING ANY LATER REPORT

Having prematurely moved to dismiss, the SLC has already answered the *Zapata* question that would otherwise await delivery of its report. The SLC is not independent, demand is futile, ***and its Motion (and pending report) must be rejected***.

In *Kaufman v. Computer Associates, Inc.*, the court considered an SLC that moved to dismiss before completing its investigation. The Court observed and asked itself: "Rather than taking steps to investigate at the time allegations were brought, they filed a motion to dismiss. How can I ignore that?"[54] The court did not ignore it, answering its own question: "A sham SLC that is established merely as a device for delaying litigation will receive little respect from the

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[50] *Oracle*, 824 A.2d 917, 938.
[51] 252 P.3d at 698.
[52] *Rosenbloom*, 2014 WL 4290625, at * 8 (internal citation omitted).
[53] *See, e.g.*, *Grobow v. Perot*, 539 A.2d 180, 188 (Del. 1988).
[54] 2005 WL 3470589, at *4 n.19 (Del. Ch. Dec. 21, 2005).

court."[55] This Court should ask the same question and reach the same conclusion.

Then-Vice Chancellor (now Delaware Chief Justice) Strine reached the same conclusion in *Biondi v. Scrushy*.[56] Citing evidence that the SLC had prejudged the issue in favor of exonerating the alleged wrongdoer, the Court refused to stay the case pending the SLC's report because the SLC's actions had already raised reason to doubt its independence and good faith.[57] As the Court explained, "[e]ven if the SLC later issues a report in favor of dismissal that reads well and that appears to be factually supported, there will always linger a reasonable doubt that its investigation was designed to paper a decision that had already been made."[58]

If mild comments by the *Biondi* SLC indicating potential premature judgment were sufficient to create a doubt that would "linger," the DISH SLC's completely prejudicial submissions, made ***throughout this case***, leave no question about its lack of objectivity and independence. As detailed in the SAC and in Section II above, every time the SLC submitted written or oral argument to this Court, it permanently impaired and prejudiced its own ability to pursue the claims:

- The SLC's earliest status report already concluded that Ergen faces no conflict, and that DISH could not have purchased LightSquared debt, when in fact, Company counsel admitted that DISH could directly purchase the debt until May 2012, and through an affiliate thereafter. ¶¶85-88, 269.

- The SLC's November 20, 2013 status report concluded the deal was fair, thus rejecting the STC's and Plaintiff's concerns that no matter how attractive the spectrum price, any windfall to Ergen raised questions about corporate opportunity and disgorgement of profits from the deal. ¶¶206, 319.

- The SLC's oral argument against an injunction completely vindicated Ergen and the Board on the merits, including its assertion that terminating the STC was proper because "they had done job their job." ¶¶329.

- The SLC insisted that Ergen's control over the release was "not likely to have any material impact" even though a federal judge and the U.S. Trustee disagreed, and despite this Court's clear concerns about the matter. ¶¶201-11, 327, 333.

- When Ergen's counsel terminated the spectrum bid, the SLC's counsel was in the courtroom, yet took no action. ¶¶253-56.

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[55] *Id.* at *4.
[56] *Biondi*, 820 A.2d at 1150.
[57] *Id.* at 1165-66.
[58] *Id.* at 1166. *In re AIG*, 965 A.2d 763, 809 n.165 (SLC's decision not to pursue claims "shows that any demand upon the SLC would be futile in the truest sense of the word").

The SLC plainly reached its conclusions about the merits of this case long before filing the instant, premature motion to dismiss. Months ago, the Court correctly "recognized" that "they're working together." ¶331. Allowing the SLC now to ignore its premature judgment about the case and ask for a demand makes a mockery of the process.

E. THERE IS, AT THE LEAST, A REASONABLE DOUBT ABOUT THE INDEPENDENCE OF A MAJORITY OF THE SLC

Whether applying the stringent independence test for SLC members or the standard demand futility test, Plaintiff carries its burden by detailing why the SLC members' relationships with personally conflicted defendants undermine their willingness to bring suit. The Nevada Supreme Court held in *Shoen* that a director lacks independence when he "is unable to consider a demand on its merits, for directors' discretion must be free from the influence of other interested persons."[59] As discussed above, the independence analysis looks beyond merely financial considerations, as a sense of divided loyalties "can also flow out of 'personal or other relationships' to the interested party."[60] The nature of such relationship is more likely to affect independence in the SLC context. The law recognizes "the extraordinary importance and difficulty of" an SLC's responsibility, as "it is easier to say no to a friend, relative, colleague or boss who seeks assent for an act (*e.g.*, a transaction) that has not yet occurred than it would be to cause a corporation to sue that person."[61] Moreover, "[t]he difficulty of making this decision is compounded in the special litigation committee context because the weight of making the moral judgment necessarily falls on less than the full board. A small number of directors feels the moral gravity – and social powers – of this duty alone."[62]

A "directors' discretion" can be tainted in a variety of ways. Familial ties can show a lack of independence.[63] For example, in *Grace Bros., Ltd. v. Uniholding Corp.*, the court held that the

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[59] *Shoen,* 122 Nev. 621, 639, 137 P.3d 1171, 1183.
[60] *Oracle,* 824 A.2d at 938-39.
[61] *Oracle*, 824 A.2d at 940.
[62] *Id.*
[63] *Shoen*, 122 Nev. at 639 n.56, 137 P.3d at 1183; *See, e.g.*, *Mizel v. Connelly*, No. Civ.A. 16638, 1999 WL 550369, at *4 (Del. Ch. Aug. 2, 1999) (finding a director unable to consider a demand that would be adverse to his grandfathers' interests, stating "[a]s an objective matter, this relationship gives me ***'reason to doubt'*** that [the grandson] can impartially consider a demand." [emphasis added]); *Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, 889 (Del. Ch. 1999) (director that was the brother-in-law of the Chief Executive Officer ("CEO") could not

brother-in-law of an interested fiduciary lacked independence.[64] Similarly, in *London v. Tyrrell*, the Court held that an SLC member lacked independence because his wife was a distant cousin of one of the defendants.[65] The defendant and the SLC member's wife did not frequently associate with one another, and "they only occasionally cross[ed] paths at large family functions once or twice each year."[66] Defendants in *London*, like the SLC here, cited *Beam v. Stewart* to argue that the relationship at issue was not close enough to impair the SLC members' independence.[67] The court rejected that notion, explaining that "it will be nigh unto ***impossible*** for a corporation bearing the burden of proof to demonstrate that an SLC member is independent in the face of plaintiffs' allegation that the SLC member and a director defendant have a family relationship."[68]

Longstanding business and social relationships can also call into doubt the independence of directors (and SLC members).[69] In *London*, the defendant worked for a member of the SLC for six years, approximately a decade before the SLC's creation.[70] In that role, the defendant was "very helpful" in the SLC member's efforts to sell his company. After the sale of that company, the SLC member and the defendant "maintained minimal connections." Nevertheless, that business relationship may have, according to the court, "given rise to a sense of obligation or loyalty to [the defendant]." This possible sense of obligation or loyalty – or "owingness" – to the defendant was enough for the court to have a reasonable doubt about the SLC member's independence.[71]

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impartially consider a demand, stating "[t]hat Hudson also happens to be Huizenga's brother-in-law makes me incredulous about Hudson's impartiality"); *Chaffin v. GNI Grp., Inc.*, No. Civ.A. 16211-NC, 1999 WL 721569, at *5 (Del. Ch. Sept. 3, 1999) (holding father-son relationship was sufficient to rebut presumption of independence).

[64] *Uniholding Corp.*, 2000 WL 982401 at *10.

[65] *London*, 2010 WL 877528, at *14.

[66] *Id.* at *10.

[67] *Id.* at *14.

[68] *Id.* at *14 n. 60.

[69] *See also Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, 889 (Del. Ch. 1999) (finding reason to doubt director's independence where the director had a 30-year business relationship with the corporation's CEO, was a former subordinate of the CEO, had a history of investing alongside the CEO, and served on the board of a separate business controlled by the CEO); *Goldman v. Pogo.com, Inc.*, No. CIV A. 18532-NC, 2002 WL 1358760, at *3 (Del. Ch. June 14, 2002) (finding director was not independent where director had previously served on the boards of two companies involved with the firm at issue, and the firm had used him as a short-term high-ranking executive).

[70] 2010 WL 877528, at *15.

[71] *Id*; *see also In re INFOUSA S'holder Litig.*, 953 A.2d at 992-94 (Del. Ch. 2007) (finding two directors were not independent of the corporation's CEO and largest stockholder where the directors received rent-free office space

1. Brokaw Is Not Independent

There is reasonable doubt that Brokaw would sue the Ergens. The familial relationship between Brokaw and the Ergen family is even closer than the relationship at issue in *London* and the other cases cited above. Cantey Ergen is the godmother of Brokaw's son. ¶27. While the SLC member in *London*, and the in-laws in the *Huizenga* and *Grace Bros.* cases, were forced by marriage into family relationships with the defendant, Brokaw made the intensely personal and voluntary decision to ask the Ergens to become part of his family. ¶308. In *London*, it was enough that the Court could ***speculate*** that the SLC member may "have considered the potentially awkward situation of showing up to [the defendant's] annual party after the family rumor mill had spread the word that [the SLC member] had recommended that a lawsuit should proceed against the host."[72] At a minimum, Brokaw's selection of Cantey Ergen as his son's godmother creates a similar issue here, demonstrating his lack of independence.

Notably, the SLC does not dispute that Brokaw and the Ergens have a close relationship. Rather, the SLC disputes only that the Ergens would raise Brokaw's son if necessary. The fact that the Ergens may not raise Brokaw's sone does not undermine the fact that Brokaw has a close enough relationship with the Ergens to raise a doubt as to whether he would sue them on behalf of the Company (to whom he did not even owe any duties until he was asked to join the Board and the SLC itself).

The SLC tries to reframe the issue, arguing that friendship ***alone*** is insufficient to excuse a demand, relying on a case not dealing with an SLC.[73] The court in *Wynn* stated that long term friendship ***"alone"*** and ***"without more"*** is insufficient to raise a reasonable doubt that a director lacks independence.[74] As already explained, Brokaw and Cantey Ergen are not mere longtime

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from the corporation for their personal business use); *In re Freeport-McMoran Sulphur, Inc. S'holder Litig.*, No. Civ.A. 16729, 2005 WL 1653923, at *8-9 (Del. Ch. June 30, 2005) (concluding that director who also served as officer of numerous subsidiaries run by a corporation's chairman and CEO was not independent).

[72] 2010 WL 877528, at *14.

[73] SLC Br. at 24 (citing *La. Mun. Police Emps. Ret. Sys. v. Wynn*, No. 2:12-CV-509 JCM (GWF), 2014 WL 994616 (D. Nev. Mar. 13, 2014).

[74] *Id.* at * 6. *See also* Transcript of Oral Argument at 134-58, *In re Barnes & Noble S'holders Deriv. Litig.*, C.A. 4813-VCS (Del. Ch. Oct. 21, 2010) (denying motions to dismiss given inability to "rule out possibility that ties of personal friendship and long-standing business relationships influenced these directors to do something that strayed from what was best for the company and that they knew that"); *Harbor Fin. Partners v. Huizenga*, 751 A.2d 879,

friends. Brokaw selected Cantey Ergen to join his family by becoming godmother of his son. That relationship is "more" than just a longtime friendship between Brokaw and Cantey Ergen. There is, at least, a reasonable doubt about defendant Brokaw's independence.

2. Ortolf Is Not Independent

The connections between Ortolf and Charles Ergen are significant. Ortolf's relationship with Ergen goes back at least twenty-five years, to when Ortolf served as DISH's President and Chief Operating Officer from 1988 until 1991. ¶32. While no longer a DISH executive, Ortolf sits on the boards of two Ergen-controlled companies, DISH and EchoStar. *Id.* In these positions, Ortolf earns a substantial salary, almost $900,000 between 2011 and 2013 alone, while he has been a member of DISH's Board since 2005 and EchoStar's board since 2007. *Id.* Finally, despite his efforts to conceal this fact from the Court, one of Ortolf's children used to work at DISH and another child works there now, both at the whim of Charles Ergen.

In *California Public Employees' Retirement System v. Coulter*, the court held that a director lacked independence because: (i) he was friends with the self-dealing CEO; (ii) his son worked for the company; and (iii) he approved of the questioned transactions.[75] Here, there is, at a minimum, similar reason to believe that Ortolf may feel loyalty or a sense of owingness to the individual he has known for twenty-five years and worked intimately with, who is responsible for his children's jobs, and who is responsible for Ortolf's receiving hundreds of thousands of dollars in yearly compensation. And, of course, Ortolf approved the misconduct at issue here, including voting to disband the STC, allowing Ergen to condition DISH's LightSquared bid on receiving a personal release, and terminating DISH's bid for LightSquared. ¶¶298, 300-01. It is literally impossible for Ortolf to press claims against his fellow directors without directly implicating himself. Accordingly, there is ample reason to doubt Ortolf's independence.

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889 (Del. Ch. 1999) (longstanding pattern of advantageous business relations made it doubtful that director could impartially consider a demand adverse to CEO's interests).

[75] *California Public Employees' Retirement System v. Coulter*, No. Civ.A. 19191, 2002 WL 31888343, at *9 (Del. Ch. Dec. 18, 2002).

The SLC's cited cases in which ***a single fact*** about the director in question did not create a reasonable doubt about his independence (SLC Br. at 25), do not change the outcome.[76] Plaintiff alleges that all of Ortolf's ties collectively, not piecemeal, provide significant reasons to doubt his independence and, indeed, establish his lack of independence.[77]

3. Lillis is Not Independent

There is, at the least, reasonable doubt that Lillis would pursue the claims alleged here. Like Ortolf, Lillis has a long history with two interested fiduciaries, Defendants Vogel and Cullen. Like the director in *London* who had a sense of loyalty to the fiduciary who helped sell his company, Cullen helped Lillis sell his company, MediaOne. ¶31. Indeed, after Cullen helped Lillis sell his company, the two later together formed a private equity firm. ¶310. As explained above, Lillis's sense of "owingness" to Cullen also excuses making a demand.[78]

In addition to his ties to Cullen, Lillis has already shown that he will place the interests of Vogel ahead of his own. In 2003, While Vogel was the company's President and CEO, Lillis joined the board of directors at Charter Communications, Inc. *Id.* When the Charter board fired Vogel, Lillis resigned in protest. *Id.* Lillis was willing to give up significant yearly compensation simply to make a statement in support of his friend Vogel.

At a minimum, Lillis's unequivocal support of Vogel, coupled with his history of partnerships and loyalty to both Cullen and Vogel raises a reason to doubt his ability to consider a demand to sue Vogel on the merits.

The SLC relies on two Nevada District Court orders dismissing derivative claims in support of its argument that demand on the SLC is not be excused. In *Kim v. Murren*,[79] the court dismissed the complaint because – as opposed to here – there was no controlling shareholder, no conflicted transaction, no particularized allegations that a majority of directors lacked

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[76] *Citing Fosbre v. Matthews*, 2010 WL 2696615, at *15 (that directors are paid for their services as directors ... ***without more***..."); *In re Ltd. Inc.*, 2002 WL 537692, at * 5 (the receipt of director's fees from a subsidiary does not, ***in the absence of other facts***..."); *In re BHC Commc'ns S'holder Litig.*, 789 A.2d 1, 10 n. 18 ("***the only facts alleged*** to support this inference" was the directors prior employment); *In re J.P. Morgan Chase & Co., S'holder Litig.*, 906 A.2d 808, 823 (Del Ch. 2005)(director independent when the only allegation was that his son was an employee of the company).

[77] *Rosenbloom*, 2014 WL 42290625, at * 13.

[78] *In re Ltd. Inc.*, 2002 WL 537692 at *7.

[79] *Kim v. Murren*, No. A-09-599937-C (Nev. Dist. Ct. May 11, 2012) ("*MGM Mirage Derivative Litig.*").

independence, and no allegations that the board's decision-making process was deficient.[80] In *In re Las Vegas Sands Corp. Derivative Litigation*,[81] the court dismissed the complaint because, as opposed to here, the plaintiffs failed to allege that the controlling shareholder (or any other director) was interested in the transactions at issue, and the complaint's allegations showed a board that frequently engaged in "spirited debate" rather than one that rubber-stamped the controller's preferred decisions. Accordingly, neither case is applicable.

F. THE SLC MEMBERS FACE A SUBSTANTIAL RISK OF PERSONAL LIABILITY

Demand is also excused because the SLC's members face a substantial likelihood of liability for placing Ergen's interests ahead of DISH's, refusing to conduct a good-faith investigation, facilitating Ergen's breaches, and aligning themselves with Ergen's bad-faith conduct to DISH's detriment.[82] Even if the Court ignored the SLC members' ties to other defendants who are personally and financially interested in whether the claims in the SAC proceed, the SLC's conduct demonstrates its lack of independence and credibility.

Courts recognize that SLCs can be structurally biased against pursuing derivative litigation, and therefore carefully scrutinize the steps an SLC took after its formation. "The reality is ... special litigation committees created to evaluate the merits of certain litigation are appointed by the defendants to that litigation. It is not cynical to expect that such committees will tend to view derivative actions against the other directors with skepticism."[83] The SLC's actions leave no doubt that it prejudged this action and sees its role as protecting Ergen at all costs.

In *AIG Retirement Services, Inc. v. Barbizet*,[84] the court noted that one factor that can demonstrate a lack of independence is when a director makes decisions that are illogical, except that they benefit the dominating director. There, several directors rejected offers to settle litigation against the company at no cost.[85] The court determined that the directors had done so only out of "their allegiance [to the dominating director] and his interests," because "[i]t is hard

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[80] *Id.* at *6-10.
[81] *In re Las Vegas Sands Corp. Derivative Litigation*, No. A576669 (Nev. Dist. Ct. Nov. 4, 2009).
[82] *AMERCO*, 252 P.3d at 697; *Aronson*, 473 A.2d at 814.
[83] *Joy v. North*, 692 F.2d 880, 888 (2d Cir. 1982).
[84] *AIG Retirement Services, Inc. v. Barbizet*, C.A. No. 974-N, 2006 WL 1980337 (Del. Ch. July 11, 2006).
[85] *Id.* at *4.

to imagine why "a non-conflicted director would decline to settle litigation at no cost to the companies."[86]

The SLC's members breached their duty of loyalty when they placed the interests of Ergen over those of the Company, as in *Louisiana Municipal Police Employees' Retirement System v. Fertitta*.[87] In *Fertitta*, with full knowledge of the board, the company's CEO engaged in a creeping takeover of the company without paying a premium, yet the Board did nothing to stop him.[88] The court in *Fertitta* held that the board's knowing support of the CEO's interests over shareholders was a breach of their duty of loyalty.[89]

Here, as in *Fertitta*, the SLC's members knew that Ergen's interests diverged from DISH's. The SLC's only goal should have been ensuring that DISH acquired LightSquared's assets, despite Ergen's insistence on a release of LightSquared's claims against him personally, which LightSquared rejected. ¶¶232-35, 239-40. Despite these conflicts of interests, and this Court's admonitions, the SLC did nothing while Ergen's personal lawyers continued to represent LBAC in the bankruptcy proceedings, even as Ergen terminated the bid for LightSquared and gave up a vital opportunity. ¶¶240, 249-56. The SLC's members' facilitation of Ergen's breaches is itself in breach of their fiduciary duties of loyalty, just as in *Fertitta*. As a result, the SLC's members face a substantial likelihood of liability and demand is excused.[90]

The SLC's history of insisting upon Ergen's unfettered control over DISH's bidding for the spectrum is yet another reason to doubt their independence and excuse a demand. In *Kells-Murphy v. Miff*,[91] the majority shareholder, Miff, authorized a transaction that allowed him to appropriate considerable property owned by the nominal defendant for himself at the expense of

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[86] *Id.* at *5.

[87] *Louisiana Municipal Police Employees' Retirement System v. Fertitta*, C.A. No. 4339-VCL, 2009 WL 2263406, at *8 (Del. Ch. July 28, 2009).

[88] *Id.*

[89] *Id.*

[90] While demand futility is considered on a director by director basis, when allegations are common to all directors, "courts may evaluate demand futility by looking to the whole board of directors rather than by going one by one through its ranks." *Rosenbloom*, 2014 WL 4290625 , at * 18, n. 13; *See also ATR-Kim Eng Fin. Corp. v. Araneta*, CIV.A. 489-N, 2006 WL 3783520, at * 19 (Del. Ch. Dec. 21, 2006) *aff'd sub nom. Araneta v. Atr-Kim Fin. Corp.*, 930 A.2d 928 (Del. 2007) (outside directors held jointly liable for controlling fiduciary's breaches of fiduciary duty even though they neither "participated in, approved of, or directly profited from" the challenged transaction because, among other things, they entirely deferred to the controlling shareholder's wishes when dealing with the company.).

[91] C.A. No. 11009, 1991 WL 137143, at *2 (Del. Ch. July 12, 1991).

the company.[92] The plaintiffs claimed, and the court agreed, that demand was excused because the board had a history of subordinating the company's and minority shareholder interests to the majority shareholder.[93] The court held that this failure to control the dominating director excused the need for the plaintiff to make a demand.[94]

Here, Ortolf sat idly by while Ergen bullied and interfered with the STC's review to the point where it was ineffective. ¶¶119, 137-68. In addition, Ortolf was one of the directors who voted to disband the STC, despite such action contravening the STC resolution that Ortolf himself passed. ¶273. Therefore, not only did Ortolf not counter Ergen's dominance of the Company and Board, but by disbanding the STC, Ortolf attempted to remove one of the few checks on Ergen's power. Accordingly, there is ample reason to doubt Ortolf's independence from Ergen, just like in *Kells-Murphy, Fertitta*, and *Hampshire Group*. Indeed, because of Ortolf's central role in the Board's breaches giving rise to this case, there is literally no way he can pursue claims against his fellow board members without implicating himself.

Once created, the SLC spent more time impeding Plaintiff's efforts instead of taking control of DISH's bid for LightSquared. The SLC allowed Ergen to control the bidding for LightSquared and pull the Company's bid after LightSquared refused to release its claims against Ergen personally. ¶¶242, 301. Brokaw was actually at the Bankruptcy Court's hearing while Ergen's personal lawyers spoke on behalf of DISH and pulled the bid. ¶¶18, 334. As a result. DISH lost the opportunity to purchase an asset worth over $7 billion to the Company for less than a third of that price. ¶14. As in *AIG*, the SLC's willingness to put the Company's health at risk for Ergen's gain demonstrates that it lacks independence, and it will not pursue these claims because it faces a substantial likelihood of liability for disloyalty.

In sum, the business judgment rule does not save the SLC here. In *Fertitta*, company when the CEO was having trouble closing the deal, the company terminated the merger

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[92] *Id.* at *1.
[93] *Id.* at *2.
[94] *See also Hampshire Group, Ltd. v. Kutner*, 2010 WL 2739995, at *12 (Del. Ch. Jul. 12, 2010) (explaining that "directors violate their duty of loyalty when, for any reason, they in bad faith place any other interest above that the of the corporation's best interest", including by "facilitating wrongful action by [a conflicted officer-director] ....") (*citing In re RJR Nabisco, Inc., S'holders Litig.*, 1989 WL 7036 at *14-15 (Del. Ch. Jan. 31, 1989)).

agreement, which saved the CEO from having to pay a $15 million termination fee.[95] While the Board had a pretextual reason for cancelling the merger agreement instead of forcing the CEO to cancel it, the Court held that plaintiff's allegation "raises a question whether the board's decision ... constituted a rational exercise of business judgment" and that any weighing of the different theories would have to wait until a later procedural phase.[96] Accordingly, the Court held that demand was excused.[97]

The bid termination here is a similarly egregious action that raises reasonable doubts about the SLC's decisions. The bid termination cost DISH an asset worth billions of dollars to the Company. Further, the SLC's argument ignores the Complaint's well-pleaded allegations that threatening and then pulling DISH's bid was Ergen's way of gaining additional leverage in the bankruptcy proceedings so that he could receive full payment on his debt and try to force LightSquared to release its claims against him. ¶¶229, 232, 234-37, 241. Ergen was at least partially successful. The new bankruptcy agreed-upon plan guarantees that Ergen will be paid in full on his personal debt purchase, resulting in a $150 million-plus profit for him while SPSO gets to invest an addition $300 million in LightSquared. ¶262. Because the SLC's members face a substantial likelihood of liability and there is a reason to doubt the SLC's decision to terminate the LightSquared bid was an exercise of its valid business judgment, demand is excused.

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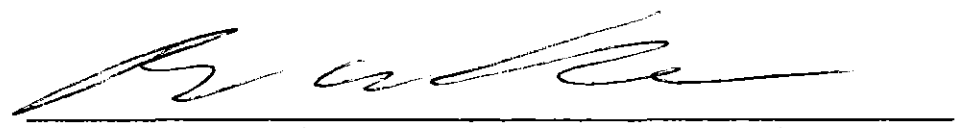
[95] *Fertitta*, 2009 WL 2263406, at * 5.
[96] *Id.* at *8.
[97] *Id.* at *9.

IV. CONCLUSION

Accordingly, and based upon the foregoing, Plaintiffs respectfully request that the Motion to Dismiss be denied in its entirety, and the SLC's report be rejected from the outset.

Dated this 19th day of September, 2014.

HOLLEY, DRIGGS, WALCH, PUZEY &THOMPSON



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that the foregoing **PLAINTIFF'S OPPOSITION TO THE SLC'S MOTION TO DISMISS FOR FAILURE TO PLEAD DEMAND FUTILITY** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 19th day of September, 2014. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:

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DISTRICT COURT

CLARK COUNTY, NEVADA

JACKSONVILLE POLICE AND FIRE PENSION FUND, derivatively on behalf of nominal defendant DISH NETWORK CORPORATION,

Plaintiff,

v.

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

Defendants.

DISH NETWORK CORPORATION, a Nevada corporation,

Nominal Defendant.

CASE NO.: A-13-686775-B
DEPT NO.: XI

REPLY IN FURTHER SUPPORT OF DIRECTOR DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

DATE OF HEARING: October 28, 2014

TIME OF HEARING: 8:30 A.M.

Defendants James DeFranco, David K. Moskowitz, and Carl E. Vogel (collectively, the "Director Defendants"), through undersigned counsel hereby submit their Reply in further support of their Motion to Dismiss the Verified Second Amended Shareholder Derivative Complaint ("Second Amended Complaint" or "SAC").

PRELIMINARY STATEMENT

It is telling that only ten pages of Plaintiff's 47-page opposition (the "Opposition" or "Opp.") are devoted to Plaintiff's duty of loyalty claims against the Director Defendants. With nothing of substance to say about the merits of its allegations against the Director Defendants, Plaintiff instead simply repeats the insufficient allegations of the Second Amended Complaint, and declares that they amount to a viable cause of action. This is not so. Plaintiff acknowledges that it challenges just three decisions by the Director Defendants during the course of the Board's consideration of DISH's bid for LightSquared's spectrum assets – (a) the termination of the DISH Special Transaction Committee (the "Special Committee"), (b) the failure "to intervene" and prevent DISH's termination of its LightSquared bid, and (c) the creation of the Special Litigation Committee (the "Litigation Committee") to investigate Plaintiff's allegations. Not one of these assertions can support a breach of fiduciary duty claim against any Director Defendant.

To survive dismissal, Plaintiff must meet a heavy pleading burden. Under Nevada law, the business judgment rule establishes a strong presumption that the actions of the directors of a Nevada corporation are in good faith and in compliance with their fiduciary duties to the corporation. NRS 78.138(3). Plaintiff must adequately plead not only that the challenged conduct by each Director Defendant "constituted a breach of his or her fiduciary duties as a director or officer," but also that "[t]he breach of those duties involved intentional misconduct, fraud or a knowing violation of law." NRS 78.138(7). Notably, nowhere in the Opposition does Plaintiff even mention NRS 78.138(7), and for good reason. The Second Amended Complaint does not remotely plead any intentional misconduct that could establish a cognizable cause of action for money damages under NRS 78.138(7). The claims against the Director Defendants must be dismissed.

Plaintiff has not pled the sort of financial or fiduciary self-interest on the part of any

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director that might form the predicate of a viable duty of loyalty claim under NRS 78.140. Plaintiff's argument that compliance with NRS 78.140 does not insulate a board decision from challenge misses the point. While compliance with NRS 78.140 does not preclude challenges to other aspects of a board decision, it does prevent a claim like Plaintiff alleges here that is premised only on the idea that the Director Defendants breached a duty of loyalty because they lacked independence. In any event, Plaintiff does not remotely plead facts establishing any conflict of interest on the part of any Director Defendant under any standard.

Moreover, Plaintiff has not alleged any injury or damage tied to the only claims alleged against the Director Defendants. Plaintiff does not even contend that any decision to form or terminate some board committee caused DISH any monetary harm, nor could it. And, Plaintiff does not suggest anything that any Director Defendant said or did to cause DISH to lose some opportunity to purchase the LightSquared assets, which remain available for potential purchase in LightSquared's bankruptcy, though no takers have surfaced for the assets Plaintiff which believes are worth in excess of $7 billion but could be bought for a fraction of that price.

Finally, Plaintiff pleads no facts to rebut the business judgment presumption in respect of any challenged act by any Director Defendant. Indeed, Plaintiff offers no rationale whatsoever to challenge the fact that each Director Defendants' personal interests are aligned with the stockholders' interests or that the DISH Board's creation or termination of Board committees was a valid exercise of its business judgment. And Plaintiff offers nothing more than utter speculation to improperly seek to second-guess the DISH's Board's business judgment in declining to pursue a potential, though risky and uncertain, purchase of LightSquared's spectrum assets to, among other reasons, pursue other opportunities.

I. PLAINTIFF AGAIN FAILS TO PLEAD A VIABLE DUTY OF LOYALTY CLAIM

A. Plaintiff Has Not Alleged the Financial Self-Interest Required to Allege a Duty of Loyalty Claim under Nevada Law.

Plaintiff's entire claim against the Director Defendants rests on Plaintiff's insistence that the Director Defendants harbored some personal allegiance toward Mr. Ergen that compromised their independence and caused DISH not to acquire LightSquared's assets. Yet, Plaintiff argues

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that NRS 78.140 does not apply because "[n]o one is even seeking to void a transaction between DISH and Ergen here." (Opp. 38.) This misses the point. Plaintiff claims that the Director Defendants formed and/or terminated two board committees, and terminated DISH's bid to acquire LightSquared's assets, out of allegiance to Mr. Ergen and thus in bad faith.[1]

NRS 78.140 sets forth a statutory safe harbor for board decision-making in the context of allegedly interested transactions. It defines the sort of transactions that create a disabling interest, and provides that the board's decision is valid if made in compliance with the statute. NRS 78.140 provides that the only interests that compromise a director's ability to act are overlapping fiduciary or financial interests in the transaction at issue. Here, there is no dispute that the Director Defendants lacked the conflicting financial self-interest of the sort that raises duty of loyalty concerns under Nevada law, and the challenged Board decisions were in any event made in compliance with NRS 78.140 because the decisions were made with the support of admittedly independent directors. Thus, the breach of fiduciary duty claims fail.

Plaintiff's contention that NRS 78.140 does not insulate a transaction from judicial scrutiny is beside the point. NRS 78.140 sets forth the terms and conditions by which a transaction between a Nevada corporation and an interested fiduciary can be approved and implemented despite the presence of conflicted directors. Compliance with the statute eliminates any duty of loyalty claim that is based on the director conflict – the only basis for any claim against the Director Defendants here. Whether any such board action might be challenged as a breach of some duty of care or on some other theory is irrelevant.

Plaintiff seeks to avoid the plain meaning of NRS 78.140 by arguing that this Court already rejected this reading of the statute in a colloquy during the November 25, 2013

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[1] Plaintiff cites to Mitchell v. Bailey and Selover, Inc., 96 Nev. 147, 605 P.2d 1138 (1950) (Opp. 39 n.62), to support its assertion that whether a director's consideration of a transaction was done in "good faith" is a question of fact that should not be decided on a motion to dismiss. The case is wholly inapposite. Mitchell does not consider "good faith" in a context like that at issue here, where there is a presumption under Nevada law (a presumption Plaintiff bears the burden of rebutting) that directors act "in good faith, on an informed basis and with a view toward the interests of the corporation." NRS 78.138(3). Rather, in Mitchell, the court considered, on an appeal of a grant of summary judgment, whether a company's compliance with the UCC's requirement to carry out its contractual duties in "good faith" was an issue of material fact that rendered summary judgment inappropriate. 96 Nev. at 150, 605 P.2d at 1139.

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preliminary injunction hearing before this Court. (Opp. 39.) Not so. What the transcript actually illustrates is that, even if one were to accept Plaintiff's position that the Board conduct that Plaintiff challenges here is outside the scope of NRS 78.140, Plaintiff still must contend with – and rebut – the presumption under Nevada law that directors act "in good faith, on an informed basis and with a view toward the interests of the corporation." NRS 78.138(3). See Transcript of November 25, 2013 Hearing at 145:2-19. Plaintiff has not done neither here. See Section II, infra.

B. Plaintiff Has Not Alleged that the Director Defendants Lack Independence.

Plaintiff in any event fails to allege any facts that might rebut the strong presumption of independence that applies to the Director Defendants under Nevada law. "The business judgment rule postulates that if directors' actions can arguably be taken to have been done for the benefit of the corporation, then the directors are presumed to have been exercising their sound business judgment rather than to have been responding to self-interest motivation." Horwitz v. Sw. Forest Indus., Inc., 604 F. Supp. 1130, 1135 (D. Nev. 1985). In the Opposition, Plaintiff attempts to evade the business judgment rule by repeating its conclusory allegations that the Director Defendants lack independence. (Opp. 40.) But regurgitating its deficient pleading does nothing to impugn the independence of the Director Defendants. Instead, Plaintiff categorically dismisses the Director Defendants' independence as "nonsense" (id.) and relies on allegations about the professional and personal relationships of the Director Defendants that fail as a matter of law to compromise their independence.[2]

Plaintiff repeats that Mr. DeFranco lacks independence because he "is Ergen's close friend of decades and co-founder of DISH" (Opp. 40), that Mr. Moskowitz lacks independence because he "is Ergen's consigliere and the trustee of trusts set up for his children" (id.), and that

[2] Plaintiff misrepresents the Delaware cases it cites to support its statement that director independence is "not appropriate for resolution at this stage." (Opp. 38.) Plaintiff cites London v. Tyrrell, 2010 WL 877528, at *12 (Del. Ch. Mar. 11, 2010), for the proposition that "factual disputes about director independence preclude dismissal on motion to dismiss." (Opp. 38.) In fact, due to a procedural "curiosity," the court in Tyrrell "treated [a special litigation committee's] motion [to dismiss] in a manner akin to a Rule 56 motion for summary judgment." 2010 WL 877528, at *12. The other case Plaintiff cites, Krasner v. Moffett, 826 A.2d 277 (Del. 2003), is similarly irrelevant. The Delaware court simply concluded that, because a majority of the directors were on both sides of the transaction, whether the recommendation of the transaction by two disinterested directors cured that conflict raised issues of fact. Id. at 285-86.

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Mr. Vogel has held "high-paid executive positions at DISH and EchoStar." (Id.) These allegations are entirely insufficient to overcome the presumption of independence or to "demonstrate why the relationship creates a reasonable doubt as to the director's disinterestedness." Shoen v. SAC Holding Corp., 122 Nev. 621, 639 n.56, 137 P.3d 1171, 1183 n.56 (2006) (emphasis added). The Directors Defendants' longstanding business and financial ties to DISH demonstrate nothing more than that their interests are aligned with those of DISH. Indeed, particularly in light of Mr. DeFranco's ownership of over 4.5 million shares of DISH stock, Mr. Moskowitz's ownership of over 944,000 shares of DISH stock, and Mr. Vogel's ownership of over 350,000 shares of DISH stock (collectively worth over nearly $400 million), the Director Defendants' financial interests are closely aligned with DISH.[3] "[W]here a director is beholden to the company there is no reason to doubt her loyalty to that company. Her interests are aligned with the company." In re Dow Chem. Co. Derivative Litig., No. 4349-CC, 2010 WL 66769, at *8 (Del. Ch. Jan. 11, 2010). And similarly, the fact that Mr. Moskowitz serves as trustee for trusts established for Mr. Ergen's children casts no doubt on Mr. Moskowitz's ability to serve independently. See Beam ex. rel. Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1051 (Del. 2004) ("such affinities" like "collegial relationships among the board of directors" are insufficient).[4]

C. Plaintiff Has Pled No Cognizable Injury or Damages.

Plaintiff insists that it has sufficiently pled damages because it is not required to specify a

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[3] This alignment of interests is consistent with the fact that, under the leadership of all the directors, DISH stock price has increased from $45.64 on the day this action commenced to over $63 per share on the date of this filing. Plaintiff ignores this over 30% increase in the value of its own DISH stock in the Opposition.

[4] Plaintiff misrepresents entirely the unpublished Delaware decision in In re Barnes & Noble Stockholders Derivative Litig., No. 4813-VCS (Del. Ch. Oct. 21, 2010), as support for its claim that the Director Defendants are not independent. In Barnes & Noble, then-Chancellor Strine stated:

> I don't want this cited back to me that Strine held that you're necessarily not an independent director [as a result of personal or business relationships]. What Strine held here is, in a very unusual situation, with a bunch of particularized facts pled, including business circumstances that bear explanation on a fuller record, that I'm not prepared to rule out the possibility that ties of personal friendship and long-standing business relationships influenced these directors to do something that strayed from what was best for the company and that they knew that.

Id. at 157:22-158:8.

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damages amount. (Opp. 46.) This misses the point entirely. A breach of fiduciary duty claim requires a plaintiff to plead both injury and damages. See Stalk v. Mushkin, 125 Nev. 21, 28, 199 P.3d 838, 843 (2009) ("a breach of fiduciary duty claim seeks damages for injuries that result from the tortious conduct of one who owes a duty to another by virtue of the fiduciary relationship"). Whether or not the Second Amended Complaint alleges with sufficient precision the amount of any damages, Plaintiff has failed to plead the existence of any cognizable injury or damage. "[T]o be entitled to compensatory damages, plaintiffs must show that the injuries suffered are not speculative or uncertain." LaPoint v. AmerisourceBergen Corp., No. 327-CC, 2007 WL 2565709, at *9 (Del. Ch. Sept. 4, 2007).

Plaintiff argues that DISH was "damaged" because (a) Mr. Ergen "stands to profit" from his LightSquared debt purchases (purchases Plaintiff contends Mr. Ergen "wrongly denied DISH") (Opp. 46); (b) DISH "missed [an] opportunity to purchase [LightSquared's] assets (id.); and (c) Mr. Ergen "caused multiple litigations against DISH." (Id.) Plainly, none of these assertions have anything at all to do with two of the three claims against the Director Defendants, which relate only to the formation of the two Board committees, and the termination of the Special Committee. None of those actions caused DISH any harm, and Plaintiff nowhere alleges or argues otherwise.

Further, Plaintiff's allegation that the Director Defendants caused DISH to "miss" an opportunity to acquire LightSquared's assets is wholly speculative. DISH's bid to acquire LightSquared's spectrum assets was highly conditional and far from certain, and it was vigorously opposed by LightSquared, its owners, other constituents, and in all events was subject to higher bids and uncertain Bankruptcy Court approval. Plaintiff has not and cannot allege any non-speculative harm from some abandoned proposal to acquire LightSquared assets, which were themselves of uncertain value. In re LightSquared Inc., 513 B.R. 56, 98 (Bankr. S.D.N.Y. 2014) ("But as long as the regulatory hurdles that exist remain unresolved, it is impossible to conclude by a preponderance of the evidence, that [LightSquared's] valuation and projections are sufficiently reliable to support – indubitably – the valuation on which SPSO's treatment under the plan is premised.") In any event, no such "opportunity" was "missed" — LightSquared's

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bankruptcy remains pending, with no interested bidders in its assets. "[P]laintiff[] must show that the injuries suffered are not speculative." LaPoint, 2007 WL 2565709, at *9.

Finally, Plaintiff continues to misrepresent Mr. Ergen's investment in LightSquared debt as a "corporate opportunity" that belonged to DISH and that Mr. Ergen usurped. (Opp. 47.) The purchase of LightSquared debt was not a corporate opportunity for DISH. DISH's charter, in compliance with Nevada law, provides that a director is under no duty to refer business opportunities to DISH unless certain conditions are met, including that DISH previously had expressed a specific interest in acquiring the opportunity, as reflected in the minutes of the Board, and that the opportunity was available to DISH or a controlled Subsidiary. (See Aug. 29, 2014 Rugg. Decl. Ex. B at A-6, ¶ 3.) Plaintiff does not allege that DISH ever previously expressed an interest in acquiring LightSquared debt and admits that, at best, only an affiliate, uncontrolled by DISH, could have purchased the LightSquared debt.[5] By any measure, supposed "opportunities" that might exist to a minority-owned affiliate of DISH are not a corporate opportunity for DISH.

Moreover, the Bankruptcy Court's finding with respect to Mr. Ergen's acquisition of LightSquared's distressed debt sinks Plaintiff's claim that the acquisition was a corporate opportunity for DISH. The Bankruptcy Court

> conclude[d] that the conduct of Mr. Ergen and SPSO, undertaken on behalf of or for the benefit of DISH, was an end-run around the Eligible Assignee provisions of the Credit Agreement that breached the implied covenant of good faith and fair dealing arising under the Credit Agreement. Simply put, that which a corporation is contractually unable to accomplish itself in its own name cannot be accomplished by interposing a shell company.

In re LightSquared Inc., 511 B.R. 253, 333 (Bankr. S.D.N.Y. 2014) (internal citation omitted). Thus, as the Bankruptcy Court found, DISH was contractually unable to purchase LightSquared's distressed debt, through an affiliate or otherwise. The acquisition of LightSquared's distressed debt simply was not a corporate opportunity for DISH.[6]

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[5] Plaintiff's focus on the contract dates for Mr. Ergen's purchases through SPSO is also mistaken. None of SPSO's purchases were completed and closed prior to DISH being listed as an excluded purchaser in the Credit Agreement. (SAC ¶¶ 83, 90.)

[6] Plaintiff's assertion in a footnote that the Director Defendants are, as a matter of Nevada law, "collaterally estopped from seeking now to re-litigate" issues litigated during the bankruptcy proceedings (Opp. 5 n.9) is wrong. "To determine the preclusive effect of a federal decision, we apply federal law."

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II. THE CHALLENGED BOARD ACTIONS ARE PROTECTED BY THE BUSINESS JUDGMENT RULE AND PLAINTIFF AGAIN FAILS TO ALLEGE AN EXCEPTION TO THE RULE

Plaintiff is required to plead sufficient facts to establish an exception to the business judgment rule's strong presumption that directors "are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation." NRS 78.138(3). Plaintiff may do so only by sufficiently alleging with respect to each Director Defendant that "(a) [his] act or failure to act constituted a breach of [his] fiduciary duties as a director" and "(b) [the] breach of those duties involved intentional misconduct, fraud or a knowing violation of law." NRS 78.138(7). Plaintiff nowhere even argues that it has pled any claim in compliance with NRS 78.138(7).

A. The Director Defendants Exercised Their Business Judgment to Determine Compensation and Indemnification for the Special Committee and to Discontinue the Special Committee When It Was No Longer Necessary.

Neither the Director Defendants' consideration of appropriate compensation and indemnification for the Special Committee, nor the Director Defendants' decision to discontinue the Special Committee when it was deemed no longer necessary, constituted any breach of the Director Defendants' duty of loyalty. Plaintiff insists that it can turn these decisions into acts of

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Bower v. *Harrah's Laughlin, Inc.*, 125 Nev. 470, 482, 215 P.3d 709, 718 (2009). Collateral estoppel does not apply at all because, contrary to Plaintiff's mischaracterization, the Bankruptcy Court proceedings are ongoing, no final judgment has been entered, and no appeals have been exhausted. See, e.g., Arizona v. California, 530 U.S. 392, 414, 120 S. Ct. 2304, 2319 (2000) ("It is the general rule that issue preclusion attaches only when an issue of fact or law is actually litigated and determined by a valid and final judgment") (internal quotation marks omitted). Further, under federal law, non-parties, like the Director Defendants here, are subject to issue preclusion only in limited circumstances, such as when (i) the non-party agrees to be bound by the other action; (ii) the non-party has a "substantive legal relationship" to a party to the judgment, like "succeeding owners of property, bailee and bailor, and assignee and assignor"; (iii) the non-party was adequately represented by a party to the judgment, such as class action plaintiffs; (iv) the non-party "'assume[d] control over the litigation in which that judgment was rendered'"; (v) the non-party is merely the proxy or agent for the party already bound; or (vi) statutes prohibit further litigation by non-parties. Taylor v. Sturgell, 553 U.S. 880, 893-95, 128 S. Ct. 2161, 2172-73 (2008). The Opposition ignores federal law on this point and Plaintiff offers no argument to suggest that any of those circumstances are present here. In any event, Plaintiff may not pick and choose among the findings of the Bankruptcy Court that are binding or persuasive here, and the Bankruptcy Court's finding with respect to the acquisition of LightSquared debt refutes completely Plaintiff's argument that the Director Defendants acted disloyally, or that Mr. Ergen usurped a DISH "corporate opportunity" when he acquired LightSquared debt, which the Bankruptcy Court ruled expressly was done in whole or part for DISH's benefit.

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disloyalty by substituting its judgment for that of the Board and then concluding that these decisions were wrong. Not so.

Plaintiff cannot derive a duty of loyalty claim from the fact that the Board deliberated over whether to provide additional compensation and indemnification to members of the Special Committee and reached different conclusions than Plaintiff believes the Board should have reached. (Opp. 41.) The Board concluded that additional compensation for members of the Special Committee was warranted. It is simply irrelevant that the additional compensation was paid to members of the Special Committee later than Plaintiff believes it should have been paid. (Id.) In fact, Mr. Goodbarn, who Plaintiff identifies as "one of only two independent directors" of DISH (SAC ¶ 40), testified that issues related to compensation and indemnification for members of the Special Committee did not affect the Committee's ability to reach an independent judgment. (See Plaintiff's Supplement to Motion for Preliminary Injunction, dated Nov. 13, 2013, at Ex. 2, Tr. of Mr. Goodbarn, at 234:22-235:3, on file herein.)

Plaintiff also does not allege a breach of the duty of loyalty by asserting that the Board's decision to discontinue the Special Committee once it was deemed no longer necessary was improper. Plaintiff contends that the "only plausible inference" from this Board decision is that it was "intended to give Ergen free reign over DISH's bid while protecting him from the [Special Committee's] inquiries into his debt purchases." (Opp. 42.) This is non-sensical, since the same Board formed a Committee to investigate those debt purchases.

The Board created the Special Committee to consider a DISH bid for LightSquared's spectrum assets. It was within the Board's business discretion to terminate the same committee when the Board determined it was no longer necessary. The resolution creating the Special Committee authorized the Board to terminate the Committee when the Board deemed such termination appropriate.[7] Even if in Plaintiff's view, the Board's decision to terminate the Special

[7] Plaintiff is wrong when it states that the Director Defendants improperly cite to Board meeting minutes for the "truth" of the assertions therein. Relevant here is that the Board minutes reflect that the Board considered the scope and duration of the Special Committee's work. Moreover, these Board minutes provide a more complete rendition of the facts that Plaintiff represents with its incorporation by reference into the SAC the May 8, 2013 Board resolution that created the Special Committee. (SAC ¶ 176.) See, e.g., Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001) ("The court need not,

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Committee was a bad one, "even a bad decision is generally protected by the business judgment rule's presumption that the directors acted in good faith." Shoen, 122 Nev. at 636, 137 P.3d at 1181.

B. The Director Defendants Validly Appointed a Special Litigation Committee to Investigate Plaintiff's Claims.

Plaintiff contends that the Director Defendants breached their duty of loyalty by voluntarily appointing the Litigation Committee to investigate Plaintiff's claims. This is puzzling. The Director Defendants were under no duty to appoint the Litigation Committee; in the exercise of their business discretion and in an act of good governance, they elected to do so.[8]

Plaintiff's assertion that "[t]he Board knew it was creating a committee that would do Ergen's bidding" (Opp. 43) is not a factual allegation that the Director Defendants' appointment of the Litigation Committee constituted intentional misconduct. Rather than pleading some intentional misconduct, Plaintiff merely recycles allegations that the members of the Litigation Committee were unfit to serve on that committee because one member, George Brokaw, had asked Cantey Ergen to serve as his child's godmother, and the other, Tom Ortolf, had children who worked at DISH. (Id.) These bare allegations are insufficient even to impugn the independence of the Litigation Committee members. See Shoen, 122 Nev. at 639 n.56, 137 P.3d at 1183 n.56 ("to show partiality based on familial relations, the particularized pleadings must demonstrate why the relationship creates a reasonable doubt as to the director's disinterestedness"). But the allegations are entirely irrelevant to the only relevant question: Whether the Director Defendants intentionally breached some duty of loyalty by creating a

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however, accept as true allegations that contradict matters properly subject to judicial notice or by exhibit.").

[8] Plaintiff contends that it is irrelevant whether the Director Defendants were under a duty to appoint a special litigation committee because "[o]nce directors decide to exercise their powers, they must do so in good faith and with a view to the interests of the corporation . . . regardless whether they had a duty to exercise their powers in the first instance." (Opp. 43 (internal quotation marks omitted).) In so doing, Plaintiff relies on another Delaware decision, Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006). The Stone decision addresses a Board's potential liability under Delaware law for failing to prevent mismanagement in breach of a duty of care, which has nothing to do with whether Plaintiff has pled an intentional breach of a duty of loyalty under Nevada law.

committee that Plaintiff deems insufficiently independent. Plaintiff elsewhere in this action seeks relief in the unlikely event that this Court calls into question the independence of the Litigation Committee or the completeness of its investigation. Plaintiff may not preordain that process by challenging the appointment of a Board committee in compliance with Nevada law as some breach of duty.

C. The Director Defendants Exercised Their Business Judgment When Deciding Whether to Pursue DISH's Bid for LightSquared's Spectrum Assets.

In a last-ditch attempt to derive some duty of loyalty claim from the allegations in the SAC, Plaintiff repeats its assertion that "the Board breached its fiduciary duty by refusing to intervene when Ergen threatened to withdraw DISH's bid to protect his personal interests." (Opp. 44.) This allegation is based entirely on Plaintiff's wholesale speculation about why the Board decided not to pursue a DISH bid for LightSquared's spectrum assets and its illogical assertion that the Board caused DISH to pull its bid for LightSquared's assets to serve Mr. Ergen's personal interests. In fact, the withdrawal of DISH's bid for LightSquared's assets did just the opposite, eliminating a several hundred million dollar profit that Mr. Ergen otherwise would have received on his LightSquared debt investment and leaving Mr. Ergen's investment in serious risk of substantial losses. Of course, Plaintiff's original complaint was that DISH was bidding on the LightSquared assets to guarantee Mr. Ergen a profit on the LightSquared debt – i.e., the opposite of what it now alleges. Plaintiff cannot have it both ways.

Plaintiff cannot establish a duty of loyalty claim by second-guessing the Board's business decisions, but it does just that when it concludes that the Board "intentionally abdicated [its] fundamental duty and obligation to protect DISH" (id.) when the Board decided not to pursue DISH's bid for LightSquared's spectrum assets. Plaintiff has apparently convinced itself that by deciding to withdraw DISH's bid for LightSquared's spectrum assets, the Board failed to protect DISH from "harm reasonably perceived." (Id.) Plaintiff's conclusion is belied by facts. It is no secret that LightSquared's L-Band downlink spectrum assets were plagued by GPS interference issues, and additional issues had surfaced that raised serious questions as to whether or to what extent LightSquared's spectrum would be useable at all. Just as any potential purchaser would be

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required to do, the Board had to consider whether an investment in LightSquared's spectrum assets would be viable in spite of these issues. While Plaintiff may disagree with the Board's ultimate decision not to pursue LightSquared's spectrum assets, this disagreement is not a valid basis for a breach of fiduciary duty claim. See Shoen, 122 Nev. at 636, 137 P.3d at 1181 ("even a bad decision is generally protected by the business judgment rule's presumption that the directors acted in good faith").

Nor can Plaintiff establish a duty of loyalty claim with its oft-repeated and demonstrably false refrain that the Board allowed Mr. Ergen to condition DISH's bid for LightSquared's assets on the allowance of SPSO's debt claims. (Opp. 44-45.) Plaintiff contends that the Board members breached some duty by proxy when DISH's litigation counsel supposedly "did nothing," "did not object," and "did not intervene" at oral arguments during the LightSquared bankruptcy proceedings on this subject. (Opp. 44; see also id. at 45.) These assertions plead no act or omission by any Director Defendant, much less some knowing and intentional breach of duty.[9]

In any event, the record upon which Plaintiff relies entirely contradicts these false assertions. At the outset, this claim is bizarre, since all agree that the DISH Board terminated that bid, and thus did not "allow" any bid to be conditioned on anything. Moreover, even after the falsity of the underlying assertion was pointed out in the Director Defendants' Motion to Dismiss, Plaintiff persists in pursuing it, including by misrepresenting the same Bankruptcy Court transcript, which says exactly the opposite. The DISH bid was never "conditioned" on the allowance of Mr. Ergen's claims. The transcript Plaintiff cites for this proposition made that abundantly clear: "What I heard Your Honor to say today was you infer something from the fact that LBAC was drafting to get the affirmative allowance of SPSO's claims. That is not what the release says." (Rugg Decl. Ex. A, at 135:24-136:1.) Yet, Plaintiff persists in pursuing this theory despite having no support for it.

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[9] Plaintiff cites to *La. Mun. Police Emps.' Ret. Sys.* v. Fertitta, No. 4339-VCL, 2009 WL 2263406, at *7 (Del. Ch. July 28, 2009), and states that "[t]he Board's silence here is like the 'inexplicable impotence' of the supposedly independent directors of Landry's in the face of their dominating shareholder's improper assertion of control." (Opp. 45.) The facts in Fertitta are readily distinguishable from those here. At issue in Fertitta was the Landry's Board's consideration of a cash-out merger between Landry's and an entity controlled by its Chairman and CEO.

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Plaintiff again resorts to surmise and the substitution of its own interpretation of Board decisions for factual allegations when it says that "[t]he suggestion that the DISH bid was terminated in order to pursue the government auction of different spectrum is also false." (Opp. 45-46.) After withdrawing its bid for LightSquared's spectrum assets, DISH instead pursued the acquisition of wireless spectrum assets through a government auction. Whether to acquire wireless spectrum through LightSquared, a government auction, or at all was a decision for the Board to make. Plaintiff's second-guessing of the Board's decision is insufficient to rebut the business judgment rule's presumption that the directors acted in good faith.

CONCLUSION

For the foregoing reasons, as well as those stated in the Director Defendants' Motion to Dismiss, Plaintiff has failed to state a claim upon which relief could be granted. The Second Amended Complaint should be dismissed with prejudice as against the Director Defendants.

DATED this 2nd day of October, 2014

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By: /s/ Jeffrey S. Rugg

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on the 2nd day of October, 2014, the foregoing **REPLY IN FURTHER SUPPORT OF DIRECTOR DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT** was served via the Court's mandatory electronic filing system to the following:

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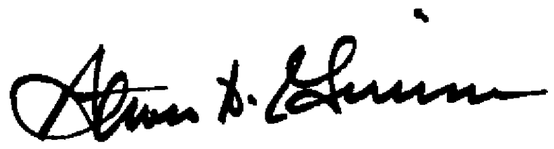

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DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE DISH NETWORK CORPORATION DERIVATIVE LITIGATION	Case No. A-13-686775-B Dept. No. XI

SLC'S REPLY IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO PLEAD DEMAND FUTILITY

The Special Litigation Committee (the "SLC"), on behalf of DISH Network Corporation ("DISH"), respectfully submits its Reply in support of its Motion to Dismiss the Verified Second Amended Shareholder Derivative Complaint for failure to plead a legally sufficient excuse for the plaintiff's failure to make a pre-suit demand on the SLC.

This Reply is supported by the following Memorandum of Points and Authorities, the papers and pleadings on file herein, and any oral argument the Court may allow.

DATED this 2nd day of October, 2014

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REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE SLC'S MOTION TO DISMISS FOR FAILURE TO PLEAD DEMAND FUTILITY

I.

PRELIMINARY STATEMENT[1]

In its motion, the SLC established that, before the Second Amended Complaint was filed, the DISH board had delegated to the SLC its authority to consider a demand. If the plaintiff had made a demand for claims asserted in the Second Amended Complaint, the SLC therefore would have been the party to consider the demand. For this reason, demand could

[1] This reply cites to the SLC's motion as (Mot. __) and to the plaintiff's opposition brief as (Opp. __). All other defined terms used herein have the same meaning that was ascribed to them in the SLC's motion.

have been futile only if the SLC could not have considered it independently. In its opposition brief, the plaintiff does not disagree. The demand futility analysis necessarily focuses on the SLC. The only case cited by either party to address this unusual circumstance determined that the demand futility analysis indeed must focus on the SLC. *In re UnitedHealth Grp., Inc. Deriv. Litig.*, No. 27 CV 06-8085, 2007 WL 5557050 (D. Minn. Feb. 6, 2007).

The plaintiff contends that, by noticing this motion, the SLC demonstrated a lack of independence, but this is not correct. The motion addresses a standing issue: Who, as between the stockholder plaintiff and the corporation in the form of the SLC, is entitled to control the claims?[2] By making this motion, the SLC has not pre-judged the merits of the claims in any sense.[3]

There similarly is no merit to the plaintiff's contention that if – as is indeed the case – the demand futility analysis must focus on the SLC, the plaintiff is relieved of pleading demand futility. The demand requirement is a bedrock principle of corporation law, and the plaintiff has no standing to pursue the claims unless it is satisfied. The plaintiff argues that it is relieved of pleading demand futility because the burden should be on the SLC to establish its own independence. In this argument, the plaintiff seeks to bypass the statutory requirement of demand in NRCP 23.1 and NRS 41.520. But, as detailed herein, courts never shift the burden to an SLC unless and until the plaintiff has met its burden to satisfy the demand requirement. The plaintiff therefore must adequately allege particularized facts to establish that a majority of the members of the SLC lack independence.

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[2] For purposes of this motion, the SLC addresses only the allegations of the Complaint and some relevant law. To the extent that the SLC has taken positions concerning legal issues that might bear upon the merits of the claims, the SLC is confident that they are correct.

[3] The case cited by the plaintiff, *Kaufman v. Computer Associates, Inc.*, 2005 WL 3470589 (Del. Ch. Dec. 21, 2005), does not concern an SLC's motion to dismiss for failure to plead demand futility. Nor does it state whether the transcript ruling to which it refers addressed such a motion. In the transcript, the court addresses a statement by members of an SLC that they intended to "defend against this action vigorously." *Id.* at *4 n.19. Here, the SLC has never made any such statement; it has not yet determined whether the claims have merit.

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The Second Amended Complaint does not adequately allege that a majority – or even any member – of the SLC lacks independence. As for Mr. Lillis, the plaintiff now concedes that he was independent of Ergen. Its continuing assertion that Lillis lacks independence from Vogel and Cullen relies only upon facts asserted in the plaintiff's opposition brief. Since they are found nowhere in the Complaint, they must be disregarded. They also would not have established a lack of independence, even if they had been included in the Complaint.

As for Mr. Brokaw, the plaintiff contends that, in alleging the godparent relationship between Brokaw's son and Cantey Ergen, it has alleged something more than a longstanding friendship, but this is not correct. In fact, allegations of a godparent relationship and a longstanding friendship are substantially identical. In neither case, can it be determined from the mere alleged existence of the relationship that the relationship is so close that the director cannot be expected to act independently.[4] Since, as the plaintiff does not dispute, the mere allegation of a longstanding friendship does not suffice to establish a lack of independence, the mere allegation of a godparent relationship also does not suffice.

As for Mr. Ortolf, the plaintiff does not dispute that each of Ortolf's alleged relationships with DISH do not suffice to establish a lack of independence standing alone. The plaintiff nonetheless argues that, when combined, the alleged relationships suffice. As detailed herein, the courts have already determined that substantially identical combinations of relationships are not sufficient to excuse demand.

As for the plaintiff's contention that a majority of the members of the SLC face a substantial risk of material liability, the plaintiff does not and cannot dispute that a majority of such members were not even on the DISH board at the time of all of the alleged breaches, except for the alleged breach in the bid termination. The members of the SLC do not face any prospect of material liability for the bid termination because the approval of the bid termination is protected by the business judgment rule. It is protected by the business judgment rule because there are no allegations that Ergen personally benefitted from the decision; the

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[4] As for godparent relationships, this is confirmed by advisory opinions concerning circumstances in which judges must recuse themselves. (*See infra* p. 15-18)

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allegations are rather that he was personally harmed by it. The plaintiff provides no intelligible counterargument, much less one that relies upon the allegations of the Complaint.

The plaintiff primarily resorts to repeatedly accusing the SLC of misleading the Court. In its motion, the SLC explained why the most significant accusations are meritless – showing that they were obviously wrong based upon the same written record on which the plaintiff relies. Having no counterargument, the plaintiff simply repeats the same accusations over and over again, as if they had not already been conclusively proven wrong, and as if restating them multiple times might somehow make them correct. As for those allegations that the SLC has not previously addressed, the SLC explains below why they too are wrong. For example, the plaintiff contends that "SLC's words rarely reflect its own actions." As evidence for this proposition, the plaintiff cites the SLC's failure to complete its investigation in the four months that it originally projected. This is a remarkable accusation since it was the plaintiff's own announcement that it would file the Second Amended Complaint that delayed the completion of the SLC's investigation.

II.

ARGUMENT

I. THE DEMAND FUTILITY ANALYSIS MUST FOCUS ON THE SLC.

The plaintiff asserts that it must plead demand futility not as to the SLC, but as to the full board. This is not correct either for the majority of the claims that were newly asserted in the Second Amended Complaint or for the two claims that had been asserted in the Prior Complaints.

A. The Newly Asserted Claims

The plaintiff does not dispute that, for any claims that were newly asserted in the Second Amended Complaint, it must have made a demand on some corporate body in place when the Second Amended Complaint was filed or, since it did not make such a demand, must adequately plead demand futility as to that body. The plaintiff rather contends that the relevant corporate body for purposes of pleading demand futility is not the SLC, but the full board. Alternatively, the plaintiff contends that, even if it must establish demand futility as to the SLC

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for newly asserted claims in the Second Amended Complaint, the Second Amended Complaint does not contain any newly asserted claims. Both of the plaintiff's alternative arguments are incorrect.

1. The Relevant Body Is the SLC.

There is no merit to the plaintiff's contention that the relevant corporate body for purposes of analyzing demand futility is the full board, not the SLC. The plaintiff does not dispute that if it had made a demand, the demand could have been considered only by the SLC. Before the Second Amended Complaint was filed, the full board had lawfully delegated to the SLC the entirety of its authority to consider a demand.[5] The board thereby divested itself of any authority to consider a demand. Since the SLC must have been the body to consider the demand, demand could be futile only if the SLC could not properly consider it. The demand futility analysis therefore necessarily must focus on the SLC.[6]

Not surprisingly, the only authority cited by either party to have addressed the unusual situation of a board delegating authority to consider a demand to an SLC, before claims are newly asserted, *In re UnitedHealth Group, Inc. Derivative Litigation*, No. 27 CV 06-8085, 2007 WL 5557050 (D. Minn. Feb. 6, 2007), held that the plaintiff must plead demand futility

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[5] The plaintiff does not contend that there was anything improper in the board's delegation of authority to the SLC, and there was nothing improper. By statute, the board is expressly permitted to delegate such authority to a committee. NRS 78.125(1) ("Unless it is otherwise provided in the articles of incorporation, the board of directors may designate one or more committees which, to the extent provided in the resolution or resolutions or in the bylaws of the corporation, have and may exercise the powers of the board of directors in the management of the business and affairs of the corporation.").

[6] The plaintiff suggests that two cases cited by the SLC, *Braddock v. Zimmerman*, 906 A.2d 776, 786 (Del. 2006), and *Harris v. Carter*, 582 A.2d 222, 230 (Del. Ch. 1990), do not stand for the proposition that an SLC "can dismiss a suit for failure to make a demand." (Opp. at 15) On this, the plaintiff is correct. They do not stand for that proposition, but they were not cited for it. Neither case concerned an SLC. For this reason, neither case supports or refutes the proposition that an SLC may move to dismiss claims for failure to make a demand. They were cited for the proposition, with which the plaintiff now agrees, that for claims newly asserted in the Second Amended Complaint, the plaintiff was required to make a demand on the relevant corporate body in place when the Second Amended Complaint was filed.

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as to the SLC, not the full board. *Id.* ("consider[ing] whether it would have been futile to make a demand upon the SLC.").[7]

The plaintiff attempts to distinguish this case on the ground that the derivative plaintiff in *In re UnitedHealth Group* "first brought suit ***after*** the board had already created an SLC." (Opp. at 13 (emphasis in original)) This is no distinction at all. In both cases, the claims were first asserted after the board had created the SLC. If the plaintiff means to suggest that *In re UnitedHealth Group* applies only to claims first asserted in an original complaint and not to claims first asserted in an amended complaint, the plaintiff does not explain why this would be so, and there is no logical reason why it would be so. In both cases, the SLC would have been the body to consider a demand that the claims be asserted.

2. The Claims Were Indeed Newly Asserted.

There is likewise no merit to the plaintiff's alternative contention that the claims that the SLC has identified as having been newly asserted – all but two of the claims – should rather be treated, under the relevant legal standard, as not newly asserted, but as having been asserted in the Prior Complaints. In its motion, the SLC set forth the relevant legal standard, to which the plaintiff has now agreed. (Mot. at 16-17) Only claims that challenge the same "acts and transactions" as the Prior Complaints are treated as asserted in the Prior Complaints. This would include any allegation that "elaborates upon facts relating to acts or transactions alleged" in the Prior Complaints.[8]

While the plaintiff asserts in conclusory fashion that each of the claims in the Second Amended Complaint "elaborates upon facts relating to acts or transactions" alleged in the Prior Complaints (Opp. at 16), it does not even attempt to show how this is true, and it is not true.

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[7] In its opposition brief, the plaintiff states that the SLC's position was "presented without legal citation." (Opp. at 13) This is a remarkable assertion. The plaintiff proceeds in the very next paragraph to acknowledge that the SLC's position was presented with legal citation, by addressing the SLC's citation to *In re UnitedHealth Group*.

[8] In its motion, the SLC also carefully compared the claims of the Second Amended Complaint to the claims of the Prior Complaints to establish that almost all the claims were newly asserted under this standard. (Mot. at 9-11) The plaintiff does even attempt to rebut this analysis. It rather simply asserts that the analysis is "artificial," but makes no effort to explain why this is so. (Opp. at 16 n.39)

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The claims do far more than elaborate upon the facts previously alleged. They address entirely new alleged wrongs. (*See* Mot. at 9-11) For example, the bid termination claim concerns the termination of the bid, which occurred after the Prior Complaints were filed. For this reason, there is no mention in the Prior Complaints of any wrongdoing associated with the bid termination. The release claim concerns the alleged effect of the release on the cancellation of the auction, which also occurred after the Prior Complaints were filed. Again, the Prior Complaints contain no mention of any alleged wrong associated with either the release or the auction. The remaining claims, other than the two that the SLC has identified as pre-existing in the Prior Complaints, rely upon alleged wrongs that allegedly pre-dated the Prior Complaints, but are not mentioned anywhere in the Prior Complaints. Nowhere do the Prior Complaints set forth the factual predicates for any of these claims nor suggest the alleged wrongs.

If the plaintiff's position were accepted, it would defeat the very purpose of the demand requirement. That purpose is to give the relevant corporate body, usually the board of directors, the opportunity to evaluate and consider whether to assert the claims desired by the stockholder and, if it decides to pursue them, to control the pursuit of the claims. *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 633, 137 P.3d 1171, 1179 (2006) ("This demand requirement recognizes the corporate form . . . . [by] inform[ing] the directors of the complaining shareholder's concerns and gives them an opportunity to control any acts needed to correct improper conduct or actions, including any necessary litigation."). If, by satisfying the demand requirement as to a claim asserted in an original complaint, a plaintiff could then proceed with new claims in an amended complaint that are based upon entirely new factual predicates and allege entirely new wrongs, without making a new demand as to the new claims, simply because the new claims relate in some general way to the claim asserted in the original complaint, the corporate body would have no meaningful opportunity to evaluate and consider whether to assert and control the new claims. In the absence of a new demand for new claims the purpose of the demand requirement would be defeated.

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B. The Claims Asserted in the Prior Complaints

In its motion, the SLC explained that the Court had previously directed the plaintiff to make demand on the SLC concerning the claims in the Verified Amended Derivative Complaint of Jacksonville Police and Fire Pension Fund Pursuant to the Nevada Rules of Civil Procedure Rule 23.1 (the "First Amended Complaint"). (Mot. at 8) In doing so, as the SLC observed in its motion, the Court explained that the plaintiff was not making any concessions. (Mot. at 4 n.3) In its motion, the SLC therefore agreed that, despite the demand, the plaintiff has not waived its right to proceed upon a showing of demand futility. (*Id.*) However, since the Court has already determined that demand for the claims in the First Amended Complaint should be made on the SLC, the demand futility analysis should similarly focus on the SLC. The plaintiff therefore must also establish demand futility as to the SLC for the claims in the Second Amended Complaint that had previously been included in the First Amended Complaint. The plaintiff makes no counterargument except to say that, in making the demand, it did not concede the independence of the SLC. There is no disagreement between the parties to this motion on this point, but it has nothing to do with the proper body as to which demand was to have been made and demand futility must be adequately pled.

II. THE PLAINTIFF MAY NOT SKIP OVER PLEADING DEMAND FUTILITY.

According to the plaintiff, if the Court concludes that the demand futility analysis must focus on the SLC, the plaintiff is relieved of the requirement to plead demand futility. According to the plaintiff, the burden is always on the SLC to establish its independence, and therefore it should be on the SLC even for purposes of this motion. (Opp. at 16-17 ("If the Court nevertheless analyzes demand as to the SLC . . . , the SLC must, at the least, bear the burden of proof.")) This is wrong for at least three reasons:

First, it is a fundamental principle of corporation law that a stockholder must satisfy the *pleading* standards of the demand requirement, before it may pursue claims derivatively on behalf of a corporation. If it has not made a demand, it must adequately plead that such demand is excused because it would have been futile. NRCP 23.1 ("The complaint shall also

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allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort."); NRS 41.520; *Shoen*, 122 Nev. at 634, 137 P.3d at 1179-80 (requiring "particularized factual statements . . . that making a demand would be futile or otherwise inappropriate"). As a pleadings motion, a motion to dismiss for failure to satisfy the pleading standards of the demand requirement is necessarily based upon only the allegations of the complaint. *Zimmerman ex rel. Priceline.com Inc. v. Braddock*, No. 18473-NC, 2002 WL 31926608, at *7 (Del. Ch. Dec. 20, 2002) ("In deciding whether demand is excused, [the court is] limited to those particularized facts alleged in the Complaint, not those set forth only in the briefs."). If the allegations are inadequate, the plaintiff lacks standing to pursue the claims. *Shoen*, 122 Nev. at 634, 137 P.3d at 1180 ("A shareholder's failure to sufficiently plead compliance with the demand requirement deprives the shareholder of standing and justifies dismissal of the complaint for failure to state a claim upon which relief may be granted.").

Second, the plaintiff cites no authority for the proposition that the burden shifting that applies in some jurisdictions for purposes of other motions by an SLC relieves the plaintiff of pleading demand futility. The authority cited by the SLC, *In re UnitedHealth Group, Inc. Derivative Litigation*, No. 27 CV 06-8085, 2007 WL 5557050 (D. Minn. Feb. 6, 2007), squarely refutes the plaintiff's position. As stated above, in that case, the Minnesota federal district court determined that the plaintiff was required to make, but did not make a demand on an SLC. The court therefore required the plaintiff to adequately plead that demand on the SLC would have been futile. *Id.* The court did not, as the plaintiff advocates, shift to the SLC the burden of establishing independence, for purposes of assessing whether the plaintiff had adequately pled demand futility. It affirmatively required the plaintiff to carry its burden of *pleading* demand futility on an SLC, without any discussion of burden shifting.

Finally, the burden shifting that sometimes applies for purposes of other motions by an SLC could not possibly relieve the plaintiff from pleading demand futility. Under the cases that shift the burden, it is the adequate pleading of demand futility itself that warrants the

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burden shift. The plaintiff cannot rely upon a burden shift that may happen only because it has adequately pled demand futility to avoid adequately pleading demand futility. For example, in *Zapata Corporation v. Maldonado*, 430 A.2d 779 (Del. 1980), the Delaware Supreme Court explained why it determined that it was appropriate, to shift the burden to an SLC for purposes of a "hybrid" motion for summary judgment to dismiss the claims based upon the SLC's determination that they were not in the best interests of the corporation:

> *[W]here demand is properly excused*, the stockholder does possess *the ability to initiate the action* on his corporation's behalf. . . .
>
> The question to be decided becomes: When, if at all, should an authorized board committee be permitted to cause litigation, *properly initiated by a derivative stockholder in its own right*, to be dismissed? . . .
>
> Even *when demand is excusable*, circumstances may arise when continuation of the litigation would not be in the corporation's best interests. Our inquiry is whether, *under such circumstances*, there is a permissible procedure under *§ 141(a)* by which a corporation can rid itself of detrimental litigation. . . .
>
> *The context here is a suit against directors where demand on the board is excused*. We think some tribute must be paid to the fact that the *lawsuit was properly initiated*. . . .
>
> In this case, the litigating stockholder plaintiff facing dismissal of a lawsuit *properly commenced* ought, in our judgment, to have sufficient status for strict Court review.

Id. at 784-85, 787-88 (emphasis added); *see also Louisiana Mun. Police Emps. Ret. Sys. v. Morgan Stanley & Co., Inc.*, No. 5682-VCL, 2011 WL 773316, at *7 (Del. Ch. Mar. 4, 2011) ("[T]he *Zapata* Court was commenting on the decision that a special litigation committee faces when addressing derivative claims being actively pursued by a stockholder plaintiff *after demand has been excused*.") (emphasis added).

Under Nevada law, the burden would not shift, even if the plaintiff had *pled* demand futility. Under Nevada law, the plaintiff must also *prove* demand futility at an evidentiary hearing, before it may proceed with its claims. *Shoen*, 122 Nev. at 645, 137 P.3d at 1187 ("If the district court should find the pleadings provide sufficient particularized facts to show demand futility, it must later conduct an evidentiary hearing to determine, as a matter of law, whether the demand requirement nevertheless deprives the shareholder of his or her standing to sue."); *In re AMERCO Deriv. Litig.*, 127 Nev. Adv. Op. 17, 252 P.3d 681, 690 (2011) ("We

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conclude that appellants adequately pleaded demand futility, but the district court must now conduct a proper evidentiary hearing regarding whether the evidence supports appellants' allegations."). Even if the plaintiff had both pled and proved demand futility, it is far from clear that Nevada would align with Delaware and other jurisdictions to shift the burden. The SLC however will brief that issue if it later determines that claims should be dismissed and the plaintiff disagrees.[9] In all events, the plaintiff bears the burden to plead demand futility before it may proceed with its claims. As detailed below, it has not.[10]

III. THE SECOND AMENDED COMPLAINT DOES NOT ADEQUATELY PLEAD DEMAND FUTILITY AS TO THE SLC.

There is no merit to the plaintiff's contention that it has adequately pled demand futility as to a majority of the members of the SLC.

A. The Plaintiff's Allegations Do Not Establish that Mr. Lillis Lacks Independence.

The plaintiff's opposition brief makes clear that the allegations of the Complaint do not suffice to establish that Mr. Lillis lacks independence from any relevant person. The plaintiff concedes that Lillis does not lack independence from Ergen. Indeed, as it does not dispute, it urged that Lillis serve on the proposed special transaction committee that it unsuccessfully sought on the motion for preliminary injunction. (Mot. at 12, 23) At the time, it took the

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[9] As a preview, the SLC states that the issue is far from clear because the Nevada courts have not addressed the issue, and based on research to date, it appears that, unlike all States in which the burden is shifted, except one, Nevada has a statutory presumption that the directors "are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation." NRS 78.138(3). Placing the initial burden on the members of the SLC would deprive them of the statutory presumption. Obviously, the statute cannot be modified by the Courts. In the one State that has a statutory presumption and has addressed the shifting of the burden, Maryland, the Court of Special Appeals of Maryland concluded that the burden could not be shifted because of the statutory presumption (*Boland v. Boland*, 5 A.3d 106, 121-23 (Md. Ct. Spec. App. 2010)) and, in the highest court in Maryland, the Court of Appeals of Maryland, a dissenting judge agreed (*Boland v. Boland*, 31 A.3d 529, 582-83 (Md. 2011) (Battaglia, J., dissenting)). The court majority nonetheless shifted the burden without an explanation as to how it could do so in view of the statutory presumption. *Boland*, 31 A.3d at 556.

[10] Whether the burden rests on the plaintiff or the SLC, "the substantive contours of the independence doctrine are [not] different." *London v. Tyrell*, No. 3321-CC, 2010 WL 877526, *13 (Del. Ch. Dec. 18, 2009).

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position that Lillis was needed on the committee to ensure its *independence* from Ergen in DISH's bid for LightSquared.

The plaintiff argues that it has adequately alleged that Lillis lacks independence from Cullen and Vogel, but this is not correct. The plaintiff does not dispute that the allegations actually contained in the Complaint – those concerning Lillis's alleged prior "professional relationships" with Cullen at MediaOne and Cullen and Vogel at Charter – are precisely the sort of allegations that the courts have long held insufficient to establish a lack of independence. The plaintiff rather effectively concedes that its allegations do not suffice, by relying upon asserted facts not alleged in the Complaint, but asserted only in its brief. As explained below, assertions made only in a brief must be disregarded, for purposes of this motion.

The plaintiff specifically argues that Lillis had a sense of "owingness" to Cullen because, *according to the brief*, "Cullen helped Lillis sell *his* company, MediaOne." (Opp. at 25 (emphasis added)) The Complaint however contains no such allegation. Although the Complaint alleges that a company, MediaOne, was sold, there is no allegation that MediaOne was Lillis's company. MediaOne was, in fact, a well-known, publicly held company, the shares of which Lillis owned far less than 1%. Most importantly, there is no allegation in the Complaint that Cullen helped with the sale in any way, much less in a way that might give rise to a sense of "owingness" in Lillis.[11]

The plaintiff also specifically argues that Lillis has "shown that he will place the interests of Vogel ahead of his own." (Opp. at 25) The plaintiff bases this argument on the following assertion *in its brief*: "When the Charter board fired Vogel, Lillis resigned in

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[11] Even if there had been an allegation that Cullen "helped with the sale" of MediaOne, it still would not have sufficed. In the case cited by the plaintiff, *London v. Tyrell*, No. 3321-CC, 2010 WL 877526, *15 (Del. Ch. Dec. 18, 2009), the Delaware Court of Chancery found a possible lack of independence based upon the following testimony by the director in question about the interested person: "And he was very helpful in helping me get a good price for my company. Very helpful." Based upon this testimony, the Court explained, "I believe that there is a material question of fact as to Salvatori's independence because his earlier associations with Tyrell may have given rise to a sense of obligation or loyalty to him. Salvatori appears to have been very satisfied with the price he received for QuesTech." *Id.* In this case, there are no similar facts, even in the plaintiff's brief.

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protest. Lillis was willing to give up significant yearly compensation simply to make a statement in support of his friend Vogel." (*Id.*) These are not the allegations of the Complaint. The Complaint does not allege that Lillis resigned "simply to make a statement in support of his friend." (*Id.*) It rather makes the contrary allegation that Lillis resigned because he disagreed with the Charter board's business decision to terminate Vogel. (SAC ¶ 310 ("Lillis was 'not happy' with the decision of the Charter board of directors to fire Vogel.")) Nor does the Complaint allege that, in resigning from the board, Lillis "was willing to give up significant yearly compensation." (Opp. at 25) There is no allegation that Lillis earned less in his subsequent position, much less that any reduction in compensation was material to him.[12]

Since the assertions upon which the plaintiff relies to establish Lillis's supposed lack of independence are not found in the Complaint and even contradicted by the allegations in the Complaint, they are irrelevant for purposes of this motion to dismiss. *Zimmerman*, 2002 WL 31926608, at *7; *see also In re The Goldman Sachs Grp., Inc. S'holder Litig.*, No. 5215-VCG, 2011 WL 4826104, at *11 (Del. Ch. Oct. 12, 2011) ("Contrary to the statements by the Plaintiffs in the answering brief, the complaint does not allege that Dahlback's 'livelihood depends on his full-time job as an advisor.' . . . [T]he pleadings are insufficient to raise a reasonable doubt as to Dahlback's independence.").

B. The Plaintiff's Allegations Do Not Establish that Mr. Brokaw Lacks Independence.

The plaintiff's contention that it has adequately alleged a lack of independence as to Mr. Brokaw now rests solely upon the allegation that Brokaw and the Ergens have a longstanding family relationship. That allegation is based solely upon the allegation

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[12] Even if the Complaint had contained any such allegations, they would suggest at most that Vogel might be beholden to Lillis, not that Lillis would be beholden to Vogel, as required to plead a lack of independence for demand futility purposes. *See In re INFOUSA S'holder Litig.*, 953 A.2d 963, 985 (Del. Ch. 2007) ("To demonstrate that a given director is beholden to a dominant director, plaintiffs must show that the beholden director receives a benefit upon which the director is so dependent or is of such subjective material importance that its threatened loss might create a reason to question whether the director is able to consider the corporate merit's [sic] of the challenged transaction objectively." (internal quotation marks omitted)).

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concerning the godparent relationship between Brokaw's son and Cantey Ergen.[13] Although the allegation of a sufficiently close family relationship generally suffices to establish a lack of independence for demand futility purposes, a godparent relationship is not a family relationship of any sort. *Cf.* Fed. Advisory Op. 11, 2009 WL 8484525 (June 2009) ("A godfather is not a 'relative' within the meaning of Canon 3C(1)(d)."). It rather reflects a friendship.

The Complaint therefore alleges at most a longstanding friendship with Cantey Ergen (in this case, derived from a relationship between Mr. Brokaw's mother-in-law and Cantey Ergen). The plaintiff does not dispute that a longstanding friendship standing alone does not suffice to establish a lack of independence to excuse demand, and this is indeed the law. (*See infra* p. 17) The plaintiff therefore has not adequately alleged that Brokaw lacks independence. *See Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 177 (Del. Ch. 2005) ("[P]eople normally get appointed to boards through personal contacts."), *aff'd*, 906 A.2d 114 (Del. 2006); *In re Oracle Sec. Litig.*, 852 F. Supp. 1437, 1442 (N.D. Cal. 1994) ("Business dealings seldom take place between complete strangers and it would be a strained and artificial rule which required a director to be unacquainted or uninvolved with fellow directors in order to be regarded as independent.").

The plaintiff alternatively contends that its allegation of the godparent relationship constitutes an allegation of something more than a longstanding friendship and therefore suffices to establish a lack of independence for demand futility purposes. This is not correct. The plaintiff cites no authority for this proposition. In fact, the allegations of a godparent relationship and a longstanding friendship are substantially identical for demand futility purposes. Like a longstanding friendship, a godparent relationship could reflect a friendship so close as to give rise to a reasonable doubt that the director is "not so 'beholden' to an interested director . . . that his or her 'discretion would be sterilized,'" as required to alleged a lack of

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[13] As the SLC previously established, the allegation that Cantey Ergen might become the legal guardian for the Brokaw's son was wrong. (Mot. at 5, 13) The plaintiff has now dropped this baseless assertion.

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independence for demand futility purposes. *Beam v. Stewart*, 845 A.2d 1040, 1050 (Del. 2004). Alternatively, the allegation of a godparent relationship could reflect a more distant friendship that would not give rise to such a reasonable doubt and therefore would not establish a lack of independence. Like a longstanding friendship, whether it reflects the former or the latter depends upon the nature of the godparent relationship. An Advisory Opinion concerning the Code of Conduct for United States Judges reflects this reality. As the Committee on Codes of Conduct explained,

> A godfather is not a "relative" within the meaning of Canon 3C(1)(d) and is not otherwise covered by any of the enumerated circumstances requiring recusal. Recusal may nonetheless be required if the circumstances are such that the judge's impartiality could reasonably be questioned. No such question would be raised if the relationship were simply one of historical significance, the godfather being merely within the wide circle of the judge's friends, and the obligation having been perfunctorily assumed. By contrast, if the godfather is a close friend whose relationship is like that of a close relative, then the judge's impartiality might reasonably be questioned.

Fed. Advisory Op. 11, 2009 WL 8484525 (June 2009). Thus, the mere existence of a godparent relationship between a judge and an attorney appearing in a case before the judge standing alone does not require the judge to recuse himself. *Id.* The judge must recuse himself only if the godparent relationship reflects a friendship that is sufficiently close as to require recusal. *Id.* (Godparent relationship does not require recusal unless "the circumstances are such that the judge's impartiality could reasonably be questioned.").

The law on the pleading of demand futility treats longstanding friendships in similar fashion. Since a longstanding friendship may or may not reflect a friendship sufficiently close to establish a lack of independence, the law is well-settled that the mere allegation of a longstanding friendship does not suffice to establish a lack of independence for demand futility purposes. The plaintiff is required to plead particularized facts showing that the longstanding friendship is so close as to raise a reasonable doubt that the director is not beholden to the interested person. *Beam*, 845 A.2d at 1051-52 ("Mere allegations that [directors] move in the same business and social circles, or a characterization that they are close friends, is not enough to negate independence for demand excusal purposes. . . . To create a reasonable doubt about an outside director's independence, a plaintiff must plead facts that would support the

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inference that because of the nature of a relationship or additional circumstances other than the interested director's stock ownership or voting power, the non-interested director would be more willing to risk his or her reputation than risk the relationship with the interested director."); *In re Walt Disney Co. Deriv. Litig.*, 731 A.2d 342, 355 (Del. Ch. 1998) ("The fact that Eisner has long-standing personal and business ties to Ovitz cannot overcome the presumption of independence that all directors, including Eisner, are afforded."), *aff'd in part, rev'd in part on other grounds sub nom. Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).[14]

Since a godparent relationship similarly may or may not reflect a friendship sufficiently close to establish a lack of independence, its mere allegation cannot suffice to establish a lack of independence. The plaintiff was required to plead particularized facts showing that the godparent relationship with Cantey Ergen is so close as to raise a reasonable doubt that Brokaw is not beholden to the Ergens. The Complaint contains no allegation concerning the godparent relationship other than that it exists. It therefore does not suffice to establish that Brokaw lacks independence for demand futility purposes.

C. The Plaintiff's Allegations Do Not Establish that Mr. Ortolf Lacks Independence.

The plaintiff does not contend that any of the four alleged relationships between Mr. Ortolf and DISH suffices to establish a lack of independence, standing alone. As detailed in the SLC's motion, the law is clear that none of the relationships suffices. (Mot. at 24-25) The plaintiff rather contends that they suffice when combined. This is not correct. The courts routinely hold insufficient to establish a lack of independence combinations of alleged relationships. They uniformly do so when the relationships standing alone do not suffice and most of the relationships are mundane and have been repeatedly held insufficient by the courts.

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[14] *See also La. Mun. Police Emps. Ret. Sys. v. Wynn*, No. 2:12-CV-509 JCM (GWF), 2014 WL 994616, at *6 (D. Nev. Mar. 13, 2014) (allegations that directors had "been friends for forty years and that [the interested director] has played a significant role in [the other director's] political success" did not establish lack of independence); *id.* (allegations of a thirty-year friendship did not establish lack of independence); *id.* at *7 (allegations that directors had "been close . . . since they were young" as a result of their fathers' business together and the interested director's past employment of the other director and the other director's siblings did not establish lack of independence).

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See, e.g., *McSparran v. Larson*, Nos. 04-C-0041, 04 C 4778, 2006 WL 2052057, at *3 (N.D. Ill. May 3, 2006) ("If mere social acquaintances and prior business relationships with other board members coupled with the receipt of directorial fees destroyed a board member's independence, few boards would have any independent members."); *La. Mun. Police Emps. Ret. Sys. v. Wynn*, No. 2:12-CV-509 JCM (GWF), 2014 WL 994616, at *6-7 (D. Nev. Mar. 13, 2014);[15] *Sachs v. Sprague*, 401 F. Supp. 2d 159, 167-68 (D. Mass. 2005).[16]

The alleged relationships between Ortolf and DISH are of the same nature as the relationships that the courts have held insufficient even when combined. The courts have repeatedly held that the mundane combination of the alleged receipt of director's fees and the alleged approval of a challenged transaction does not suffice to establish a lack of independence. Indeed, these relationships are present in nearly all demand futility cases. *See, e.g.*, *Disney*, 731 A.2d at 353, 359-60 (no lack of independence where plaintiff alleged that director's "salary as a teacher is low compared to her director's fees and stock options" and that "the Director Defendants breached their fiduciary duties . . . by entering into the Employment Agreement with Ovitz and then by terminating Ovitz without cause"); *Fosbre v. Matthews*, No. 3:09-CV-0467-ECR-RAM, 2010 WL 2696615, at *5 (D. Nev. July 2, 2010) (no lack of independence where plaintiffs made no "allegations of a quid pro quo, or indeed any

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[15] In *Wynn*, the Court found that the following combinations of allegations did not rebut the presumption of independence: As to Miller: (1) a forty-year friendship with Wynn, a director with a personal interest, and (2) Wynn's "significant role in Miller's political success" as substantiated by (1) Wynn's $70,000 to Miller's campaign; (2) a threat Wynn made against Miller's opponent; (3) Miller's testimony on Wynn's behalf in a separate case, and (4) "Wynn's business relationship to a company Miller is affiliated with." *Wynn*, 2014 WL 994616, at *6. As to Moran: (1) a thirty-year friendship with Wynn; (2) Wynn's "large donation" to the "Moran Eye Center"; (3) Wynn's "large donation" to a "presidential campaign to which Moran was the finance chair." *Id.* As to Virtue: "personal financial benefits" from a "business relationship" with Wynn. *Id.* at *7. As to Wayson: (1) close with Wynn "since they were young" as a result of their fathers' operation of a business together and (2) "Wynn's past employment of Wayson and of Wayson's siblings." *Id.*

[16] In *Sachs*, the Court found that the following combination of allegations did not rebut the presumption of independence: (1) a "longtime friendship" between the director, Glider, and Sprague, an interested director, (2) "Glider and Steven Sprague often participate together in technology conferences," (3) "Glider has staked his reputation on Steven Sprague's success," (4) Glider was a member of the board "that approved loans to [Sprague's father] totaling over one million dollars 'during a year in which the company lost $48.7 million and saw its stock price plunge 40%.'" *Sachs*, 401 F. Supp. 2d at 167-68.

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causal link, between the challenged actions and omissions of the IGT Board and the directors' compensation."), *aff'd sub nom. Israni v. Bittman*, 473 Fed. Appx. 548 (9th Cir. Apr. 2, 2012). Ortolf's alleged receipt of director's fees and alleged approval of the challenged transactions thus fall squarely within this well-settled authority. The courts also have repeatedly held that alleged prior employment with the corporation or some similar alleged prior professional relationship does not suffice to excuse demand. *See, e.g.*, *In re Pfizer Inc. Deriv. Sec. Litig.*, 503 F. Supp. 2d 680, 686 (S.D.N.Y. 2007) (An "employee for many decades[] does not lack independence by way of his former employment."), *aff'd*, 307 Fed. Appx. 590 (2d Cir. 2009); *Disney*, 731 A.2d at 358 ("Whatever rights [the former executive vice president and chief financial officer] had when he left Disney have already been paid to him. Nothing indicates that [the director] expects to receive additional financial benefits from Disney for acceding to Eisner's wishes in connection to the Employment Agreement."). Ortolf's alleged employment by DISH certainly falls within this well-settled authority, particularly in view of the allegation that it occurred more than twenty years ago.

It is similarly clear that combining these three mundane allegations with the final allegation that Ortolf's daughter works at DISH does not change the result. In a case cited by the SLC in its motion, *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 823 (Del. Ch. 2005), *aff'd*, 906 A.2d 766 (Del. 2006), the Delaware Court of Chancery held that an allegation that a director's child worked at the corporation did not suffice to establish a lack of independence. The court so held despite the presence of some of the same other mundane relationships alleged concerning Ortolf. Specifically, in that case, the individual in question was a director and therefore undoubtedly received director's fees. He also was alleged to have approved the challenged transaction. The plaintiff has not and cannot distinguish the case, and it agrees that Nevada applies the pleading standards for demand futility established by the Delaware courts. (Opp. at 12) In that case, combining the alleged relationship concerning the child's work at the corporation with the more mundane allegations similar to Ortolf's did not result in a determination that the director lacked independence. The same should be true in this case. The plaintiff has not adequately alleged that Ortolf lacks independence.

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The plaintiff cites no case in which the courts have found sufficient to establish a lack of independence a combination of relationships similar to those alleged as to Ortolf. In the case cited by the plaintiff, *California Public Employees' Retirement System v. Coulter*, No. 19191, 2002 WL 31888343, *9 (Del. Ch. Dec. 18, 2002), the combination of alleged relationships that sufficed to establish that the director was not disinterested and independent included several unusual allegations that had not previously been addressed by the courts and, most significantly, suggested that the director may have personally benefited from the totality of the alleged misconduct. Specifically, it was alleged that (1) the director had condoned the controlling stockholder's shirking of duties to the corporation, (2) the controlling stockholder had shirked the duties to prepare an initial public offering of the stock of another corporation, TENT, and (3) that the director himself "had a financial interest" in TENT. *Id.* It also was alleged that the director had approved the challenged re-pricing of employee stock options and that he had benefited from the similar re-pricing of director stock options. *Id.* at *9, *11. The allegations as to Ortolf do not similarly suggest that he might have personally benefited from the alleged misconduct. They therefore do not come close to the combination of relationships at issue in the case on which the plaintiff relies.[17]

* * *

Contrary to the plaintiff's suggestion, director Goodbarn did not testify that the members of the SLC lack independence. (Opp. at 4) The complete allegations of the

[17] The plaintiff alleges that Ortolf "concealed" DISH's employment of his daughter. (Opp. at 3, 7, 24) To the extent that, by use of the term "concealed," the allegation suggests that the non-disclosure was deliberate, the allegation is conclusory. Since it is not supported by any particularized factual allegations suggesting that the non-disclosure was indeed deliberate, it must be disregarded. *Shoen*, 122 Nev. at 634, 137 P.3d at 1179-80 ("[M]ere conclusory allegations will not suffice under NRCP 23.1's 'with particularity' standard."); *McSparran v. Larson*, Nos. 04-C-0041, 04 C 4778, 2006 WL 2052057, at *2 (N.D. Ill. May 3, 2006) ("Pleading with particularity means that a plaintiff must include the who, what, when, where, and how: the first paragraph of any newspaper story." (internal quotation marks omitted)). In fact, the non-disclosure was not deliberate. When providing information pertinent to any personal lack of independence, it did not occur to Mr. Ortolf to mention DISH's employment of his daughter. The non-disclosure was an oversight. Since, as detailed above, DISH's employment of Ortolf's daughter does not suggest a lack of independence, the oversight, however regrettable, was immaterial.

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Complaint itself, including the full quotation from Mr. Goodbarn, make clear that Goodbarn rather testified concerning indemnification and compensation issues. (SAC ¶¶ 153-58) He had been concerned that the issues might have affected the independence of the special transaction committee, although he testified that they did not. (Goodbarn Dep. at 236, excerpts attached hereto as Exhibit A ("Q: And was that recommendation to the board reached by the special committee independently? . . . A: Yes.")) In his testimony, he expressed concern that the same issues might affect the independence of the SLC. (SAC ¶ 158) The Complaint does not explain why, if the indemnification and compensation arrangements did not affect the independence of the special transaction committee, they would affect the independence of the SLC. The resolutions establishing the SLC require DISH to pay directly legal and other expenses of the SLC. (Resolutions duly adopted at the Special Meeting of the Board of Directors held on September 18, 2013, attached hereto as Exhibit B) Also, unlike the special transaction committee, the SLC is not called upon to approve a high value transaction and therefore is not exposed to significant potential liability. In all events, the resolutions establishing the SLC provide for the indemnification of its members.[18]

D. The Plaintiff Has Not Alleged that the SLC Faces a Substantial Risk of Material Liability.

In its motion, the SLC explained that demand is not excused by the allegations that the members of the SLC participated in the alleged misconduct, and the plaintiff does not disagree. (Mot. at 19) The SLC further explained that demand might nonetheless be excused if the Complaint alleged particularized facts showing that a majority of the members of the SLC faced a substantial risk of material liability. (Mot. at 20 n.10) The SLC explained that, for all but the bid termination claim, a majority of the members of the SLC consisting of Messrs. Lillis and Brokaw had not yet even joined the DISH board and therefore do not face any prospect of liability for those claims. For the bid termination claim, the SLC explained that no

[18] If, as the plaintiff suggests, the ability of a controlling shareholder to change the indemnification and compensation arrangements for a committee renders the committee lacking in independence, no committee of a corporation with a controlling shareholder could ever be independent. That is not the law.

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member of the SLC faces a substantial risk of material liability for a different reason: As the SLC explained, there is no particularized allegation that Ergen benefited from the bid termination; the Complaint rather alleges facts demonstrating that he was harmed by it. The decision to approve the bid termination therefore was protected by the business judgment rule.

The plaintiff now presents three flawed arguments in an effort to show that members of the SLC do face a substantial risk of material liability. *First*, the plaintiff argues that the members of the SLC prejudged the plaintiff's claims and have engaged in misconduct in the investigation of the claims. The SLC respectfully submits that this is nonsense. As detailed in the motion and the following section of this brief, the SLC has demonstrated that each of the many accusations that the plaintiff has made about the SLC's conduct are meritless.

Second, the plaintiff argues that Ergen did have an interest in the bid termination and therefore that the business judgment rule does not protect the decision to approve the termination of the bid. The plaintiff contends that the bid termination was "Ergen's way of gaining additional leverage in the bankruptcy proceedings." (Opp. at 29) The Complaint however alleges to the contrary. According to the Complaint, the alleged threat to withdraw DISH's bid provided Ergen with leverage that he might use to obtain the release and increase the likelihood of seeing his Secured Debt paid. (SAC ¶¶ 229-37) The Complaint contains no allegations to suggest that Ergen had any particular leverage *after* the bid was actually terminated.

Finally, the plaintiff contends that the members of the SLC face a substantial risk of material liability based upon the allegations concerning the handling of the release. This is incorrect. As with the bid termination claim, a majority of the members of the SLC were not even on the DISH board when the board approved the draft Asset Purchase Agreement that included the draft release. They therefore do not face any prospect of liability for that decision.[19]

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[19] This is not to suggest that there are allegations that Mr. Ortolf faced a substantial risk of material liability due to his approval of the draft Asset Purchase Agreement that contained the release. The Complaint indeed contains no particularized factual allegations indicating that Ortolf had any knowledge, when approving the draft Asset Purchase Agreement, that it contained a release that would have released the adversary claims against Ergen. The

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There similarly is no merit to the contention that the members of the SLC face a substantial risk of material liability for failing to reduce the scope of the release before the auction. It is true that the plaintiff has alleged that the release caused the cancellation of the auction and that, if the auction had not been cancelled, DISH would have acquired LightSquared. The SLC is investigating whether these allegations are correct. Nonetheless, the Complaint contains no particularized allegations that the DISH board was aware, before the auction was cancelled, that the release might result in the cancellation of the auction. For example, there are no allegations that LightSquared informed any DISH representative that LightSquared would accept DISH's bid at the auction if only DISH would agree to reduce the scope of the release. Putting aside the question, which the SLC is still investigating, whether the failure to reduce the scope of the release, before the auction, constituted a breach of fiduciary duty by any defendant, there are no particularized allegations in the Complaint to suggest that any member of the SLC intentionally engaged in misconduct or knowingly violated the law, as required for such member to be exposed to a claim for damages.[20] *In re AMERCO Deriv. Litig.*, 127 Nev. Adv. Op. 17, 252 P.3d at 701 ("[T]o hold 'a director or officer . . . individually liable,' the shareholder must prove that the director's breach of his or her fiduciary duty of loyalty 'involved intentional misconduct, fraud or a knowing violation of law.'" (quoting NRS 78.138(7)(b))).

The cases cited by the plaintiff do not support the plaintiff's position on this issue. None of them even addresses an argument that a director was interested or lacked independence on the ground that he faced a substantial risk of material liability. In *Louisiana*

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adversary claims had not been asserted when the draft Asset Purchase Agreement was approved.

[20] The plaintiff states that the Court "ordered the SLC to handle all issues relating to the release." (Opp. at 10) Of course, this is not correct. The Court enjoined only Ergen and his counsel from negotiating or discussing the release, thereby allowing the full board, other than Ergen, to address issues concerning the release. (Findings of Fact and Conclusions of Law at pp. 15-16 (Nov. 27, 2013) ("Charles Ergen or anyone acting on his behalf is enjoined from participation, including any review, comment, or negotiations related to the release contained in the Ad Hoc LP Secured Group Plan pending before the Bankruptcy Court for any conduct which was outside or beyond the scope of his activities related to DISH and LBAC. The remainder of the motion is denied."))

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Municipal Police Employees' Retirement System v. Fertitta, No. 4339-VCL, 2009 WL 2263406, *8-9 (Del. Ch. July 28, 2009), the court held that demand was excused based on allegations that the board had no rational purpose to approve the challenged transaction other than to benefit the controlling stockholder. The case could never have relevance to the claims at issue in this case other than the bid termination claim. As explained in the SLC's motion, the case was decided under a demand futility test that applies only to decisions of the board in place when the Second Amended Complaint was filed. (Mot. at 21 (citing *Aronson v. Lewis*)) The Complaint does not challenge any decision of the board in place when the Second Amended Complaint was filed other than its decision to approve termination of the bid.[21] *Fertitta* also does not apply to the bid termination claim. This is so because, in contrast to the controlling stockholder in *Fertitta*, Ergen is not alleged to have benefitted from the bid termination.[22]

The second case cited by the plaintiff, *Kells-Murphy v. McNiff*, 1991 WL 137143, *2 (Del. Ch. July 12, 1991), stands for the proposition that allegations concerning other transactions not challenged by the complaint may be used to establish that a director lacks independence, if the director's approval of the other transactions suggests a lack of independence. Here, the Complaint does not allege any transaction other than the challenged transactions. To the extent that any member of the SLC approved the challenged transactions, his approval falls within the well-settled law, cited previously by the SLC, that a plaintiff's allegation that a director approved a challenged transaction does not suffice to establish a lack of independence. (*See* Mot. at 19)[23] If the rule were otherwise, the demand futility standard would be satisfied in almost every case.

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[21] To the extent that the plaintiff has alleged that the board's decision to terminate the bid was irrational, this would at most plead a claim for breach of the duty of care, due to the absence of any alleged conflicting interest in the bid termination. Such a claim would not give rise to a risk of liability on the part of any member of the SLC.

[22] The plaintiff's reliance upon *AIG Retirement Services, Inc. v. Barbizet*, No. 974–N, 2006 WL 1980337 (Del. Ch. July 11, 2006), is misplaced for the same reason.

[23] The final case, *Hampshire Group, Ltd. v. Kuttner*, No. 3607-VCS, 2010 WL 2739995, *12 (Del. Ch. July 12, 2010), is cited for the banal proposition that a director breaches his fiduciary duty when he puts the interest of others ahead of the interests of the corporation. It

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IV. THE RECORD REFUTES THE ALLEGATIONS THAT THE SLC HAS NOT ACTED INDEPENDENTLY.[24]

The Complaint makes numerous accusations concerning alleged statements by the SLC to suggest that the SLC has not acted independently. In its motion, the SLC rebutted the most significant accusations. By comparing them to the written record, the SLC established that the alleged statements either had never been made or were correct. (Mot. at 26-29) The plaintiff cannot and therefore does not even attempt to make a counterargument. In its opposition brief, it repeats the same accusations over and over again, as if they had not already been proven wrong and as if saying them multiple times might make them correct. Since the plaintiff has presented no counterargument, the SLC will not repeat its rebuttal here. It simply refers the Court to its motion. (Mot. at 26-29) The SLC addresses below only the few accusations that it did not previously address. They too are demonstrably wrong.

The plaintiff contends that the SLC "made clear its prejudgment of the outcome" of its investigation by stating, in response to the plaintiff's demand, that it "does not believe that the requested action would serve the best interests of DISH." (Opp. at 8) Although the SLC made this statement, it clearly was not referring to the claims that it is investigating. It rather was referring to only the plaintiff's request for injunctive relief, which the Court also determined

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has no application here. As explained in the text, a majority of the SLC was not involved in the alleged misconduct, is not alleged to have engaged in intentional misconduct or, as to the bid termination claim, is not alleged to have put any interest ahead of the interests of the corporation, as there is no particularized allegation that Ergen benefited from the bid termination.

[24] The plaintiff contends that the SLC, in its first discussion with counsel for the plaintiff, asked only about information relevant to the independence of the members of the SLC. (Opp. at 7) For purposes of this motion, the Court must assume that this allegation is true. Even so, the plaintiff neglects to point out that the discussion took place, at the earliest stage of the investigation, when the SLC was investigating its own members' independence. It also neglects to mention that the SLC has since requested an interview of the plaintiff or its counsel to obtain facts relevant to the SLC's investigation of the merits of the claims, but the plaintiff and its counsel have declined to provide such an interview.

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would not serve DISH's best interests, with the limited exception addressed in the footnote.[25]

The following is what the SLC actually stated:

> The SLC has considered your client's demand for immediate action that would provide the relief sought by your client's motion for preliminary injunction. Specifically, the SLC has considered whether it would be in the best interest of DISH for the SLC to seek to prevent Ergen and the directors that allegedly lack independence from him from influencing DISH's decisions in the auction or concerning more generally DISH's efforts to acquire LightSquared's assets. . . . [T]he SLC does not believe that the requested action would serve the best interests of DISH.

(Letter from C. Barr Flinn to Mark Lebovitch at 2 (Oct. 3, 2013), attached hereto as Exhibit C)

The plaintiff contends that, on October 3, 2013, also in response to the plaintiff's demand, the SLC stated that it would need "approximately four months" to complete its investigation. (Opp. at 3) Since, at the present time, the SLC still has not completed its investigation, the plaintiff concludes that the "SLC's words rarely reflect its own actions." (*Id.*) The plaintiff's accusation is nonsense. It leaves out the critical fact that, before the four months was concluded, DISH terminated its bid for LightSquared, thereby mooting some of the claims in the complaint that the SLC was then investigating, and the plaintiff informed the SLC that it would be filing an amended complaint. Upon this news, it did not make sense for the SLC to complete an investigation of what was then a largely stale complaint. The SLC cannot be faulted for failing to complete, in the time projected, an investigation that was delayed by the plaintiff's own action.

The plaintiff further suggests that the Court has already determined that the SLC lacks independence, quoting the following words of the Court, at the preliminary injunction hearing: "You think maybe they're working together? . . . I recognized that, too." (Opp. at 5) The Court will know better the intent behind its words. However, the SLC's coordination with counsel for the defendants, for purposes of presenting the argument on the plaintiff's motion for preliminary injunction, does not suggest in any way that the SLC lacks independence from

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[25] Although the Court did grant the requested injunctive relief to the limited extent that it related to the release in the draft Asset Purchase Agreement, the issue of the release had not been raised at the time that the SLC responded to plaintiff's demand.

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the defendants, much less for purposes of investigating the damages claims against them in the Second Amended Complaint. Once the SLC had determined that the plaintiff's request for preliminary injunction was not in the best interest of DISH, a determination that it reached on its own, its position on that issue was aligned with the position to be taken by the defendants. There was nothing improper therefore with the SLC counsel's limited coordination with counsel for the defendants for purposes of presenting the aligned opposition to the plaintiff's request. The Court indeed observed that it appreciated such coordination. Tr. of Hr'g on Mot. for Prelim. Inj. at 138 (Nov. 25, 2013) ("And it was nice they didn't duplicate their efforts in making the arguments, because I wouldn't have wanted to hear the same argument from Mr. Rugg that I heard from Mr. Peek.").

The plaintiff contends that the SLC misinformed the Court by supposedly suggesting that an "affiliate" of DISH could not have acquired the LightSquared secured debt. (Opp. at 20) In fact, the SLC has never made any statements concerning whether a DISH *affiliate* might have acquired the secured debt. In the material referenced by the plaintiff, the SLC rather addressed only DISH and a *subsidiary* of DISH: "[T]he SLC has determined that DISH and any subsidiary of DISH were Ineligible Transferees at the time that the secured debt was transferred to Mr. Ergen." (Opp. at 8-9) As explained in the SLC's motion, this statement was entirely correct. (Mot. at 27) The Bankruptcy Court has since confirmed its correctness, while also making clear the difference between a subsidiary and an affiliate. (Post-Trial Findings of Fact and Conclusions of Law, at 98, *LightSquared LP v. SP Special Opportunities LLC (In re LightSquared Inc.)*, No. 12-12080 (SCC), Adv. Pro. No. 13-01390 (SCC) (Bankr. S.D.N.Y. June 10, 2014) ("While the term 'subsidiary' is well-understood to reference ownership, the broader term 'affiliate' (used elsewhere throughout the Credit Agreement) includes entities controlled by, or under common control with, one another.")) The SLC has never suggested that the inability of DISH or a subsidiary of DISH to acquire the secured debt might preclude any form of claim against Ergen for usurpation of corporate opportunity. It rather has specifically reserved judgment on the merits of the corporate opportunity claim. (SLC Report Regarding Pl.'s Mot. for Prelim. Inj. at 38 n.168 (Nov. 20, 2013) ("The SLC's investigation of

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any claims that DISH may have against Mr. Ergen arising from his purchase of LightSquared debt remains ongoing. . . . [T]he SLC is not waiving or surrendering any legal or equitable claims that DISH may have.")) The SLC is now investigating whether an investment by a DISH affiliate was a corporate opportunity for DISH that was usurped by Ergen.[26]

III.

CONCLUSION

The SLC, on behalf of DISH, respectfully requests that the Court dismiss the Second Amended Complaint for failure to plead a legally sufficient excuse for the plaintiff's failure to make a pre-suit demand on the SLC.

DATED this 2nd day of October, 2014

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[26] The plaintiff also suggests that the SLC misinformed the Court by suggesting that DISH could not have acquired the secured debt during the time period before May 2012, when the prohibition on DISH acquiring the secured debt was established. (Opp. at 20) This assertion is wrong. As made clear by the SLC statement on which the plaintiff relies, the SLC said only that DISH and a DISH subsidiary were Ineligible Transferees "at the time that the secured debt was transferred to Ergen." (Opp. at 3) This was correct as no secured debt was transferred to Ergen before May 9, 2012, when the prohibition was established. The SLC is now investigating the significance of Ergen's entry into trades, before the prohibition was established, that did not close until after the prohibition was established.

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of October, 2014, a true and correct copy of the foregoing **SLC'S REPLY IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO PLEAD DEMAND FUTILITY** was served by the following method(s):

☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

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EXHIBIT A

IN THE DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE: DISH NETWORK CORPORATION DERIVATIVE LITIGATION	)	Case No. A-13-686775-B
	)	Dept. No. XI

VIDEOTAPED DEPOSITION OF STEVEN R. GOODBARN
OCTOBER 31, 2013

PURSUANT TO NOTICE and the Nevada Rules of Civil Procedure, the Videotaped Deposition of STEVEN R. GOODBARN was taken on behalf of the Plaintiff at 555 17th Street, Suite 3200, Denver, Colorado 80202, on October 31, 2013, at 8:46 a.m., before Lynnette L. Copenhaver, Registered Merit Reporter, Certified Realtime Reporter, and Notary Public within Colorado.

Job No: 32247

A. I -- I think beyond David Moskowitz, everyone else was surprised, but I can't say that --

Q. Okay.

A. -- for sure.

Q. You just don't know whether there was --

A. I don't know.

Q. -- a plan or not? Okay. Okay.

And then you write in the -- later in that paragraph: "We believe that there are continuing issues that relate to the fairness of a transaction and potential conflicts of interest with the chairman that we believe should be subject to independent scrutiny and evaluation."

Do you see that?

A. Mm-hmm.

Q. Okay. Was that your belief then?

A. Yes.

Q. Is that still your position now?

A. Yes.

Q. Okay. And -- and your point was there would remain issues related to the fairness of a transaction and potential conflicts of interest beyond your initial recommendation of whether to present a bid, correct?

MR. MUNDIYA: Objection.

A. Yes, as sort of set forth in these five points.

Q. (BY MR. LEBOVITCH) Okay. A few days after -- well, did any board members, you know, contact you after you sent this letter to talk about it?

A. No.

Q. Did any board members contact you after the termination of the committee to talk about what had happened at the July 21st meeting?

A. No.

(Deposition Exhibit 43 was marked.)

Q. No. Okay. Going to hand you Exhibit 43. Do you recall a few days after the public announcement of DISH's bid for LightSquared, there was a Wall Street Journal article talking about Charlie's potential profits on the deal?

A. Yes, I recall this.

Q. Okay. And you -- you were upset when you read the article, right?

A. Yes.

Q. Why?

A. Because it implied that the committee had blessed the entire thing and had -- you know,

was -- you know, we approved, you know, Charlie, you know, realizing a profit in these bonds, which we specifically had not done.

Q. Okay. And, you know, below the quote, I guess there's a paragraph that says, "We have not weighed in on the chairman's transactions in any way as we have yet to receive information from him."

And then you wrote: "I have not directly seen anything that says we could not have purchased these for DISH."

Do you see that?

A. Yes.

Q. That was your view?

A. It still is my view. I've still not seen anything.

Q. Okay.

A. I've seen nothing --

Q. Okay.

A. -- that would say that we could not buy these bonds.

Q. And you say that the company must issue a clarification to Wall Street Journal ASAP, right?

A. Yeah.

Q. Okay. And then you -- you end it by

saying that you as a committee have no ability to act in that capacity, but these remain related party transactions, and if anyone expects them to be approved as things stand, they are mistaken, right?

A. Well, I'm still on an independent committee that approves related party transactions, and, obviously, we haven't had a transaction, so there's going to be a transaction at some point in time if we win. And I do not intend to vote in favor of that, so, you know, I'm just putting the board on notice.

Q. Okay. Now, show you one document. Now, there was a special meeting of the board of directors on September 18, 2013, correct?

A. Let's see.

Q. I can show you if it helps.

A. Okay.

Q. There was a meeting called to create a special litigation committee?

A. Correct.

Q. Okay. And, you know, were you -- were you told that the timing of the meeting was linked to a hearing that was set to take place in Las Vegas the next day?

A. I don't recall. I -- I mean, I don't recall.

(Deposition Exhibit 44 was marked.)

Q. Okay. Going to hand you a document, see if you can identify it as -- this is Exhibit 44. Hand you a document and see -- sorry. I've handed you Exhibit 44. Can you identify it as the board -- the minutes of the board meeting of September 18, 2013?

A. Yes.

Q. Okay. Earlier I asked a question about whether you had seen the minutes of any board meeting subsequent to July 21st, and I think you said you couldn't recall?

A. Couldn't recall.

Q. Does this refresh your recollection there are minutes?

A. Okay. But I can't -- you know, I don't know that I've seen these before. I may have.

Q. Okay.

A. So -- but I -- but I recall the meeting, so. . .

Q. Okay.

A. I don't know that we've approved these minutes, but we may have.

Q. Okay.

A. But -- but I don't --

Q. Well, at the very least --

A. That would normally be part of this next board cycle.

Q. Okay. Now, first Item 2, there's a discussion about the LightSquared bankruptcy and bid, do you see that? This is Item 2 on the --

A. Okay. Yeah.

Q. Okay. And it says that Mr. Ergen was providing the update on the LightSquared bankruptcy proceedings. Do you see that?

A. Mm-hmm.

Q. Okay. Since the bid was made, have there been other updates to the board about the LightSquared bankruptcy -- with the bidding process besides this one here on September 18th?

A. Well, yeah, because we had a board meeting -- there was a subsequent routine board meeting where that would have been discussed, and I -- I don't have a general knowledge on that. But, I mean, the question (sic) is yes, so. . .

Q. Okay. So there was -- so you can recall that there were two updates to the board?

A. At least two.

Q. Okay. And is Mr. Ergen providing all those updates to the board about the bidding process?

A. I -- Tom Cullen, I believe, has been involved, also --

Q. Okay.

A. -- in those updates.

Q. Who -- who on behalf of DISH is -- is in charge of the LightSquared bidding process today?

A. Specifically I would say it's -- it's Tom Cullen, but I can't say that with certainty.

Q. Well, I guess who's making -- let me ask it differently. Today is it your view that -- that Charlie is essentially responsible for what DISH does in connection with the LightSquared bankruptcy?

A. Yes.

Q. Okay. Now, there's the discussion regarding the potential creation of a special litigation committee.

A. Uh-huh.

Q. And a couple paragraphs down, it says "Mr. Moskowitz led a discussion" --

A. Yes.

Q. -- "regarding the selection, compensation

and indemnification of potential members of the -- potential special litigation committee."

Do you see that?

A. Yes.

Q. Okay. And during the course -- it says in here that during the course of that discussion, you removed yourself from consideration as a potential member of the committee. Do you see that?

A. Yes.

Q. Okay. You did, in fact, remove yourself from consideration?

A. Yes.

Q. Why?

A. Because, number one, the discussion was being led by David Moskowitz. Number two, we were back to the same compensation and indemnification issues that we had with the earlier meeting, and no one else was raising any objections, and I wasn't going to be on a committee that could not be independent.

Q. Okay.

A. Those are all independent issues, in my mind.

Q. Okay. So it was -- it was your view that

nobody else could act in an independent way of Charlie, correct?

A. That is correct.

Q. Okay. Thank you.

MR. LEBOVITCH: I -- I have no further questions subject to any redirect I may have.

Do you guys -- does anyone have anything?

EXAMINATION

BY MR. FRAWLEY:

Q. Mr. Goodbarn, I am going to ask you just a couple of questions, if you don't mind.

A. Sure.

Q. As I think you heard -- when I introduced myself this morning, I'm Brian Frawley. I represent a number of the individual defendants here.

We heard a couple of questions this morning about indemnity and compensation as well as just more recently. Do you recall those questions?

A. Yes.

Q. Did any of the issues in -- with respect to the transaction committee earlier this year with respect to the indemnity or the -- or the compensation affect your ability to reach an

independent judgment with respect to the LightSquared acquisition?

A. No.

Q. Did any of the interactions that you had with Mr. Ergen or any other DISH representative affect your ability to reach an independent judgment in respect to the LightSquared transaction?

A. So -- so let's clarify. Making evaluation decision or making an overall decision on the transaction? Because we never completed that process as a committee.

Q. Right.

A. So. . .

Q. So in terms of --

MR. MARKEL: Wait. Hold on one second. Were you finished? Were you finished with your answer?

THE DEPONENT: Well, yeah. I mean, I don't think I was because I -- I just want to --

A. I mean, you asked a broad question about the transaction and we only reached a conclusion on the valuation as a committee.

Q. (BY MR. FRAWLEY) Right.

A. So that's what I'm referring to in

reaching a conclusion on that point. We did not reach a conclusion on the other points.

Q. Right.

A. So. . .

Q. Go ahead. At some point, you made a recommendation to the board on behalf of the special committee to proceed with potential LightSquared acquisition, correct?

A. Correct.

Q. And was that recommendation to the board reached by the special committee independently?

MR. LEBOVITCH: Object to the form.

A. Yes.

Q. (BY MR. FRAWLEY) And was the judgment of the special committee at the time it made that recommendation that the transaction recommended to the board was fair to the DISH shareholders?

A. No, because we had not completed the process. We only reached a conclusion on the valuation. We did not reach a conclusion regarding the conflict of interest, and that's really integral to that decision. That has not been -- that decision has not been reached.

Q. So in what respect would any decision-making on the conflict affect your

judgment as to the recommendation of the transaction?

A. What -- okay. In the context of what I just said, what do you mean? We only reached a conclusion on the valuation. We did not participate or review in the transaction, that was separate -- that took place after the committee was dismissed.

Q. Right.

A. So it -- I mean, am I making myself clear? The process was not complete.

Q. I understand the process was not complete, but part of the process was complete, correct?

A. Correct.

Q. And the part of -- included among what was complete was a recommendation to the board that, in fact, make a bid for LightSquared at $2.2 billion, correct?

A. Correct.

Q. And, in your mind, at the time you made that recommendation, was acquiring the LightSquared assets at $2.2 billion fair to the DISH shareholders?

A. That decision is not complete. Okay?

Because we have not reviewed the other side of the transaction. So we have five recommendations that were not complete at that point. Our recommendation was conditioned on those five conditions, we never have followed up on them.

Q. I --

A. So, I mean, I guess if it's a quick answer, it's no, because we reached a conclusion that that valuation, it was an asset worth pursuing.

Q. Right. And so you reached a conclusion that the asset was worth pursuing at a price of $2.2 billion, correct?

A. Yes.

Q. And is there anything in respect of the issues that you contend have not been addressed that might cause that conclusion to be revisited?

A. Well, we have not --

MR. LEBOVITCH: Objection to the form. Sorry. Sorry. Objection to the form.

Go ahead.

A. Could we have gone into an alternate world where Charlie did not own LightSquared securities and acquired this asset for less money, that's unanswered. Could we -- should we go after

any profits that Charlie has in those bonds and say those belong to DISH, we specifically reserve that. Those -- those are still open issues that really have never been vetted. So. . .

Q. (BY MR. FRAWLEY) I understand that they're open issues that had never been vetted. I'm trying to understand how -- how the -- the resolution of those issues might affect your judgment as to recommending the transaction or the price of the transaction?

MR. MARKEL: I don't want to interfere, but I -- I must put in an objection to be balanced that this I think is the third time that question has been asked, but you -- you can answer it again.

A. Well, again, as I've said, we -- we documented that we felt this process was incomplete. We -- we focused our efforts on being able to participate and not lose an opportunity to acquire an asset at a beneficial price, and to do that we needed a fairness opinion that said at least -- supported the price that we were willing to -- to talk about to third parties, but to say that that, you know -- that was all fair to DISH shareholders, that -- that full vetting by the

committee has not been done. That -- that has not been -- there is no conclusion there on that. Does that make -- I mean --

Q. (BY MR. FRAWLEY) And the fairness opinion that you got from Perella, did that reach a conclusion as to the fairness of the price to the DISH shareholders?

A. Well --

MR. LEBOVITCH: Objection.

A. -- it -- it raised a conclusion on the value of that asset to DISH.

Q. (BY MR. FRAWLEY) And was the conclusions of Perella contingent in any way upon the other issues that the special committee wishes to investigate?

A. That was not part of what they were looking at. That wasn't within their scope.

MR. FRAWLEY: I have no further questions.

A. At -- at that point in time.

MR. LEBOVITCH: Anyone else? No? I have nothing either.

Thank you, Mr. Goodbarn. Thank you for your patience with us today.

THE VIDEOGRAPHER: This is the end of

Media 3 of 3. Going off the record. The time is 2:52.

(Deposition concluded at 2:52 p.m.)

STATE OF _____)
) :ss
COUNTY OF _____)

I, STEVEN R. GOODBARN, the witness herein, having read the foregoing testimony of the pages of this deposition, do hereby certify it to be a true and correct transcript, subject to the corrections, if any, shown on the attached page.

_____
STEVEN R. GOODBARN

Sworn and subscribed to before me,
this _____ day of _____, 201_.

_____
Notary Public

REPORTER'S CERTIFICATE

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

I, LYNNETTE L. COPENHAVER, Registered Merit Reporter, Certified Realtime Reporter, and Notary Public, State of Colorado, do hereby certify that previous to the commencement of the examination, the deponent was duly sworn by me to testify to the truth in relation to the matters in controversy between the parties hereto.

That the said deposition was taken in machine shorthand by me at the time and place aforesaid and was thereafter reduced to typewritten form; that the foregoing is a true transcript of the questions asked, testimony given, and proceedings had.

I further certify that I am not employed by, related to, nor of counsel for any of the parties herein, nor otherwise interested in the outcome of this litigation.

Dated: October 31, 2013

My commission expires: April 25, 2015

_____
Lynnette L. Copenhaver, RMR, CRR

INSTRUCTIONS TO WITNESS

Please read your deposition over carefully and make any necessary corrections. You should state the reason in the appropriate space on the errata sheet for any corrections that are made.

After doing so, please sign the errata sheet and date it.

You are signing same subject to the changes you have noted on the errata sheet, which will be attached to your deposition.

It is imperative that you return the original errata sheet to the deposing attorney within thirty (30) days of receipt of the deposition transcript by you. If you fail to do so, the deposition transcript may be deemed to be accurate and may be used in court.

E R R A T A

I wish to make the following changes, for the following reasons:

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WITNESS' SIGNATURE DATE

EXHIBIT B

DISH NETWORK CORPORATION

CERTIFICATE OF THE ASSISTANT SECRETARY

The undersigned, being the Assistant Secretary of DISH Network Corporation (the "Corporation"), a Nevada Corporation, hereby certifies that:

> Attached hereto as Exhibit A is a true and correct copy of resolutions duly adopted by the board of directors of the Corporation (the "Board of Directors") at the Special Meeting of the Board of Directors held on September 18, 2013.

IN WITNESS WHEREOF, I have hereunto signed my name effective as of the 3rd day of October, 2013.

Brandon Ebrhart
Vice President, Associate General Counsel and Assistant Secretary

Exhibit A

Formation of the Special Litigation Committee

WHEREAS, the board of directors (the "Board of Directors") of DISH Network Corporation (the "Corporation") believes it is in the best interests of the Corporation to establish a special committee of the Board of Directors (the "Special Litigation Committee"), consisting of Messrs. Tom A. Ortolf and George R. Brokaw (each a "Committee Member" and collectively the "Committee Members"), pursuant to NRS 78.125 (the "Nevada Statute") and the applicable provisions of the Bylaws of the Corporation, for the purposes set forth herein; and

WHEREAS, the Board of Directors has determined that the Committee Members are independent of the claims asserted in the shareholder derivative action filed by the Jacksonville Police and Fire Pension Fund in the District Court, Clark County, Nevada (together with any amendments, revisions or other pleadings related thereto or generated thereby) and any similar shareholder derivative actions that may be filed from time to time (collectively, the "Derivative Litigation");

NOW, THEREFORE, BE IT RESOLVED, that in light of the foregoing, the Board of Directors has determined, in the good faith exercise of its reasonable business judgment, that it is advisable and in the best interests of the Corporation and its stockholders to establish the Special Litigation Committee to accomplish the purposes and to carry out the intent of the resolutions herein; and further

RESOLVED, that the Special Litigation Committee be, and it hereby is, established, in accordance with the Nevada Statute and the applicable provisions of the Bylaws of the Corporation with all the powers and authority of the Board of Directors to accomplish the purposes and to carry out the intent of the resolutions herein; and further

RESOLVED, that the Board of Directors has determined that each of Tom A. Ortolf and George R. Brokaw are independent of the claims asserted in the Derivative Litigation and neither of them has, or is subject to, any interest that, in the opinion of the Board of Directors, would interfere with the exercise by him of his independent judgment as a member of the Special Litigation Committee and that, each of them be, and they hereby are, appointed as the Committee Members to hold such office for so long as is necessary to carry out the functions and exercise the powers expressly granted to the Special Litigation Committee as shall be authorized in the resolutions herein; and further

RESOLVED, that the Board of Directors hereby delegates to the Special Litigation Committee the power and authority of the Board of Directors

to: (1) review, investigate and evaluate the claims asserted in the Derivative Litigation; (2) file any and all pleadings and other papers on behalf of the Corporation which the Special Litigation Committee finds necessary or advisable in connection therewith; (3) determine whether it is in the best interests of the Corporation and/or to what extent it is advisable for the Corporation to pursue any or all of the claims asserted in the Derivative Litigation taking into consideration all relevant factors as determined by the Special Litigation Committee; (4) prosecute or dismiss on behalf of the Corporation any claims asserted in the Derivative Litigation; and (5) direct the Corporation to formulate and file any and all pleadings and other papers on behalf of the Corporation which the Special Litigation Committee finds necessary or advisable in connection therewith, including, without limitation, the filing of other litigation and counterclaims or cross complaints, or motions to dismiss or stay the proceedings if the Special Litigation Committee determines that such action is advisable and in the best interests of the Corporation; and further

RESOLVED, that, in furtherance of its duties as delegated by the Board of Directors, the Special Litigation Committee is hereby authorized and empowered to retain and consult with such advisors, consultants and agents, including, without limitation, legal counsel and other experts or consultants, as the Special Litigation Committee deems necessary or advisable to perform such services, reach conclusions or otherwise advise and assist the Special Litigation Committee in connection with carrying out its duties as set forth in the resolutions herein; and further

RESOLVED, in connection with carrying out its duties as set forth in the resolutions herein, the Special Litigation Committee is hereby authorized and empowered to enter into such contracts providing for the retention, compensation, reimbursement of expenses and indemnification of such legal counsel, accountants and other experts or consultants as the Special Litigation Committee deems necessary or advisable, and that the Corporation is hereby authorized and directed to pay, on behalf of the Special Litigation Committee, all fees, expenses and disbursements of such legal counsel, experts and consultants on presentation of statements approved by the Special Litigation Committee, and that the Corporation shall pay all such fees, expenses and disbursements and shall honor all other obligations of the Corporation and/or the Special Litigation Committee under such contracts; and further

RESOLVED, that, in connection with carrying out its duties as set forth in the resolutions herein: (1) the officers of the Corporation are hereby authorized and directed to provide to the Special Litigation Committee, each Committee Member and any of their advisers, agents, counsel and designees, such information and materials, including, without limitation, the books and records of the Corporation and any documents, reports or

studies pertaining to the Derivative Litigation as may be useful or helpful in the discharge of the Special Litigation Committee's duties or as may be determined by the Special Litigation Committee, or any member thereof, to be appropriate or advisable in connection with the discharge of the duties of the Special Litigation Committee; (2) the Special Litigation Committee is authorized and empowered to meet with both present and past members of the Board of Directors who are not members of the Special Litigation Committee or with the officers of the Corporation to solicit the views of such directors and/or officers pertaining to the Derivative Litigation as may be useful or helpful in the discharge of the Special Litigation Committee's duties or as may be determined by the Special Litigation Committee, or any member thereof, to be appropriate or advisable in connection with the discharge of the duties of the Special Litigation Committee; (3) the Special Litigation Committee may but shall not be required to make such reports to the Board of Directors with respect to its deliberations and recommendations at such times and in such manner as it considers appropriate and consistent with carrying out its duties as set forth in the resolutions herein; and (4) to the fullest extent consistent with law, the deliberations and records of the Special Litigation Committee shall be confidential and maintained as such by each Committee Member and any legal counsel, experts and consultants engaged by the Special Litigation Committee and, without limiting the generality of the foregoing, all statutory and common law privileges shall be available with respect to legal advice rendered to, and documents prepared by counsel to assist, the Special Litigation Committee in its deliberations; and further

RESOLVED, that the Corporation shall indemnify each Committee Member in the manner and to the extent set forth under the current practices of the Corporation under the Articles of Incorporation of the Corporation in effect as of the date of this meeting (the "Current Articles") and under the Bylaws of the Corporation in effect as of the date of this meeting (the "Current Bylaws") regarding indemnification and advancement of expenses to the members of the Board of Directors against permitted items (as set forth in the Current Articles and Current Bylaws) arising out of the fact that the Committee Member is a member of the Special Litigation Committee, regardless of whether the Current Articles and the Current Bylaws are amended or modified in the future; with the sole exception that the advancement of expenses (including, without limitation, attorney's fees) incurred in defending against any such permitted items shall be determined in the sole discretion of the chairman of the Audit Committee of the Board of Directors (the "Audit Committee") if not a member of the Special Litigation Committee (or the next most senior member of the Audit Committee who is not a member of the Special Litigation Committee if the chairman of the Audit Committee is a member of the Special Litigation Committee (or the Chief Financial Officer of the Corporation if all members of the Audit Committee are

members of the Special Litigation Committee)), but otherwise subject to the terms and conditions applicable under the Current Articles and Current Bylaws, including, without limitation, that subject to an undertaking by or on behalf of the Committee Member to repay such amount if it shall ultimately be determined by a final order of a court of competent jurisdiction that he is not entitled to be indemnified by the Corporation for such permitted items; and further

RESOLVED, that, as of the date of this meeting, Mr. Brokaw be, and hereby is, designated as a Beneficiary (as defined in the D&O Trust (as defined below)) under the terms and conditions of that certain 2004 Indemnification Trust entered into by and between the Corporation and U.S. Bank National Association as of November 22, 2004 (the "D&O Trust"), with all of the rights, duties and obligations of a Beneficiary as set forth in the D&O Trust; and further

RESOLVED, that for their services on the Special Litigation Committee, each Committee Member shall be entitled to receive compensation as set forth on Schedule A (at the times specified therein), together, during the pendency of their service on the Special Litigation Committee, with prompt reimbursement of expenses reasonably incurred in connection with their services on the Special Litigation Committee; and further

General Enabling Resolutions

RESOLVED, that the proper officers be, and each one of them acting alone or with one or more other proper officers hereby is, authorized, empowered and directed, in the name and on behalf of the Corporation and its subsidiaries and under their corporate seals or otherwise, from time to time, to make, execute and deliver, or cause to be made, executed and delivered, all such other and further agreements, certificates, instruments or documents, to pay or reimburse all such filing fees and other costs and expenses, and to do and perform or cause to be done or performed all such acts and things, as in their discretion or in the discretion of any of them may be necessary or desirable to enable the Corporation and its subsidiaries to accomplish the purposes and to carry out the intent or the foregoing resolutions; and further

RESOLVED, that any and all actions previously taken by any of the proper officers of the Corporation and its subsidiaries within the terms of the foregoing resolutions be, and the same hereby are, ratified and confirmed in all respects.

Schedule "A"

Special Litigation Committee Compensation

Each Committee Member will be compensated $5,000 per month while serving on the Special Litigation Committee; provided that, the Board of Directors shall review the amount of such compensation following the date that is five (5) months after the date of this meeting.

EXHIBIT C

YOUNG CONAWAY STARGATT & TAYLOR, LLP
Attorneys at Law

WILMINGTON
RODNEY SQUARE

NEW YORK
ROCKEFELLER CENTER

C. Barr Flinn
P 302.571.6692
F 302.576.3292
bflinn@ycst.com

October 3, 2013

VIA EMAIL

Mark Lebovitch
Bernstein Litowitz Berger & Grossmann LLP
1285 Avenue of the Americas
New York, NY 10019-6028

Re: *Jacksonville Police and Fire Pension Fund on behalf of DISH Network Corporation v. Charles W. Ergen, et al.*

Dear Mr. Lebovitch:

On behalf of the Special Litigation Committee ("SLC") of DISH Network Corporation ("DISH"), we write in response to your September 23, 2013 letter, demanding that the SLC pursue – or support your client's pursuit of – each of the claims asserted in the Complaint (the "Demand"). Your letter also urges the SLC to pursue immediate relief, by reconstituting the Special Transaction Committee, and requests certain information concerning the SLC. You have subsequently clarified by telephone that the immediate action your client demands from the SLC need not take the form of reconstituting the Special Transaction Committee, that any immediate action that provides the relief sought by your preliminary injunction motion would suffice.

Response to Demand That Claims Be Pursued

Under the governing DISH Board resolutions, which are attached,[1] the SLC has been granted full authority to investigate each of the claims of the Complaint, to determine whether their pursuit is in the best interests of DISH and to act on behalf of DISH in this litigation. The SLC has retained independent counsel, specifically my firm, Young Conaway Stargatt & Taylor, LLP, and Holland & Hart LLP, which together have substantial experience in corporate governance, bankruptcy and special litigation committee matters. The SLC has received advice of counsel concerning its fiduciary duties as members of a special litigation committee.

[1] We are providing the DISH Board resolutions on a confidential basis, pending the entry of an appropriate confidentiality order.

The SLC takes seriously each of the claims asserted in the Complaint and will conduct a thorough investigation. Upon completion of the investigation, the SLC will determine whether pursuit of the claims is in the best interests of DISH and respond to your demand that they be pursued.

To thoroughly investigate all the claims of the Complaint, the SLC expects that it will need approximately four months to complete its investigation. It expects, during the coming weeks, to request and review documents from DISH and other relevant persons and to complete its review of documents by early November. The SLC further expects to conduct interviews of relevant persons during November and early December. Thereafter, it will deliberate to determine the appropriate course of action in response to the Demand. Since issues may arise that may require more time to investigate than now estimated, the SLC cannot be certain when it will complete its investigation. However, it currently projects that it will complete its investigation by the end of January 2014. It would not make sense for the SLC to conclude its investigation until after the Bankruptcy Court has confirmed a bankruptcy plan because future events in that proceeding could affect the SLC's determinations.

Response to Request for Immediate Relief

The SLC has considered your client's demand for immediate action that would provide the relief sought by your client's motion for preliminary injunction. Specifically, the SLC has considered whether it would be in the best interest of DISH for the SLC to seek to prevent Ergen and the directors that allegedly lack independence from him from influencing DISH's decisions in the auction or concerning more generally DISH's efforts to acquire LightSquared's assets.

Based primarily upon a few points set forth in the Complaint, to which all parties apparently agree, the contents of filings in the Bankruptcy Court, including the recent order establishing LBAC as the "stalking horse" bidder, and various principles of relevant corporate governance and bankruptcy law, as well as certain practical considerations, the SLC does not believe that the requested action would serve the best interests of DISH.

The SLC believes that such actions are unwarranted and also would harm DISH, including in its effort to acquire LightSquared's assets. The SLC believes that the actions are unwarranted for the following reasons: As you have correctly alleged in the Complaint, due to the bids previously submitted by Ergen, through L-Band Acquisition, LLC, and DISH, who has now been established as the "stalking horse" bidder, Ergen will receive par plus substantially all accrued interest on his secured debt of LightSquared, if LightSquared is to be sold. For this reason, even if Ergen were to control decisions by DISH in the bidding process, he could not increase the value of his interest in LightSquared's secured debt. He therefore no longer has any material personal interest that might induce him to make decisions for DISH that are not in DISH's best interest but might increase the value of his personal interest in the secured debt. No further decision by DISH could increase that value because the value could never exceed its existing value at par plus substantially all accrued interest. Ergen therefore no longer has any

material personal interest in DISH's decisions that diverges from those of DISH's remaining stockholders. In fact, as the owner of 52% of DISH's equity, his interests are well aligned with DISH and its other stockholders.

As for whether Ergen's participation in decisions by DISH might impede or impair DISH's efforts to acquire LightSquared's assets in the bankruptcy proceeding, the SLC believes that there is no material risk that this will occur. DISH is now beyond any material risk that Ergen's participation might prevent DISH's LBAC from becoming the "stalking horse" bidder. With full knowledge of Harbinger's allegations concerning Ergen's acquisition of the secured debt and Ergen's relationship to DISH and LBAC, the Bankruptcy Court determined last Monday that LBAC would be the "stalking horse" bidder potentially entitled to a $51.8 million "break up" fee, if an alternative transaction is consummated, subject to certain exceptions. DISH therefore is now well positioned in the bankruptcy auction.

The Harbinger adversary proceeding does not present a material risk that DISH will be precluded or hindered in its efforts to acquire LightSquared's assets. The Complaint states that Harbinger seeks, in the adversary proceeding, "a bankruptcy designation that DISH is not a good faith bidder." This is not correct. Harbinger's complaint asserts no such claim for relief. The only claims against DISH are for damages.

Harbinger *has* asserted that DISH's LBAC is not a good faith bidder in support of its effort to have the Bankruptcy Court approve its proposed bankruptcy plan, which does not permit a sale to LBAC or any other bidder. However, the SLC believes that there is not a material risk that, if LBAC is the winning bidder, the Bankruptcy Court would effectively reject LBAC's bid and approve Harbinger's plan, based upon the notion that LBAC is not a good faith bidder. To do so, the Bankruptcy Court would have to forgo alternative plans that it believes provide greater value to LightSquared and its creditors, and subject LightSquared and its creditors to the $51.8 million "break up" fee, which it approved while knowing of the argument that LBAC is not a good faith bidder. If the Bankruptcy Court ever develops a concern about Ergen's acquisition of the secured debt of LightSquared, while controlling DISH and LBAC, the most direct remedy for the Bankruptcy Court would be to simply disallow Ergen's secured debt, the remedy that Harbinger is already seeking in its adversary proceeding, disqualify its vote or otherwise affect the debt. It seems exceedingly unlikely that the Bankruptcy Court would penalize LightSquared and its creditors, by denying them the value of a plan that would provide them with more value, including a winning LBAC bid, and subjecting them to the "break up" fee, when it has available a remedy that would harm only Ergen.

The SLC further believes that it would be harmful to DISH to prevent Ergen and the directors that allegedly lack independence from him – seven of the existing eight directors – from influencing DISH's decisions concerning the acquisition of LightSquared. It would be detrimental to DISH's effort to acquire LightSquared's assets to preclude nearly the entire board from functioning fully at such a critical moment.

Responding to expedited discovery and preparing for the requested evidentiary hearing on the motion for preliminary injunction would consume valuable time of the defendant directors, management and counsel. Since this time might otherwise be invested in the efforts to acquire LightSquared, the requested discovery and preliminary injunction would interfere with DISH's ability to properly prepare for and participate in the auction of LightSquared. Even if your client limits the requested discovery, the matters raised by its injunction motion are complex, the discovery burden would still be substantial and many of the directors, DISH's management and outside counsel would be needed to help prepare DISH's defense and possibly to testify.[2] The requested injunction hearing and expedited discovery would undermine the very purpose for which the injunction is ostensibly sought.

Moreover, pursuing the injunctive relief would require the movant to make arguments that would be damaging to DISH's defense of Harbinger's adversary proceeding, which seeks $2 billion from DISH. The motion for preliminary injunction is predicated in substantial part upon the notion that Harbinger's position in the bankruptcy proceedings presents a risk to DISH's efforts to acquire LightSquared's assets. To establish that there is such a risk, the movant will necessarily need to demonstrate that Harbinger's claims may have merit. If they are meritless, there would be no risk and no need for injunctive relief. To demonstrate that there is risk, the Complaint indeed quotes extensively from the Harbinger complaint and goes so far as to allege that the conduct of DISH and Ergen at the present time is "similar" to DISH's conduct in the DBSD case, in which DISH was found to have acted in bad faith in acquiring debt of a debtor in bankruptcy. This is the same argument made by Harbinger. In seeking to obtain a preliminary injunction, the movant would have to prove or come close to proving a central aspect of Harbinger's claims, thereby increasing the possibility of a $2 billion damages award against DISH.

Although the SLC does not believe that pursuing preliminary injunctive relief is in the best interests of DISH, it will be attending DISH Board meetings. If Ergen's personal interest diverges from the interests of DISH and its remaining stockholders or if the SLC otherwise has reason to believe that the Board may not act in the best interests of DISH, the SLC will promptly seek remedial action and, if it is not forthcoming, advise the Court about the concern and seek appropriate injunctive or other relief.

The SLC has reached no views on the remaining aspects of the Complaint and will not do so until it has investigated them fully by, among other measures, obtaining and reviewing relevant documents, interviewing relevant persons and considering relevant legal principles.

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[2] *Cf. Rosenblum v. Sharer*, 2008 U.S. Dist. LEXIS 65353, at *25 (C.D. Cal. July 28, 2008) (granting motion to stay and stating: "[I]t seems sensible for [the company] and its stockholders that [the company's] resources be devoted for some time to the federal securities action").

Response to Requests for Information

As for your requests for information, we attach hereto, on a confidential basis, the final resolutions establishing the SLC and defining the scope of its authority. The resolutions also address the SLC's funding. We detail below the relevant facts pertaining to the independence of the members of the SLC. We identify above the firms that will act as the SLC's counsel. We also set forth above the expected timeline for the SLC's investigation.

The following are the disclosures concerning the independence of the members of the SLC:

Mr. Ortolf has served on the DISH Board since May 2005 and is a member of its Audit Committee, Compensation Committee and Nominating Committee. He is also a member of the Board of EchoStar Corporation ("EchoStar"). He was one of the first employees and later was President of EchoStar, which then included the business that is now DISH. For nearly 20 years, he has been the President of Colorado Meadowlark Corp., a privately held investment management firm.

Mr. Ortolf met Ergen in 1977 at Frito-Lay, where they were office mates. They have maintained a generally friendly professional relationship since then.[3] With the exception noted below, Mr. Ortolf has not had any other involvement with Mr. Ergen other than in his capacity as a director of DISH and EchoStar, for which he has received disclosed director's fees and options, and as a former member of EchoStar's management, for which he received annual W-2 compensation of less than $100,000 annually. In 1983, Mr. Ortolf began working at Ecosphere Corporation ("Echosphere"), earning a salary and also earning equity. In 1986, he sold his equity interest to Ecosphere for $1 million. In 1987, he invested the $1 million plus approximately $400,000, which he had borrowed, in Echostar's predecessor, of which he was then President and Chief Operating Officer. There, he earned a salary and earned a percentage of the company's profits. During the course of his employment at EchoStar's predecessor, the amount of profits distributed to him were in the amounts needed to cover the taxes that he owed on his percentage of the profits. Upon leaving EchoStar in 1991, his initial investment, the appreciation on his initial investment and the profits to which he was entitled that had not

[3] "Allegations of mere personal friendship or a mere outside business relationship, standing alone, are insufficient to raise a reasonable doubt about a director's independence." *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart,* 845 A.2d 1040, 1050 (Del. 2004). *See also, e.g., Zimmerman v. Crothall*, 2012 Del. Ch. LEXIS 64, at *44 (Mar. 5, 2012) ("To rebut the presumption of director independence, a plaintiff must allege more than that the directors 'moved in the same social circles, attended the same weddings, developed business relationships before joining the board, and described each other as "friends."'" (citations omitted)).

previously been distributed for taxes, all of which totaled about $7 million, were distributed to him. After subsequently lending a portion of the $7 million to EchoStar, it was repaid to him by EchoStar within about six months.

The exception referenced above is that, in 1992, Mr. Ortolf invested with Echosphere and another entity unrelated to Ergen in a new venture called Titan Satellite Systems, Inc., which discontinued business at a loss within eighteen months. The amount invested and lost by Mr. Ortolf was approximately $600,000.

Mr. Ortolf owns 60,000 shares of DISH stock, with a market value of approximately $2.75 million. He also own 12,000 shares of EchoStar stock, with a market value of approximately $500,000. The shares of DISH and EchoStar were acquired by Mr. Ortolf with cash.[4]

Mr. Brokaw will join the DISH Board on October 7, 2013. Over the years, he has served on the boards of directors of multiple companies, including Capital Business Credit LLC, Timberstar, Value Place Holdings LLC and North American Energy Partners Inc. (a NYSE-listed company), where Mr. Brokaw served on the audit committee. He is deeply experienced in investment and mergers and acquisitions matters, having most recently served as Managing Director of Highbridge Principal Strategies, LLC, until September 30, 2013. Between 2005 and 2012, Mr. Brokaw was a Managing Partner and Head of Private Equity at Perry Capital, L.L.C. Prior to joining Perry Capital, in 2005 Mr. Brokaw was Managing Director (Mergers & Acquisitions) of Lazard Frères & Co. LLC. Mr. Brokaw has had no prior relationship with DISH, EchoStar or any other entity related to Ergen. Mr. Brokaw's mother-in-law is friends from childhood with Cantey Ergen. Due to this relationship and because Mr. Brokaw's in-laws now live outside the United States, in Australia, at the request of Mr. Brokaw's wife, Ms. Ergen was made godmother to Mr. Brokaw's son. Mr. Brokaw has seen one or both of the Ergens once or twice a year. From time to time, Mr. Ergen has solicited Mr. Brokaw's professional views on

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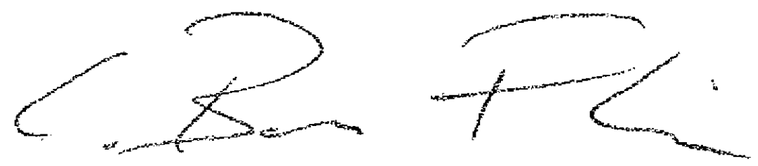
[4] DISH did not exclude Mr. Ortolf from participation on the STC due to concerns about his independence from Mr. Ergen. Rather, Mr. Ortolf recused himself from participation on the STC because, at the time, Mr. Ortolf was a member of the board of directors of EchoStar, and EchoStar had a potential interest in bidding on the LightSquared assets. EchoStar later determined that it was not interested in submitting a bid, and the DISH/EchoStar conflict that existed at the formation of the STC ceased.

some matters, without compensation. In 2003, Mr. Brokaw, as an investment banker for Lazard Frères & Co. LLC, on behalf of SBC, acted adversely to Mr. Ergen, on behalf of EchoStar, in negotiating the unwinding of an agreement between SBC and EchoStar.

Very truly yours,



C. Barr Flinn

CBF:jkm

DISH NETWORK CORPORATION

CERTIFICATE OF THE ASSISTANT SECRETARY

The undersigned, being the Assistant Secretary of DISH Network Corporation (the "Corporation"), a Nevada Corporation, hereby certifies that:

> Attached hereto as Exhibit A is a true and correct copy of resolutions duly adopted by the board of directors of the Corporation (the "Board of Directors") at the Special Meeting of the Board of Directors held on September 18, 2013.

IN WITNESS WHEREOF, I have hereunto signed my name effective as of the 3rd day of October, 2013.

Brandon Ehrhart
Vice President, Associate General
Counsel and Assistant Secretary

Exhibit A

Formation of the Special Litigation Committee

WHEREAS, the board of directors (the "Board of Directors") of DISH Network Corporation (the "Corporation") believes it is in the best interests of the Corporation to establish a special committee of the Board of Directors (the "Special Litigation Committee"), consisting of Messrs. Tom A. Ortolf and George R. Brokaw (each a "Committee Member" and collectively the "Committee Members"), pursuant to NRS 78.125 (the "Nevada Statute") and the applicable provisions of the Bylaws of the Corporation, for the purposes set forth herein; and

WHEREAS, the Board of Directors has determined that the Committee Members are independent of the claims asserted in the shareholder derivative action filed by the Jacksonville Police and Fire Pension Fund in the District Court, Clark County, Nevada (together with any amendments, revisions or other pleadings related thereto or generated thereby) and any similar shareholder derivative actions that may be filed from time to time (collectively, the "Derivative Litigation");

NOW, THEREFORE, BE IT RESOLVED, that in light of the foregoing, the Board of Directors has determined, in the good faith exercise of its reasonable business judgment, that it is advisable and in the best interests of the Corporation and its stockholders to establish the Special Litigation Committee to accomplish the purposes and to carry out the intent of the resolutions herein; and further

RESOLVED, that the Special Litigation Committee be, and it hereby is, established, in accordance with the Nevada Statute and the applicable provisions of the Bylaws of the Corporation with all the powers and authority of the Board of Directors to accomplish the purposes and to carry out the intent of the resolutions herein; and further

RESOLVED, that the Board of Directors has determined that each of Tom A. Ortolf and George R. Brokaw are independent of the claims asserted in the Derivative Litigation and neither of them has, or is subject to, any interest that, in the opinion of the Board of Directors, would interfere with the exercise by him of his independent judgment as a member of the Special Litigation Committee and that, each of them be, and they hereby are, appointed as the Committee Members to hold such office for so long as is necessary to carry out the functions and exercise the powers expressly granted to the Special Litigation Committee as shall be authorized in the resolutions herein; and further

RESOLVED, that the Board of Directors hereby delegates to the Special Litigation Committee the power and authority of the Board of Directors

to: (1) review, investigate and evaluate the claims asserted in the Derivative Litigation; (2) file any and all pleadings and other papers on behalf of the Corporation which the Special Litigation Committee finds necessary or advisable in connection therewith; (3) determine whether it is in the best interests of the Corporation and/or to what extent it is advisable for the Corporation to pursue any or all of the claims asserted in the Derivative Litigation taking into consideration all relevant factors as determined by the Special Litigation Committee; (4) prosecute or dismiss on behalf of the Corporation any claims asserted in the Derivative Litigation; and (5) direct the Corporation to formulate and file any and all pleadings and other papers on behalf of the Corporation which the Special Litigation Committee finds necessary or advisable in connection therewith, including, without limitation, the filing of other litigation and counterclaims or cross complaints, or motions to dismiss or stay the proceedings if the Special Litigation Committee determines that such action is advisable and in the best interests of the Corporation; and further

RESOLVED, that, in furtherance of its duties as delegated by the Board of Directors, the Special Litigation Committee is hereby authorized and empowered to retain and consult with such advisors, consultants and agents, including, without limitation, legal counsel and other experts or consultants, as the Special Litigation Committee deems necessary or advisable to perform such services, reach conclusions or otherwise advise and assist the Special Litigation Committee in connection with carrying out its duties as set forth in the resolutions herein; and further

RESOLVED, in connection with carrying out its duties as set forth in the resolutions herein, the Special Litigation Committee is hereby authorized and empowered to enter into such contracts providing for the retention, compensation, reimbursement of expenses and indemnification of such legal counsel, accountants and other experts or consultants as the Special Litigation Committee deems necessary or advisable, and that the Corporation is hereby authorized and directed to pay, on behalf of the Special Litigation Committee, all fees, expenses and disbursements of such legal counsel, experts and consultants on presentation of statements approved by the Special Litigation Committee, and that the Corporation shall pay all such fees, expenses and disbursements and shall honor all other obligations of the Corporation and/or the Special Litigation Committee under such contracts; and further

RESOLVED, that, in connection with carrying out its duties as set forth in the resolutions herein: (1) the officers of the Corporation are hereby authorized and directed to provide to the Special Litigation Committee, each Committee Member and any of their advisers, agents, counsel and designees, such information and materials, including, without limitation, the books and records of the Corporation and any documents, reports or

studies pertaining to the Derivative Litigation as may be useful or helpful in the discharge of the Special Litigation Committee's duties or as may be determined by the Special Litigation Committee, or any member thereof, to be appropriate or advisable in connection with the discharge of the duties of the Special Litigation Committee; (2) the Special Litigation Committee is authorized and empowered to meet with both present and past members of the Board of Directors who are not members of the Special Litigation Committee or with the officers of the Corporation to solicit the views of such directors and/or officers pertaining to the Derivative Litigation as may be useful or helpful in the discharge of the Special Litigation Committee's duties or as may be determined by the Special Litigation Committee, or any member thereof, to be appropriate or advisable in connection with the discharge of the duties of the Special Litigation Committee; (3) the Special Litigation Committee may but shall not be required to make such reports to the Board of Directors with respect to its deliberations and recommendations at such times and in such manner as it considers appropriate and consistent with carrying out its duties as set forth in the resolutions herein; and (4) to the fullest extent consistent with law, the deliberations and records of the Special Litigation Committee shall be confidential and maintained as such by each Committee Member and any legal counsel, experts and consultants engaged by the Special Litigation Committee and, without limiting the generality of the foregoing, all statutory and common law privileges shall be available with respect to legal advice rendered to, and documents prepared by counsel to assist, the Special Litigation Committee in its deliberations; and further

RESOLVED, that the Corporation shall indemnify each Committee Member in the manner and to the extent set forth under the current practices of the Corporation under the Articles of Incorporation of the Corporation in effect as of the date of this meeting (the "Current Articles") and under the Bylaws of the Corporation in effect as of the date of this meeting (the "Current Bylaws") regarding indemnification and advancement of expenses to the members of the Board of Directors against permitted items (as set forth in the Current Articles and Current Bylaws) arising out of the fact that the Committee Member is a member of the Special Litigation Committee, regardless of whether the Current Articles and the Current Bylaws are amended or modified in the future; with the sole exception that the advancement of expenses (including, without limitation, attorney's fees) incurred in defending against any such permitted items shall be determined in the sole discretion of the chairman of the Audit Committee of the Board of Directors (the "Audit Committee") if not a member of the Special Litigation Committee (or the next most senior member of the Audit Committee who is not a member of the Special Litigation Committee if the chairman of the Audit Committee is a member of the Special Litigation Committee (or the Chief Financial Officer of the Corporation if all members of the Audit Committee are

members of the Special Litigation Committee)), but otherwise subject to the terms and conditions applicable under the Current Articles and Current Bylaws, including, without limitation, that subject to an undertaking by or on behalf of the Committee Member to repay such amount if it shall ultimately be determined by a final order of a court of competent jurisdiction that he is not entitled to be indemnified by the Corporation for such permitted items; and further

RESOLVED, that, as of the date of this meeting, Mr. Brokaw be, and hereby is, designated as a Beneficiary (as defined in the D&O Trust (as defined below)) under the terms and conditions of that certain 2004 Indemnification Trust entered into by and between the Corporation and U.S. Bank National Association as of November 22, 2004 (the "D&O Trust"), with all of the rights, duties and obligations of a Beneficiary as set forth in the D&O Trust; and further

RESOLVED, that for their services on the Special Litigation Committee, each Committee Member shall be entitled to receive compensation as set forth on Schedule A (at the times specified therein), together, during the pendency of their service on the Special Litigation Committee, with prompt reimbursement of expenses reasonably incurred in connection with their services on the Special Litigation Committee; and further

General Enabling Resolutions

RESOLVED, that the proper officers be, and each one of them acting alone or with one or more other proper officers hereby is, authorized, empowered and directed, in the name and on behalf of the Corporation and its subsidiaries and under their corporate seals or otherwise, from time to time, to make, execute and deliver, or cause to be made, executed and delivered, all such other and further agreements, certificates, instruments or documents, to pay or reimburse all such filing fees and other costs and expenses, and to do and perform or cause to be done or performed all such acts and things, as in their discretion or in the discretion of any of them may be necessary or desirable to enable the Corporation and its subsidiaries to accomplish the purposes and to carry out the intent or the foregoing resolutions; and further

RESOLVED, that any and all actions previously taken by any of the proper officers of the Corporation and its subsidiaries within the terms of the foregoing resolutions be, and the same hereby are, ratified and confirmed in all respects.

Schedule "A"

Special Litigation Committee Compensation

Each Committee Member will be compensated $5,000 per month while serving on the Special Litigation Committee; provided that, the Board of Directors shall review the amount of such compensation following the date that is five (5) months after the date of this meeting.

REDACTED VERSION FILED

REDACTED VERSION FILED