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FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
LIGHTSQUARED INC., *et al.*,	:	Case No. 12-12080 (SCC)
	:	Jointly Administered
Debtors.	:	
LIGHTSQUARED LP, LIGHTSQUARED INC., LIGHTSQUARED INVESTORS HOLDINGS INC. TMI COMMUNICATIONS DELAWARE, LIMITED PARTNERSHIP, LIGHTSQUARED GP INC., ATC TECHNOLOGIES, LLC, LIGHTSQUARED CORP., LIGHTSQUARED INC. OF VIRGINIA, LIGHTSQUARED SUBSIDIARY LLC, SKYTERRA HOLDINGS (CANADA) INC., AND SKYTERRA (CANADA) INC.,	:	Adv. Pro. No. 13-01390 (SCC)
Plaintiff-Intervenors,	:	
- against-	:	
SP SPECIAL OPPORTUNITIES LLC, DISH NETWORK CORPORATION, ECHOSTAR CORPORATION, AND CHARLES W. ERGEN,	:	
Defendants.	:	

POST-TRIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

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TABLE OF CONTENTS

SHELLEY C. CHAPMAN
UNITED STATES BANKRUPTCY JUDGE

Between April 13, 2012 and April 26, 2013, Charles Ergen, through an entity named SPSO, purchased approximately $844 million of the senior secured debt of LightSquared LP, a debtor in these chapter 11 cases. Mr. Ergen – the founder, chairman of the board of directors, and controlling shareholder of DISH Network – bought the debt, he says, without any strategic intent to benefit DISH. Rather, he was interested in acquiring LightSquared debt personally because he "liked the investment" and because he had been advised that DISH itself was not eligible to purchase the debt due to restrictions in the LightSquared LP Credit Agreement. The "diligence" on the purchaser eligibility issue, such as it was, was conducted by Mr. Ergen's longtime friend Jason Kiser, the Treasurer of DISH, who from time to time worked on personal matters for Mr. Ergen. Mr. Kiser also arranged the trades on behalf of Mr. Ergen, on "his own time" while at work at DISH. Promptly after Mr. Ergen's initial debt purchase in the face amount of $5 million on April 13, 2012, and particularly after his significant debt purchase in the face amount of $247 million on May 4, 2012, the press began to speculate about the identity of the SPSO purchaser, publishing stories with headlines such as "LightSquared [Term Loan] Trades North of 70 as Ergen Enters the Picture" and "Ergen Builds Cash Pile Amidst LightSquared Restructuring Talks." The trades and the press reports did not go unnoticed by LightSquared, especially after the news that it was Carl Icahn who had sold his nearly quarter billion dollar position in the debt to SPSO. Philip Falcone, the founder and principal owner of Harbinger Capital Partners, which is the principal shareholder of LightSquared, reacted to the news swiftly and strategically, writing in an email message: "Well I'm working on giving him a nice surprise," referring to Mr. Ergen and to LightSquared's May 9, 2012 modification of its Credit Agreement's Disqualified Companies list to include DISH.

The game was afoot. Almost two years of moves and counter moves have ensued, with Lightsquared's other stakeholders sometimes watching from the sidelines and sometimes entering the fray – all under the watchful gaze of the Federal Communications Commission, which to this day has not taken definitive action to clarify the status of LightSquared's valuable spectrum assets. The questions before the Court, among others, are whether SPSO's debt purchases violated the LightSquared LP Credit Agreement and whether its now approximately $1 billion claim (inclusive of interest) should therefore be disallowed, or, alternatively, whether SPSO's claim should be equitably subordinated by virtue of its conduct in connection with the debt purchases and/or in connection with these chapter 11 cases. The Court's analysis is as follows.[1]

THE PARTIES

Plaintiffs LightSquared LP, LightSquared Inc., LightSquared Investors Holdings Inc., TMI Communications Delaware Limited Partnership, LightSquared GP Inc., ATC Technologies, LLC, LightSquared Corp., LightSquared Inc. of Virginia, LightSquared Subsidiary LLC, SkyTerra Holdings (Canada) Inc., and SkyTerra (Canada) Inc., as debtors and debtors in possession (collectively, with certain of their affiliated debtors and debtors in possession, "LightSquared" or the "Debtors") provide wholesale mobile satellite communications and broadband services throughout North America. Through its ownership of several satellites and licenses to use mobile satellite service spectrum issued by the Federal Communications Commission (the "FCC"), LightSquared delivers voice and data services to mobile devices used

[1] This Decision supersedes this Court's bench decision read into the record on May 8, 2014.

by the military, first responders and other safety professionals, and individuals throughout North America. (*See* Declaration of Marc R. Montagner [Bankr. Docket No. 3] ¶¶ 18-31.)[2]

Plaintiffs Harbinger Capital Partners LLC, HGW US Holding Company LP, Blue Line DZM Corp., and Harbinger Capital Partners SP, Inc. (collectively, "Harbinger") own in excess of 82 percent of the common equity of LightSquared and assert a general unsecured claim against LightSquared LP and claims against LightSquared Inc. (*See* Adv. Docket No. 1 ¶ 17.)

Defendant DISH Network Corporation ("DISH") is a public corporation organized and existing under the laws of the state of Nevada with its principal place of business in Englewood, Colorado. DISH provides broadband and satellite television services and aims to expand its broadband offerings, including by building a terrestrial broadband network. (PX0781 ¶¶ 30, 43.) In addition to its satellite broadcast business, DISH owns significant spectrum assets, including mobile satellite spectrum. (*Id.*) DISH is a direct competitor of LightSquared. (*Id.* ¶ 30; Jan. 13 Tr. (Ergen) 14:13-18; Jan. 10 Tr. (Kiser) 70:24-71:1; PX0013 at 10; Montagner Dep. 72:13-74:7; PX0159 at L2AP0007578.)[3]

Defendant EchoStar Corporation ("EchoStar") is a public corporation organized and existing under the laws of the State of Nevada with its principal place of business in Englewood, Colorado. EchoStar is a satellite communications company that currently operates, leases, or manages a number of satellites, including the satellites that provide services to DISH. EchoStar

[2] Citations to "Adv. Docket No. __" refer to docket entries in this adversary proceeding, Adv. Pro. 13-1390-scc (Bankr. S.D.N.Y.) (the "Adversary Proceeding") and citations to "Bankr. Docket No. __" refer to docket entries in the Debtors' bankruptcy case, *In re LightSquared Inc.*, Case No. 12-12080-scc (Bankr. S.D.N.Y.).

[3] Citations to the trial transcripts of the Adversary Proceeding, dated January 9 through January 17, 2014 and March 17, 2014, will be referenced as "Jan. __ Tr. (witness) [page:line] or "Mar. __ Tr. (counsel) [page:line]." Citations to deposition testimony from the Adversary Proceeding will be referenced as "Witness Dep. [page:line]."

is a direct competitor of LightSquared. (PX0781 ¶ 31; Jan. 10 Tr. (Kiser) 15:15-21; Jan. 13 Tr. (Ergen) 15:8-12.)

Defendant SP Special Opportunities LLC ("SPSO") is a limited liability company organized and existing under the laws of the State of Delaware with its principal place of business nominally in New York, New York. SPSO's sole member and managing member is Special Opportunities Holdings LLC ("SO Holdings"). SO Holdings is a Delaware limited liability company whose sole member and managing member is Defendant Charles W. Ergen ("Ergen").

Defendant Charles W. Ergen, a natural person, is the founder, chairman of the boards of directors, and majority owner of both DISH and EchoStar. Mr. Ergen – personally and through his family trusts – beneficially owns and controls over 88 percent of DISH's voting shares and over 80 percent of EchoStar's voting shares. Mr. Ergen owns approximately 53 percent of DISH. Mr. Ergen also wholly owns and controls SO Holdings and SPSO. (PX0700 ¶¶ 1-2; Jan. 13 Tr. (Ergen) 94:19-95:2, 208:18-211:20; Howard Dep. 37:25-38:16; PX0372 at 2, 5; PX0371 at 2.)

PROCEDURAL HISTORY

On May 14, 2012 (the "Petition Date"), LightSquared commenced a voluntary bankruptcy case pursuant to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York. ([Bankr. Docket No. 1].)

On August 6, 2013, Harbinger commenced the Adversary Proceeding against Mr. Ergen, DISH, EchoStar, L-Band Acquisition, LLC ("LBAC"), SPSO, SO Holdings, Sound Point Capital Management LP ("Sound Point"), and Mr. Stephen Ketchum, alleging inequitable conduct,

fraud, aiding and abetting fraud, tortious interference with prospective economic advantage, tortious interference with contractual relationship, unfair competition, and civil conspiracy; and seeking equitable disallowance of claims, compensatory and punitive damages, costs and fees, interest, and other appropriate relief. (*See* Adv. Docket No. 1.)

On August 22, 2013, LightSquared intervened in the Adversary Proceeding on limited grounds. (Adv. Docket No. 15.) U.S. Bank National Association ("U.S. Bank"), Mast Capital Management LLC ("Mast"), and the Ad Hoc Secured Group of LightSquared LP Lenders (the "Ad Hoc Secured Group") also intervened on the same day. (Adv. Docket Nos. 12, 14.)

On September 9, 2013, motions to dismiss were filed by each of the defendants in the Adversary Proceeding. (Adv. Docket Nos. 29, 30, 32, 33, 34, 35.)[4] On September 30, 2013, Harbinger amended its complaint as of right (the "Harbinger Amended Complaint"). (Adv. Docket No. 43.) Between October 3 and October 5, 2013, each of the defendants filed a motion to dismiss the Harbinger Amended Complaint. (Adv. Docket Nos. 44, 45, 46.) After the filing of additional oppositions and replies, this Court held a hearing on October 29, 2013.

By Order dated November 14, 2013 (the "November Order"), this Court granted Defendants' motions to dismiss the Harbinger Amended Complaint. (PX0770.) The Court also granted Harbinger leave to file a second amended complaint that did not assert claims on Harbinger's own behalf, but that merely set forth an objection, pursuant to section 502 of the Bankruptcy Code, to SPSO's claim. (*Id*.) The Court also authorized LightSquared to file a complaint setting forth the basis for its intervention. (*Id*.) On November 21, 2013, the Court issued its Memorandum Decision Granting Motions to Dismiss Complaint ("Decision on the

[4] The motions to dismiss filed in the Adversary Proceeding on September 9, 2013 were subsequently amended. *See* Adv. Docket Nos. 37, 38, 39.

Motions to Dismiss"), which set forth the bases for the November Order. (Adv. Docket No. 68; *Harbinger Capital Partners LLC v. Ergen (In re LightSquared Inc.)*, 504 B.R. 321 (Bankr. S.D.N.Y. 2013).)

On November 15, 2013, LightSquared filed a Complaint-in-Intervention (the "LightSquared Complaint") against SPSO, DISH, EchoStar, and Mr. Ergen (collectively, the "Defendants") seeking: (i) a declaration that SPSO is not an "Eligible Assignee" under LightSquared's October 10, 2010 Credit Agreement, as amended, modified, and restated (the "Credit Agreement") (PX0004), (ii) disallowance of SPSO's claim under 11 U.S.C. § 502(b), and (iii) equitable disallowance of SPSO's claim. (PX0771.) The LightSquared Complaint further alleges breach of contract against SPSO, as well as tortious interference with contractual relations against all Defendants. (*Id*.) The LightSquared Complaint also seeks equitable subordination as a remedy. (*Id*.)

On December 2, 2013, Harbinger filed a Second Amended Complaint (the "Harbinger Second Amended Complaint," and, together with the LightSquared Complaint, the "Complaints"), seeking (i) a declaration that SPSO is not an "Eligible Assignee" under the Credit Agreement, (ii) disallowance of SPSO's claim under 11 U.S.C. § 502(b), (iii) equitable disallowance of SPSO's claim, and (iv) equitable subordination of SPSO's claim under 11 U.S.C. § 510. The Harbinger Second Amended Complaint further alleges breach of contract against SPSO. (PX0781.)

On November 25 and November 26, 2013, the Defendants filed motions to dismiss the LightSquared Complaint,[5] and, on December 5, 2013, SPSO filed a motion to dismiss the

[5] Adv. Docket Nos. 69, 70, 72, 73.

Harbinger Second Amended Complaint. (Adv. Docket No. 84.) After the filing of oppositions and replies, the Court held a hearing on December 10, 2013.

By Order dated December 12, 2013 (the "December Order"), the Court granted in part and denied in part Defendants' motions to dismiss the Complaints. (PX0784.) The December Order dismissed all of the claims asserted in the Harbinger Second Amended Complaint, except for Harbinger's claim seeking disallowance of SPSO's claim under 11 U.S.C. § 502(b). (*Id*. ¶ 3.) With respect to the LightSquared Complaint, the Court granted Defendants' motions only as to LightSquared's equitable disallowance claim against SPSO and its tortious interference claim against SPSO. (*Id*. ¶ 2.) The Court retained jurisdiction to hear and determine all matters arising from the interpretation, implementation, and enforcement of the December Order. (*Id*. ¶ 4.) Answers to the remaining counts of the LightSquared Complaint and the Harbinger Second Amended Complaint were filed on December 24, 2013. (Adv. Docket Nos. 102, 103, 104.) Pre-trial briefs were filed by the parties on January 7 and January 8, 2013. (Adv. Docket Nos. 113, 115, 119, 121.)

On January 9, 2014, the Court commenced a trial[6] in the Adversary Proceeding and heard live testimony from eight witnesses: (a) Charles Ergen; (b) Thomas Cullen; (c) Stephen Ketchum; (d) Jason Kiser; (e) Philip Falcone; (f) Douglas Smith; (g) William Q. Derrough; and (h) Mark S. Hootnick.

The parties also submitted additional evidence consisting of (i) over 800 exhibits and (ii) excerpts from the deposition transcripts of six witnesses in lieu of live testimony. Deposition

[6] At the request of the parties, the Court bifurcated the Adversary Proceeding trial into two phases: liability and damages. The liability phase of the trial, which was held between January 9 and 17, 2014, and on March 17, 2014, will be referred to herein as the "Trial." The second phase of the trial, in which the extent of equitable subordination to be imposed on SPSO will be determined, has not yet been scheduled by the Court.

designations were submitted from the deposition transcripts of: (a) Steven Goodbarn; (b) Gary Howard; (c) Marc Montagner; (d) Robert Olson; (e) David Rayner; and (f) Joseph Roddy.

The Court requested that proposed findings of fact and post-trial briefs be submitted by LightSquared and Harbinger (together, "Plaintiffs") on February 24, 2014, and by Defendants on March 10, 2014. Those dates were subsequently modified by the Court. On February 24, 2014 and March 10, 2014, respectively, Plaintiffs submitted their (i) post-trial brief and proposed findings of fact and (ii) supplemental post-trial brief and supplemental proposed findings of fact. (Adv. Docket Nos. 132, 133, 137, 138.) On March 14, 2014, Defendants submitted proposed findings of fact and post-trial briefs, together with a response to Plaintiffs' supplemental post-trial brief. (Adv. Docket Nos. 140, 141, 142, 143, 144.) Closing arguments were held on March 17, 2014.

In addition, a flurry of sanctions motions and replies has been filed by the parties, each of which remains *sub judice*. (*See* Adv. Docket Nos. 145, 146, 148, 151, 152, 154, 158.)

This is an adversary proceeding pursuant to Rule 7001 of the Federal Rules of Bankruptcy Procedure. Pursuant to 28 U.S.C. §§ 157 and 1334(b), the Court has jurisdiction to consider this matter a "core" proceeding. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

FINDINGS OF FACT

The following constitute this Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure. Having considered the voluminous evidence, testimonial and documentary, including all exhibits admitted into evidence, as well as Plaintiffs' and Defendants' post-trial proposed findings of fact and briefs, and mindful that a court should not blindly accept findings of fact and conclusions of law proffered by the parties

(*see St. Clare's Hosp. and Health Ctr. v. Ins. Co. of North Am., (In re St. Clare's Hosp. and Health Ctr.)*, 934 F.2d 15 (2d Cir. 1991) (citing *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 (1964)), and having conducted an independent analysis of the law and the facts, the Court makes the following Findings of Fact and Conclusions of Law:[7]

I. The Parties and Certain Relevant Third Parties

1. In 1980, Mr. Ergen founded EchoSphere LLC ("EchoSphere") with James DeFranco and Mr. Ergen's wife, Cantey Ergen. (Jan. 13 Tr. (Ergen) 11:24-12:7, 12:21-13:11.) EchoSphere became EchoStar, which later split into EchoStar and DISH. (Jan. 13 Tr. (Ergen) 14:19-24.) Today, EchoStar is a technology company that manufactures set-top boxes and builds and operates satellites. (Rayner Dep. 27:10-18; Jan. 13 Tr. (Ergen) 14:25-15:7.)

2. DISH sells satellite television services. (Jan. 13 Tr. (Ergen) 14:13-18.) EchoStar is a supplier to DISH, but they are separate companies. (Jan. 13 Tr. (Ergen) 15:8-12.)

3. DISH's board of directors has ten members, four of whom are independent under NASDAQ rules. (Jan. 13 Tr. (Ergen) 15:13-21; see also 3/22/13 DISH Network Corp. Schedule 14A at 2-3; 9/17/13 DISH Network Corp. Form 8-K at 1; 11/5/13 DISH Network Form 8-K at 1; 2/21/14 DISH Network Corp. Form 10-K at 99.) The DISH Board of Directors has four regularly-scheduled meetings a year, but on average, the DISH Board will meet between eight and ten times a year. (Jan. 13 Tr. (Ergen) 16:11-14.) Discussions at the DISH board level cover many subjects, including potential acquisitions, the raising of capital, the strategic direction of the company, and personnel issues within the company. (Jan. 13 Tr. (Ergen) 16:21-25.)

[7] The findings of fact and conclusions of law herein shall constitute the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent any finding of fact later shall be determined to be a conclusion of law, it shall be so deemed, and to the extent any conclusion of law later shall be determined to be a finding of fact, it shall be so deemed.

4. Neither DISH nor EchoStar has an interest in SPSO. (PX0767 (Goodbarn Nevada Dep.) 32:24-33:2, 90:10-23; Olson Dep. 14:6-15:14, 26:7-27:11; Jan. 13 Tr. (Ergen) 36:7-9.)

5. Mr. Ergen, as the holder of a majority share of voting rights (approximately 88 percent and 79.4 percent of the total voting power in DISH and EchoStar, respectively), has the ability to elect a majority of the directors for both companies and control all other matters requiring the approval of their stockholders. (Jan. 13 Tr. (Ergen) 94:19-95:2, 208:18-211:20; Howard Dep. 37:25-38:16; PX0372 at 2, 5; PX0371 at 2.) Mr. Ergen voted for each of the current DISH Board members, and he testified that he does not know whether it is possible for someone to be a director of DISH without his vote. (Ergen Dep. 18:5-16, 26:19-25; Jan. 13 Tr. (Ergen) 95:3-5.) As a result of Mr. Ergen's dominance, both DISH and EchoStar are "controlled compan[ies] as defined in the Nasdaq listing rules." (PX0349 at 39-40; PX0350 at 34.)

6. Mr. Thomas Cullen ("Cullen") is the Executive Vice President of Corporate Development at DISH, a position he has held since June 2011. (Jan. 17 Tr. (Cullen) 98:19-20, 101:3-5.)

7. Mr. Jason Kiser ("Kiser") is the Treasurer of DISH and Vice President of Corporate Development at DISH and EchoStar, and, together with Messrs. Ergen and Cullen, is part of the corporate development team at DISH and EchoStar. (Jan. 10 Tr. (Kiser) 15:25-16:6, 68:24-69:2, 69:20-22.) Mr. Kiser arranged SPSO's trades in the secured debt of LightSquared LP ("LP Debt") pursuant to direction from Mr. Ergen by placing the orders for the amount and pricing of the debt and arranging to provide the funds to close the trades. (Jan. 10 Tr. (Kiser) 25:6-8.)

8. Mr. Stephen Ketchum ("Ketchum") is the founder and sole managing partner of Sound Point. (Jan. 15 Tr. (Ketchum) 13:13-19.) Sound Point is an investment management and

advisory firm that served as trading manager and investment advisor for SPSO and executed SPSO's purchases of LP Debt. (Jan. 15 Tr. (Ketchum) 20:14-17.) Messrs. Kiser and Ketchum had a twenty-year long relationship that involved work related to both EchoStar and DISH. Mr. Ketchum served as the point of contact between Sound Point and Messrs. Kiser and Ergen. (Jan. 15 Tr. (Ketchum) 14:19-22, 93:23-94:3; Jan. 10 Tr. (Kiser) 24:10-25:8.)

9. SPSO was formed by Sound Point for the exclusive purpose of serving as the investment vehicle through which Mr. Ergen made trades in LP Debt (PX0162; PX0171; PX0183; PX0224; Jan. 10 Tr. (Kiser) 30:16-21, 31:20-32:14; PX0700 ¶¶ 1-2), without those purchases being traceable to Mr. Ergen (see Jan. 10 Tr. (Kiser) 30:16-21, 31:20-22, 32:2-14, 90:6-12, 90:25-91:20; Jan. 13 Tr. (Ergen) 36:13-37:4, 49:20-50:25; PX0117; PX0290 at LSQ-SPCD-000006771; PX0298).

10. Mr. Steven R. Goodbarn ("Goodbarn") is a member of the DISH Board of Directors and was a member of the special committee of independent directors of DISH that was formed to evaluate and make recommendations regarding a possible bid by DISH for LightSquared's assets (the "Special Committee"). (PX0768 ¶ 2.)

11. Mr. Gary S. Howard ("Howard") is a former member of the DISH Board of Directors and was a member of the Special Committee. (PX0768 ¶¶ 2, 53.)

12. Harbinger began acquiring the securities of LightSquared's predecessor, SkyTerra Communications, Inc. ("SkyTerra"), in 2006 and eventually took control of the company in early 2010, renaming it LightSquared LP. (Jan. 16 Tr. (Falcone) 14:23-16:11.)

13. Harbinger currently owns about 80 to 85 percent of the stock of LightSquared. (Jan. 16 Tr. (Falcone) 18:8-12.) About 30 to 40 percent of Harbinger's assets are invested in

LightSquared, and Harbinger has invested approximately $1.8 to $2 billion in LightSquared. (Jan. 16 Tr. (Falcone) 81:3-19.)

14. Mr. Philip Falcone ("Falcone") is the portfolio manager of Harbinger Capital Partners LLC. (Jan. 16 Tr. (Falcone) 12:3-13.) Mr. Falcone has been trading high yield distressed debt for over 20 years. (Jan. 16 Tr. (Falcone) 13:13-18.) Mr. Falcone has between $500 and $700 million invested in Harbinger, which is a majority of his net worth. (Jan. 16 Tr. (Falcone) 80:6-20.)

15. Mr. Falcone is a member of LightSquared's board of directors, having joined the Board in early 2012. (Jan. 16 Tr. (Falcone) 17:25-18:1; 82:1-3.) A majority of the LightSquared Board of Directors is controlled by Harbinger. (Jan. 16 Tr. (Falcone) 81:23-25.)

II. The LightSquared LP Credit Agreement and the Restrictions on the Transfer of LP Debt

16. In 2010, LightSquared obtained authorization from the FCC to build an ancillary terrestrial network ("ATC Network") that would integrate its satellite service with terrestrial satellite ground stations to provide fourth generation long term evolution (4G-LTE) broadband mobile services throughout the United States. (DX054 ¶¶ 5-7, 29-30, 33.) To finance the buildout of its ATC Network, on October 1, 2010, LightSquared LP and certain of its affiliates entered into the Credit Agreement with UBS AG, Stamford Branch ("UBS"), as Administrative Agent, and entities that were, or would serve as, lenders under the Credit Agreement (collectively, the "Lenders"). (*Id.* ¶ 37.) The Credit Agreement is governed by New York law. (PX0004 at HARBAP00004158, § 10.09(a).)

17. The Credit Agreement restricts transfers of the LP Debt. Section 10.04(a) of the Credit Agreement provides, in pertinent part:

> [N]o Lender may assign or otherwise transfer any of its rights or obligations hereunder except (i) to an Eligible Assignee in

> accordance with the provisions of paragraph (b) of this Section 10.04, (ii) by way of participation in accordance with the provisions of paragraph (d) of this Section 10.04 or (iii) by way of pledge or assignment of a security interest subject to the restrictions of paragraph (f) of this Section (and any other attempted assignment or transfer by Borrower shall be null and void).

(PX0004 at HARBAP00004153.)

18. Section 10.04(b) states that assignments of LP Debt are permitted to Eligible Assignees: "Subject to the conditions set forth in paragraph (b)(ii) below, any Lender may at any time assign to one or more Eligible Assignees all or a portion of its rights and obligations under this Agreement . . . ." (PX0004 at HARBAP00004154.)

19. The term "Eligible Assignee" is defined in Section 1.01 of the Credit Agreement as follows: "[A]ny person to whom it is permitted to assign Loans and Commitments pursuant to Section 10.04(b)(i); *provided* that 'Eligible Assignee' shall not include Borrower or any of its Affiliates or Subsidiaries, any natural person or any Disqualified Company." (*Id.* at HARBAP0004058 (emphasis in original).)

20. The term "Eligible Assignee" also excludes "any natural person." (PX0004 at HARBAP0004058, §1.01.) Thus, pursuant to Section 10.04(b)(i), a natural person may not take an assignment of LP Debt ("Subject to the conditions set forth in paragraph (b)(ii) below, any Lender may at any time assign to one or more Eligible Assignees all or a portion of its rights and obligations under this Agreement . . ."). (PX0004 at HARBAP00004154.) Pursuant to Section 10.04(d), a natural person also may not receive a Participation in LP Debt ("Any Lender may at any time, without the consent of, or notice to, Borrower or the Administrative Agent sell participations to any person (other than a natural person, Borrower or any of its Affiliates or any Disqualified Company . . ."). (*Id.* at HARBAP00004155.)

21. Mr. Ergen, as a natural person, is not an Eligible Assignee and is not permitted to own the LP Debt.

22. "Disqualified Company" is defined in Section 1.01 as follows:

> [A]ny operating company which is a direct competitor of the Borrower identified to the Administrative Agent in writing prior to the Closing Date and set forth on Schedule 1.01(a), and thereafter, upon the consent of the Administrative Agent . . . such additional bona fide operating companies which are direct competitors of the Borrower as may be identified to the Administrative Agent from time to time and notified to the Lenders. A Disqualified Company will include any known subsidiary thereof.

(PX0004 at HARBAP0004057-58.) The Credit Agreement thus prohibits assignment or other transfer of the LP Debt to a LightSquared competitor named on Schedule 1.01(a) or a known subsidiary of such a competitor.

23. The word "Subsidiary" in the definition section of the Credit Agreement is defined, "with respect to any person (the 'parent')," as including, "any other person that is otherwise Controlled by the parent. . . ." (PX0004 at HARBAP0004073, § 1.01.) "Controlled" is defined to mean "the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a person, whether through the ownership of voting securities, by contract or otherwise. . . ." (*Id.* at HARBAP0004056, § 1.01.)

24. SPSO, SO Holdings, and Mr. Ergen were not initially included on Schedule 1.01(a) of the Credit Agreement, which, as of the inception of the Credit Agreement on October 1, 2010, did include EchoStar. (PX0004 at HARBAP00004166.)

25. On May 9, 2012, LightSquared amended the Disqualified Company list, Schedule 1.01(a) of the Credit Agreement, to add additional LightSquared competitors, including, among others, DISH. (PX0142.) On May 12, 2012, LightSquared again amended the Disqualified Company list to add Cablevision. (Jan. 16 Tr. (Falcone) 49:17-19; PX0901 at

HARBAP00011331; *see also* PX0190.) Each of DISH and EchoStar is a Disqualified Company under the Credit Agreement. SPSO is not a "known subsidiary" of any company identified as a Disqualified Company.

26. According to its CEO, LightSquared amended the Disqualified Company list on May 9 and 12, 2012, immediately prior to the Petition Date, "to make sure that the list of disqualified companies included all of [LightSquared's] competitors, because we didn't want competitors involved in the capital structure. We thought it was important as we were entering bankruptcy to make these updates." (Jan. 9 Tr. (Smith) 126:22-127:24; PX0161.)

27. The Credit Agreement defines the term "Affiliate" as "when used with respect to a specified person, another person that directly, or indirectly through one or more intermediaries, Controls or is Controlled by or is under common Control with the person specified." (PX0004 at HARBAP00004050-4051.)

28. On September 18, 2010, UBS proposed a draft of the Credit Agreement which did not include the concept of a Disqualified Company, but rather stated that an Eligible Assignee "shall not include Borrower or any of its Affiliates or Subsidiaries, any natural person or any person listed on Schedule 1.01(a)." (PX0001 at L2AP0009323.) UBS's draft did not restrict transfers to affiliates or "Affiliates" of companies or persons listed on Schedule 1.01(a); it only restricted transfers to companies or persons listed in Schedule 1.01(a). (PX0001 at L2AP0009323.)

29. On September 19, 2010, counsel for LightSquared proposed comments to UBS's draft. LightSquared's draft restricted transfers of LP Debt to any "Affiliate" of a company or person listed on Schedule 1.01(a). (PX0003.) Specifically, the draft stated that an Eligible Assignee "shall not include Borrower or any of its Affiliates or Subsidiaries, any natural person

or any Competitor." (PX0003 at L2AP0011786 (emphasis added).) It further stated, "'Competitor' shall mean (i) any person listed on Schedule 1.01(a), (ii) any other competitor of the Borrower that is designated as such in writing to the Administrative Agent by the Borrower from time to time and (iii) any Affiliate of any such person." (PX0003 at L2AP0011784.) Therefore, in this draft, transfers were restricted to any person or company listed on Schedule 1.01(a) as well as their "Affiliates."

30. On September 21, 2010, counsel for UBS proposed revisions to LightSquared's September 19, 2010 draft. (PX0002.) Those revisions removed the transfer restriction on any Affiliate of a company listed on Schedule 1.01(a) and, instead, restricted transfers to any Disqualified Company and "any known subsidiary thereof." (PX0002 at L2AP0011532.) The language from this draft defining Eligible Assignee and Disqualified Company is what appears in the final, executed Credit Agreement. (PX0002 at L2AP0011532; PX0004 at HARBAP00004057-4058.)

31. LightSquared Inc.'s Fourth Amended and Restated Stockholders' Agreement includes the defined term "Affiliates" and prohibits the transfer of any equity securities to "any of the entities set forth in Schedule 2.1(a)(ii) or any of their respective Affiliates." (PX0007 at HARBAP00010483.) LightSquared did not include a similar restriction on the transfer of its bank debt under the Credit Agreement.

32. Persons holding LP Debt are entitled to receive substantial non-public information about LightSquared and are granted access to LightSquared's officers and employees for information regarding LightSquared's ongoing business and operations. Prior to initial funding, LightSquared provided to the Lenders, among other things, multiple years of financial statements, plus current forecasts of anticipated financial performance (PX0004 at

HARBAP00004092-93, § 3.04); a listing of all interests in real property owned or leased by Borrower, together with representations regarding title, etc. (*id.* at HARBAP00004093-94, § 3.05); a listing of all copyrights, patents, and trademarks owned or licensed by Borrower, together with representations regarding same (*id.* at HARBAP00004094, § 3.06); and copies of all material agreements relating to the business operated by the Borrower (*id.* at HARBAP00004095-96, § 3.09.) Under the Credit Agreement, these disclosures must be updated regularly by the Borrower.

33. To meet this obligation, the Borrower must furnish to Lenders the type of information that would be included in annual and quarterly reports on SEC Forms 10-K and 10-Q (PX0004 at HARBAP00004108-9, §§ 5.01(a)-(b)), annual and quarterly budgets (*id.* at HARBAP00004110, § 5.01(h)), and "such other information regarding the operations, business affairs and financial condition of [Borrower, its parents and its subsidiaries] . . . as . . . any Lender may reasonably request, including, without limitation, updates on the Network build-out." (*Id.* at HARBAP00004110, § 5.01(j).) Each Lender also has the right to inspect and make copies of Borrower's financial records; to inspect Borrower's properties; and to "discuss the affairs, finances, accounts and condition of [Borrower, its parents and its affiliates] with the officers and employees thereof and advisors therefor (including independent accountants)." (*Id.* at HARBAP00004113-14, § 5.07(a).)

34. The Credit Agreement also provides that each Lender must "designate at least one individual to receive Private Side Communications [*i.e.*, communications containing material non-public information] on its behalf . . . and identify such designee (including such designee's contact information) on such Lender's Administrative Questionnaire." (PX0004 at HARBAP00004149, § 10.01(d).) A Lender may elect not to receive material non-public

information, but must, if so electing, waive "any and all claims based on or arising out of, not having access to Private Side Communications." (*Id.*)

35. SPSO did not waive its right to receive confidential information about LightSquared. To the contrary, SPSO specifically identified in the several Lender Questionnaires it provided to the Administrative Agent one or more persons to whom such information was to be delivered. (PX0198; PX0227; PX0282; PX0317; PX0362; PX0363; PX0365; PX0367; PX0411; PX0563; PX0618; PX0638; PX0658; PX0672; PX0728; PX0733; PX0849; PX0851.) Those individuals had access to information on LightSquared. (*See, e.g.*, PX0919-922.)

36. Under the express terms of the Credit Agreement, LightSquared's rights under the Credit Agreement cannot be waived. Section 10.02(b) explicitly requires written consent by the parties before a party may be found to have waived the terms of the Credit Agreement:

> Required Consents. Subject to Sections 10.02(c) and (d), neither this Agreement nor any other Loan Document nor any provision hereof or thereof may be waived, amended, supplemented or modified except, in the case of this Agreement, pursuant to an agreement or agreements in writing entered into by Borrower and the Administrative Agent or, in the case of any other Loan Document, pursuant to an agreement or agreements in writing entered into by the Administrative Agent, the Collateral Trustee (in the Case of any Security Document) and the Loan Party or Loan Parties that are party thereto, in each case with the written consent of the Required Lenders . . . .

(PX0004 at HARBAP00004149-50.)

37. Section 10.04(a) of the Credit Agreement states that only those transferees permitted under the terms of the Credit Agreement receive any rights, remedies, or claims thereunder:

> Nothing in this Agreement, expressed or implied, shall be construed to confer upon any person (other than the parties hereto, their respective successors and assigns permitted hereby,

> Participants to the extent provided in paragraph (d) of this Section and, to the extent expressly contemplated hereby, the other Indemnitees) any legal or equitable right, remedy or claim under or by reason of this Agreement.

(PX0004 at HARBAP0004153-54.)

38. Section 10.04(b) provides that "[a]ny assignment or transfer by a Lender of rights or obligations under this Agreement that does not comply with this paragraph [relating to assignments] shall be treated for purposes of this Agreement as a sale by such Lender of a participation in such rights and obligations in accordance with Section 10.04(d)." (PX0004 ¶ 10.04(b).)

39. Section 10.04(d) provides that LightSquared "agrees that any breach by any Lender or participant or sub-participant of the restrictions on assignment hereunder (including, without limitation, to Disqualified Companies) shall not excuse, in any respect, performance by the Borrower under the Loan Documents." (PX0004 ¶ 10.04(d).)

40. Section 10.16 of the Credit Agreement states that "all obligations of the Loan Parties [the Borrower and Guarantors] hereunder shall be absolute and unconditional irrespective of . . . any lack of validity or enforceability of any Loan Document or any other . . . circumstance which might otherwise constitute a defense available to, or a discharge of, the Loan Parties." (PX0004 ¶ 10.16.)

III. Background Regarding SPSO's Purchases of LP Debt

A. Messrs. Ergen and Kiser Investigate Whether DISH and EchoStar Can Purchase LP Debt

41. In the fall of 2011, Mr. Ergen believed the spectrum and satellites of LightSquared might be an attractive investment opportunity for DISH and therefore began looking into acquiring LightSquared's LP Debt. (Jan. 13 Tr. (Ergen) 109:3-9; Jan. 10 Tr. (Kiser) 27:12-18.)

42. Mr. Ergen asked Mr. Kiser, the Treasurer of DISH and a Vice President of Corporate Development at DISH and EchoStar, to provide him with information concerning a potential purchase by DISH of LightSquared's LP Debt. (Jan. 10 Tr. (Kiser) 27:19-28:5, 32:25-33:11, 77:7-18; Jan. 13 Tr. (Ergen) 25:4-18, 32:15-33:14, 112:10-113:23, 129:21-130:24.) Mr. Ergen stated that, when Mr. Kiser was first asked to check whether DISH could own the LP Debt, Mr. Kiser was acting in his capacity as Treasurer of DISH. (Jan. 13 Tr. (Ergen) 112:10-113:13; PX0832 at 88-89.) Mr. Kiser testified that when he initially inquired into who could purchase the LP Debt – and until it was clear that the companies could not purchase the debt – the LightSquared investment was considered a corporate opportunity for DISH and EchoStar. (Jan. 10 Tr. (Kiser) 32:25-34:7.)

43. Indeed, at the time when Messrs. Ergen and Kiser investigated purchasing the LP Debt, their roles and responsibilities at DISH and EchoStar included identifying potential investments and acquisitions for both companies. (Jan. 10 Tr. (Kiser) 68:24-69:9; Jan. 13 Tr. (Ergen) 95:6-24.)

44. After Mr. Ergen's initial request to determine whether DISH could purchase LP Debt, Mr. Kiser compiled information on LightSquared's spectrum and capital structure, which he shared with Mr. Ergen. (Jan. 10 Tr. (Kiser) 28:6-17.)

45. After providing this information to and discussing this information with Mr. Ergen, Mr. Kiser continued his examination into whether DISH and EchoStar could buy the LP Debt. (Jan. 10 Tr. (Kiser) 28:18-21.) To that end, Mr. Kiser sought and obtained Mr. Ergen's permission to retain Sound Point to facilitate purchases of the LP Debt and asked Sound Point's founder, Mr. Ketchum – a longtime investment banker for EchoStar who had worked with Mr. Kiser for over twenty years on EchoStar and DISH-related transactions – if DISH was permitted

to purchase the LP Debt. (Jan. 15 Tr. (Ketchum) 14:19-22; PX0116 at LSQ-SPCD-000000904; Jan. 13 Tr. (Ergen) 32:15-25; Jan. 10 Tr. (Kiser) 25:19-22.)

46. Mr. Ketchum acknowledged that the LightSquared transactions were the first time in twenty years of working with Mr. Kiser on behalf of DISH and EchoStar that he was asked to handle a personal investment for Mr. Ergen. (Jan. 15 Tr. (Ketchum) 13:22-25, 14:19-22, 94:4-7.)

47. At Mr. Kiser's request, Mr. Ketchum reviewed the Credit Agreement and determined that neither EchoStar nor DISH was eligible to purchase the LP Debt. (Jan. 10 Tr. (Kiser) 28:18-29:9, 78:18-79:1; Jan. 13 Tr. (Ergen) 32:22-25; Jan. 15 Tr. (Ketchum) 49:23-50:19, 95:10-14.)

48. Subsequently, Mr. Kiser consulted with Sullivan and Cromwell LLP ("Sullivan & Cromwell"), outside counsel to DISH and EchoStar, to determine whether DISH could purchase the LP Debt, providing Sullivan & Cromwell with excerpts from the Credit Agreement. (Jan. 10 Tr. (Kiser) 29:10-30:3, 118:14-18, 120:2-4; Jan. 13 Tr. (Ergen) 32:15-33:5.) No counsel other than Sullivan & Crowmwell, including in-house counsel for DISH, in-house counsel for Echostar, or counsel for Mr. Ergen and SPSO, were consulted on this issue. (Jan. 13 Tr. (Ergen) 32:15-33:3, 114:17-23, 180:23-181:2, 198:17-21; Jan. 10 Tr. (Kiser) 28:18-29:19, 78:24-79:22.)

49. After reviewing the Credit Agreement and consulting with Sound Point and Sullivan & Cromwell, Mr. Kiser determined that both DISH and EchoStar were restricted from buying the LP Debt, and communicated this to Mr. Ergen. (Jan. 10 Tr. (Kiser) 29:10-15, 30:4-9, 78:24-80:3, 121:8-22.)

50. In the fall of 2011, when Mr. Kiser, Mr. Ketchum, and Sullivan & Cromwell initially determined that both DISH and EchoStar were prohibited from purchasing the LP Debt

under the terms of the Credit Agreement, only EchoStar – but not DISH – was listed as a Disqualified Company on Schedule 1.01(a) of the Credit Agreement. (PX0004 at HARBAP00004166; PX0144; PX0151; Jan. 15 Tr. (Ketchum) 50:9-51:2.) DISH was subsequently added to the list of Disqualified Companies in May 2012. (PX0142.)

B. Messrs. Ergen and Kiser Create the Bal Harbour Entities, and Then SPSO, to Purchase LP Debt

51. After learning that DISH was prohibited under the Credit Agreement from purchasing the LP Debt, Mr. Kiser nonetheless asked Sound Point to monitor the prices and volume of the LP Debt. (Jan. 10 Tr. (Kiser) 30:4-9.)

52. In January, February, and March 2012, Mr. Ergen was seeking to acquire LP Debt for 40 cents on the dollar or less. (Jan. 10 Tr. (Kiser) 41:6-15; Jan. 13 Tr. (Ergen) 39:24-40:3; DX011; DX016; DX018; DX019;DX022; PX0021.) During that time, Mr. Kiser was monitoring the price of the debt for Mr. Ergen, but the debt was not yet trading at a price at which Mr. Ergen wanted to buy. (Jan. 10 Tr. (Kiser) 39:18-41:1, 42:24-43:15; DX011; DX016; DX018; DX019; DX022; PX0021; PX0032.)

53. On or after May 9, 2012, Messrs. Ergen, Kiser, and Ketchum were aware that the Credit Agreement prohibited competitors DISH and EchoStar from purchasing the LP Debt. In a May 9, 2012 email, Mr. Ketchum reported to Mr. Kiser that "[a]n amendment was just created whereby DISH Network Corp., DBSD, Clearwire, DirecTV, XM Satellite Radio Inc. were named as disqualified buyers." Mr. Ketchum specifically pointed out that "Charlie is not named." (PX0144.) The following day, Mr. Ketchum sent Mr. Kiser the original list of Disqualified Companies, as well as the exact language of the amendment. (PX0151; PX0155; *cf.* PX0190.) The copy of the amendment that Mr. Ketchum sent to Mr. Kiser included a handwritten note circling the term "Disqualified Company," explaining that this term "includes

any known subsidiary thereof." (PX0155 at SPSO-00001608.) Mr. Ketchum understood the term "subsidiary" to include any corporate entity controlled by a designated Disqualified Company. (Jan. 15 Tr. (Ketchum) 52:18-53:16; PX0155.)

54. Mr. Kiser further inquired of Sullivan & Cromwell in 2011 whether there were other ways for DISH or EchoStar to take advantage of "the LightSquared opportunity." (Jan. 10 Tr. (Kiser) 81:18-82:5.) Mr. Kiser discussed with Sullivan & Cromwell whether an investment vehicle could buy the LP Debt. (Jan. 10 Tr. (Kiser) 30:10-12.) Mr. Ergen testified that "[w]hen I talk to lawyers it's . . . more about, you know, how can I do this, as opposed to what the law says." (PX0866; Jan. 13 Tr. (Ergen) 199:4-7.)

55. No evidence was submitted demonstrating any exploration of the possibility of DISH or EchoStar purchasing the LP Debt through an "affiliate," nor any analysis of the possible corporate opportunity involved with such a structure.

56. Given the transfer restrictions in the Credit Agreement, if DISH and EchoStar could not buy LP Debt, then Mr. Ergen determined that he had an interest in "personally" purchasing the debt. (Jan. 10 Tr. (Kiser) 33:9-15, 77:11-18.) Accordingly, Mr. Kiser consulted with Sullivan & Cromwell to determine whether Mr. Ergen could buy the LP Debt, after which he understood that this would not work either, because the Credit Agreement barred Mr. Ergen and all other "natural persons" from buying the LP Debt. This led him to set up an investment vehicle. (Jan. 10 Tr. (Kiser) 30:16-21, 80:4-6, 120:20-24.)

57. Mr. Kiser structured the LP Debt purchases through a special purpose vehicle ("SPV"), initially directing the creation of two companies, Bal Harbour Capital Management LLC ("Bal Harbour Capital") and Bal Harbour Holdings, LLC (together with Bal Harbour Capital, the "Bal Harbour Entities"). (Jan. 10 Tr. (Kiser) 30:16-31:4, 87:3-8.) The Bal Harbour

Entities were incorporated in December 2011. (DX046; *see also* Delaware Department of State, Division of Corporations website (http://corp.delaware.gov/).)

58. After the Bal Harbour Entities had been formed, Mr. Kiser realized that a Littleton, Colorado address had been used in its formation documents. Mr. Ergen resides in Littleton, which is near Englewood, Colorado, where DISH and EchoStar are headquartered. (Jan. 10 Tr. (Kiser) 32:2-14, 35:21-24; Jan. 13 Tr. (Ergen) 36:13-20.) Concerned that the Colorado address would compromise Mr. Ergen's anonymity, Mr. Kiser directed Sound Point to create new SPVs to replace the Bal Harbour Entities. (Jan. 10 Tr. (Kiser) 32:2-14, 90:6-12, 91:12-20; Jan. 13 Tr. (Ergen) 35:24-36:6, 36:21-37:4, 49:20-50:25; PX0117.)

59. Mr. Ketchum suggested to Mr. Kiser that the new entity's name be SP Special Opportunities, LLC – a name suggesting Sound Point ownership. (PX0165.) Following Mr. Ketchum's suggestion, Mr. Kiser directed Sound Point to set up SPSO and SO Holdings on May 16, 2012.[8] (PX0221; PX0183; Jan. 10 Tr. (Kiser) 31:10-32:1, 91:9-11.)

60. Rather than listing a Colorado address, the SO Holdings and SPSO formation documents listed a Delaware address. (PX0183 at SPSO-00000512, SPSO-00000514.) As Mr. Kiser testified, SPSO's address was specifically chosen to deflect any possible connection between Mr. Ergen and Sound Point's purchases of the LP Debt. (Jan. 10 Tr. (Kiser) 32:2-14.)

61. It was important to Messrs. Ergen and Kiser that the public not know they were behind Sound Point's purchases. (Jan. 10 Tr. (Kiser) 30:16-21, 31:20-22, 32:2-14, 90:25-91:20; Jan. 13 Tr. (Ergen) 36:13-20; PX0171; PX0183; PX0224; PX0290 at LSQ-SPCD-000006771; PX0298.)

[8] The capital structure of SPSO and SO Holdings was set up to mirror that of the Bal Harbour Entities. (PX0224; PX0221; PX0058.)

62. SPSO's first trade in LightSquared debt was made on April 13, 2012, at a price of 48.75 cents on the dollar. (Jan. 10 Tr. (Kiser) 35:25-36:13; Jan. 13 Tr. (Ergen) 42:16-18; PX0859.) The second trade was executed on May 3, 2012, at 59 cents on the dollar. (PX0859.)

63. On May 4, 2012, SPSO entered into a trade for a $247 million block of LP Debt, paying approximately $149 million. (PX0859.) Between April 13 and May 4, 2012 (prior to LightSquared's Petition Date on May 14, 2012), SPSO purchased a total of approximately $287 million in face amount of LP Debt. These initial purchases were made at prices between 48.75 cents and 60.25 cents on the dollar and cost Mr. Ergen a total of approximately $172 million. (PX0859.)

64. Following SPSO's purchase of the $247 million piece of debt, news reports speculated that Mr. Ergen was the purchaser of the debt. (Jan. 10 Tr. (Kiser) 37:5-13.) On May 7, 2012, a *Reuters* story on the trade mentioned that Mr. Steven Ketchum of Sound Point previously counted Mr. Ergen as one of his investment banker clients and that DISH owned wireless airwaves "similar to LightSquared." (PX0121.) On May 9, 2012, an *LCD News* story carried the headline, "LightSquared TL trades north of 70 as Ergen enters the picture." (DX045.) On May 10, 2012, a *Wall Street Journal* blog, "Deal Journal," published an entry titled "Ergen Builds Cash Pile Amid LightSquared Restructuring Talks." (DX396.) Following the publication of those articles, the price of LightSquared's debt increased. (PX0859; DX047.)

65. Mr. Ergen testified that when he started buying LightSquared debt, he did not have an idea of how much debt SPSO would eventually buy, and he was not interested in achieving a "blocking position" in the debt. (Jan. 13 Tr. (Ergen) 43:17-44:8.)

66. Even after creating the Bal Harbour Entities and SPSO and purchasing large quantities of LP Debt, Messrs. Ergen and Kiser continued to check whether DISH or EchoStar

could purchase the LP Debt directly. (PX0243.) On October 4, 2012, Mr. Kiser wrote to Mr. Ergen, "I still can't get confirmation the restricted list [LightSquared] had in place that prevented the company from buying them has fallen away due to the BK." (*Id.*) The same day, Mr. Ergen responded, "[i]f we can't be sure the company can buy them, then I am interested to increase my position at the 75 level at least up to a 33% ownership level of the class." (*Id.*)

67. Mr. Ergen and Mr. Kiser checked the restrictions again in order to understand whether LightSquared's bankruptcy filing had altered any of the restrictions, such that DISH could now purchase LP Debt. (Jan. 13 Tr. (Ergen) 240:23-241:14.) Nevertheless, Mr. Ergen believed that it was not worth contacting the banks and undermining his anonymity to determine whether the transfer restriction had in fact fallen away. (Jan. 13 Tr. (Ergen) 49:14-50:13.)

C. SPSO and Mr. Ketchum Did Not Reveal that Mr. Ergen Was Behind the LP Debt Purchases

68. Sound Point endeavored not to disclose SPSO's connection to Mr. Ergen. For example, on May 2, 2012, Mr. Ketchum advised a Sound Point employee that "Echostar wants up to $50mm LightSquared," and asked him to reach out to Seaport, a middleman, but directed that "we can't tip our hand." The employee replied, "Yeah, i haven't indicated anything to anyone." (PX0088.) The following day, the employee reported that he spoke with Seaport and noted that Kevin Gerlitz, another Sound Point employee, was concerned that the trade would show Bal Harbour Capital as the buyer in the documentation. The employee asked, "Will this create problems?" Mr. Ketchum responded, "Possibly. Sh*t." (PX0089.) Indeed, Sound Point was not even willing to disclose the identity of the buyer to Jefferies as the middleman, even if Jefferies created an ethical wall. (PX0100.)

69. A few days later, on May 5, 2012, Mr. Ketchum sent an email to Mr. Kiser describing a voicemail he received from a *Wall Street Journal* reporter regarding Sound Point,

stating he was "obviously" not going to call the reporter back, even though he "clearly didn't understand what Sound Point is." (PX0119.) Mr. Ketchum further noted that the reporter "did not mention Charlie or EchoStar" in his voicemail. (*Id*.) Mr. Kiser forwarded Mr. Ketchum's email to Mr. Ergen, explaining that Mr. Kiser had spoken to Mr. Ketchum about the issue and that "[t]here might just be a lot of people fishing all over the place based on speculation (they're [*sic*] weren't a lot of other logical buyers)." (*Id*.)

70. Similarly, on May 7, 2012, after receiving a press inquiry, Mr. Ketchum reached out to Mr. Kiser and asked whether they should "employ a more strenuous strategy" around denying to the press that Mr. Ergen was behind SPSO. (PX0124.) Additionally, email exchanges demonstrate Messrs. Ketchum and Kiser making light of the fact that there were rumors in the press indicating that Carlos Slim ("Slim") was behind Sound Point's purchases of the LP Debt, noting that Mr. Ketchum would "continue to get looks" because he's "Carlos Slim's main man" and that a news report suggesting it was Slim and not Ergen was "[m]aybe [] right."[9] (*See* PX0271; PX0216; Jan. 15 Tr. (Ketchum) 91:20-92:3.)

IV. SPSO is Solely a Front for Mr. Ergen

71. Further evidencing that Sound Point viewed SPSO as being identical to Mr. Ergen, Sound Point entered into a Trading Management Agreement with SPSO on April 15, 2012 – a month before SPSO and SO Holdings were even formed.[10] (PX0055 at LSQ-SPCD-

[9] Carlos Slim is the principal of the Mexican telecommunications companies Telmex Internacional and America Movil (PX0895 (Cellular News, *America Movil, Telmex to Invest $880 Mn in Peru Through 2012*, (Apr. 18, 2010), available at *http://www.cellular-news.com/story/42891.php* (last visited Feb. 24, 2014)).)

[10] On April 5, 2012, Bal Harbour Capital entered into a trading management agreement with Sound Point, granting Sound Point non-discretionary authority to execute trades on its behalf. (PX0131 at LSQ-SPCD-000011949; Jan. 15 Tr. (Ketchum) 15:5-14.) Bal Harbour Capital was initially capitalized with one dollar ($1.00) and itself had no right to secure additional funding. (Jan. 15 Tr. (Ketchum) 19:18-25; PX0058 at LSQ-SPCD-000012134; PX0147 at SPSO-00001602; Ergen Dep. 120:2-10.) Under Bal Harbour Capital's Limited Liability Company Agreement, Mr. Ergen had no obligation to make further capital contributions beyond the initial one
(continued...)

00000750; Jan. 15 Tr. (Ketchum) 18:22-25, 99:9-19; PX0221.) Mr. Ketchum could not recall another instance where he entered into a Trading Management Agreement with an entity that had not yet been formed. (Jan. 15 Tr. (Ketchum) 19:5-10; PX0049; PX0083; PX0084; PX0087; PX0088; PX0224.) Mr. Ketchum knew he was dealing with Mr. Ergen and had no doubt that Mr. Ergen had the financial wherewithal to fund the trades.

A. SPSO was Undercapitalized and Funded Solely at Mr. Ergen's Discretion

72. SPSO is wholly owned by its one Managing Member, SO Holdings, and Mr. Ergen wholly owns and is the sole Managing Member of SO Holdings.[11] (PX0221 at LSQ-SPCD-000005552, 5557, 5560, 5565; Jan. 10 Tr. (Kiser) 31:15-19.)

73. SPSO – the vehicle on behalf of which most of the LP Debt trades were initiated and all of the trades closed – was formed with a *de minimis* amount of funding. (Jan. 10 Tr. (Kiser) 56:22-57:6; Jan. 13 Tr. (Ergen) 127:20-25; PX0529; PX0530; PX0560; PX0859.) The operating agreements for both SPSO and SO Holdings require that the Managing Member – Mr. Ergen – make an initial capital contribution of ten dollars ($10.00) for each entity. (PX0221 at LSQ-SPCD-000005553, 5558, 5561, 5566; Jan. 15 Tr. (Ketchum) 18:5-21.) Mr. Ergen testified that this initial contribution to SPSO "wasn't very much," (Jan. 10 Tr. (Ergen) 127:18-25), and Mr. Kiser ignored Mr. Ketchum's recommendation, based on advice from Sound Point's CFO, that Mr. Ergen's other SPV, Bal Harbour Capital, be capitalized initially with $500,000. (Jan. 10 Tr. (Kiser) 87:24-88:3.)

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dollar capital contribution (PX0058 at LSQ-SPCD-000012127 ("[T]he Managing Member shall have no right or obligation to make any further capital contributions in the Company.").)

[11] The Bal Harbour Entities also were solely owned by Mr. Ergen. (PX0058 at LSQ-SPCD-000012124; PX0059 at SPSO-00000396.)

74. Neither the SPSO operating agreement nor SO Holdings operating agreement requires additional capital contributions from Mr. Ergen as Managing Member. (PX0221 at LSQ-SPCD-000005553, 5561 ("[t]he Managing Member is entitled, but not required, to make additional contributions to the capital of the Company").)

75. Bear Creek Asset Management LLC ("Bear Creek") is a registered investment advisor that manages fixed-income instruments for high-net-worth individuals and corporations. (Roddy Dep. 17:8-11.) Bear Creek manages DISH's and EchoStar's corporate cash in short-term investment accounts. (Jan. 10 Tr. (Kiser) 22:1-9; Jan. 13 Tr. (Ergen) 24:14-15; Roddy Dep. 43:3-14.) Bear Creek also manages a substantial amount of Mr. Ergen's personal assets. (Jan. 10 Tr. (Kiser) 22:9-13; Jan. 13 Tr. (Ergen) 24:11-13.)

76. Mr. Ergen was the only person who could make the decision to transfer funds from his account at Bear Creek to Bal Harbour Capital or SPSO for settlement of the LightSquared trades. (Jan. 10 Tr. (Kiser) 57:7-58:12, 87:13-19; Jan. 15 Tr. (Ketchum) 99:9-19; PX0046; PX0055; PX0116 at LSQ-SPCD-000000905 (Mr. Ergen had "full discretion over the investment decisions" in his accounts at Sound Point); Jan. 10 Tr. (Kiser) 24:6-9 (Mr. Ergen "makes his own decision" with respect to his investments).)

77. The initial capital contribution amounts for SPSO and SO Holdings were insufficient to buy a significant amount of LP Debt. (Jan. 15 Tr. (Ketchum) 18:8-21, 20:4-13.)

78. Although Mr. Ketchum knew that the Bal Harbour Entities and SPSO did not have sufficient funds in their accounts to cover the purchases of LP Debt prior to the closing of the trades, Mr. Ketchum did not perform a credit check with respect to SPSO and did not have an understanding of SPSO's financial resources or wherewithal. (Jan. 15 Tr. (Ketchum) 20:18-25; PX0062; PX0066; PX0070.)

79. Sound Point nevertheless traded on behalf of Mr. Ergen's minimally-funded entities because Mr. Ketchum understood that the entities were backstopped by Mr. Ergen. (PX0052; PX0056; PX0058; PX0059; PX0074.) For instance, on April 13, 2012, Sound Point initiated a $5 million LP Debt trade for Bal Harbour Capital, even though at that time the Bal Harbour account had not yet been funded. (PX0859; PX0066; PX0049; PX0050; PX0062; PX0070.) On April 17, 2012, Mr. Ketchum wrote to Kiser that, "[w]e need to get the Citi account open for BH Holdings and get $500,000 in the account before we do any more LightSquared trades." (PX0066.)

80. Mr. Ketchum testified that Sound Point was "comfortable" that Mr. Ergen would pay for SPSO's LightSquared debt purchases because "[i]t was implicit that if we executed a trade, SPSO would pay to settle the trade." Sound Point understood that this money would come from Mr. Ergen, and Mr. Ketchum stated that Sound Point was satisfied that the trades would be settled based on Mr. Ergen's credit rather than SPSO's credit. (Jan. 15 Tr. (Ketchum) 21:1-22:8, 120:13-16; Jan. 10 Tr. (Kiser) 57:7-59:5, 61:5-9, 74:11-19; DX229; PX0041; PX0052 at LSQ-SPCD-000005238 (documentation for Bal Harbour BNP Paribas account stated that Mr. Ergen had "$100 million +" of liquid net worth); PX0091; PX0116 at LSQ-SPCD-00000904.)

B. SPSO Votes Against Extension of LightSquared's Negotiations with Lenders

81. In early 2012, both Messrs. Ergen and Kiser knew that there was a strong possibility that LightSquared would file for bankruptcy. (*See, e.g.*, PX0033 (February 20, 2012 email from Mr. Cullen to Messrs. Ergen and Kiser enclosing article on LightSquared's default on $56 million payment to Inmarsat); PX0075 (April 27, 2012 email from Mr. Cullen to Mr. Kiser enclosing *Wall Street Journal* article discussing bankruptcy as an imminent possibility); PX0078 (April 30, 2012 email from Mr. Kiser to Mr. Ergen enclosing *Wall Street Journal* article discussing Mr. Falcone's attempt to get a one week "extension on default"); PX0121 (May 7,

2012 email from Mr. Cullen to Messrs. Ergen and Kiser enclosing *Reuters* story noting LightSquared's "uncertain future" and the possibility of a default); PX0163 (May 11, 2012 email from Mr. Kiser to Mr. Ergen enclosing *Debtwire* article suggesting LightSquared could file for bankruptcy).)

82. Throughout early 2012, Mr. Ketchum kept Mr. Kiser apprised as he monitored LightSquared's situation. (PX0031; PX0039; PX0044; PX0064; PX0074.) On May 4, 2012 – prior to LightSquared's bankruptcy filing – SPSO was notified that, in connection with the $247 million in LP Debt that SPSO had agreed to purchase but had not yet closed on, it had the right to vote on a proposed amendment to the Credit Agreement that would give LightSquared more time to attempt to reach an agreement with the LP Lenders and avoid bankruptcy. In an email on Friday, May 4, 2012, Mr. Kiser wrote to Mr. Ergen, in part, that "[t]he seller is inclined to vote to approve this one week extension of time to continue negotiations, and so if the buyer does not direct the seller to the contrary, that is how the seller will vote." (Jan. 10 Tr. (Kiser) 111:13-112:5; PX0111.) The amendment was due several days later, on Monday, but responses were sought before the weekend if possible. (PX0097.) Mr. Ergen replied to Mr. Kiser's email, "I would have them vote no." (Jan. 10 Tr. (Kiser) 113:13-15, 113:23-25; Jan. 13 Tr. (Ergen) 166:1-167:16; PX0111.) Following Mr. Ergen's direction, Mr. Kiser directed Sound Point to vote "no" on the amendment. (Jan. 10 Tr. (Kiser) 116:18-117:21; PX0097; PX0109.) A Sound Point employee relayed these instructions to Mr. Ketchum, commenting "[n]o extension, so they want it to file bankruptcy." Mr. Ketchum replied, "[n]o surprise there." (PX0096.)

83. While Mr. Ergen testified that he determined to vote "no" because he did not have the documents necessary to decide how to vote (Jan. 13 Tr. (Ergen) 166:1-167:16, 261:13-263:8), the record reflects that the amendment documents likely could have been obtained by

Sound Point, had Messrs. Ergen and/or Kiser indicated an interest in reviewing them over the weekend. When a Sound Point employee told Mr. Kiser that "I might have figured out a way to get the docs . . . please stand by," Mr. Kiser simply responded "[w]e'll vote no." (PX0097; PX0096.) Mr. Kiser also conceded that, before voting no, he made no effort to discuss with any of the LP Lenders why they wanted to extend the default deadline. (Jan. 10 Tr. (Kiser) 118:10-13; PX0097.) After seeing the email exchanges between Messrs. Kiser and Ketchum concerning the availability of the amendment documents, Mr. Ergen testified, "I'm disappointed that [Kiser] answered no. . . . That's not the way I would have done it. . . ." (Jan. 13 Tr. (Ergen) 262:13-263:8.)

C. SPSO's LP Debt Purchases

84. Mr. Ergen funded SPSO's debt purchases from his personal account at Bear Creek. None of the money used to fund SPSO's purchases of LightSquared debt came from DISH or EchoStar. (Jan. 13 Tr. (Ergen) 59:11-12; Jan. 10 Tr. (Kiser) 57:18-23; Rayner Dep. 23:14-24:2, 24:13-23; Olson Dep. 14:6-15:14.)

85. Mr. Robert Olson, DISH's Chief Financial Officer ("Olson"), testified that if DISH money had been used to fund the trades, he would have known because DISH's controller, Paul Orban, would need to approve the transactions. (Olson Dep. 14:10-15:14.)

86. Mr. Ergen's Bear Creek account that was used to fund SPSO's trades in LightSquared debt is titled the "Lindsey Revocable Trust" account (Jan. 10 Tr. (Kiser) 58:13-17; Roddy Dep. 17:24-18:8; DX326), and was set up in 2000 for estate planning purposes. (Jan. 13 Tr. (Ergen) 61:17-23, 62:7-8.) Mr. Ergen is its sole beneficiary and is authorized to make investments for the trust, and his wife, Cantey Ergen, is a co-trustee. (Jan. 13 Tr. (Ergen) 61:17-23, 62:7-8, 252:18-20.) Bear Creek understood that the Lindsey Revocable Trust was a personal trust account for Mr. Ergen. (Roddy Dep. 17:24-18:8.)

87. Mr. Ergen does not have an agreement or understanding with DISH regarding SPSO's investment in LightSquared debt, and he understands that the money he personally invested in LightSquared debt is at risk. (Jan. 13 Tr. (Ergen) 233:6-16.) Thus, if SPSO's claim in LightSquared receives an impaired recovery, Mr. Ergen bears the sole risk. (Jan. 13 Tr. (Ergen) 233:6-16.) In addition, there is no agreement pursuant to which DISH or EchoStar will share in any gains from SPSO's investments. Mr. Olson confirmed that there are no agreements between Mr. Ergen and DISH related to Mr. Ergen's purchases of LightSquared debt. (Olson Dep. 26:7-27:11.)

88. Between April 13, 2012 and April 26, 2013, SPSO contracted to purchase over $1 billion in face amount of LP Debt, of which it actually closed trades for $844,323,097.83 in face amount. When a trade was scheduled to close, Mr. Kiser would contact Bear Creek and tell it how much money was needed to close the trade. (Jan. 10 Tr. (Kiser) 21:23-22:13; 57:7-17.) Mr. Ergen would then authorize the wire transfer and Bear Creek would liquidate investments to fund the transfer. (Jan. 10 Tr. (Kiser) 21:23-22:13, 57:7-17.)

89. The following chart sets forth SPSO's trades in LP Debt, including the trade and closing dates, par amount, purchase price, cost, broker, and settlement status:

Trade Date	Closing Date	Par	Price	Cost	Counterparty	Status
04/13/12	09/06/12	5,000,000.00	48.750	2,437,500	UBS	Settled
05/03/12	07/23/12	4,545,500.00	59.00	2,681,845	Jefferies	Settled
05/03/12	07/26/12	20,000,000.00	59.250	11,850,000	Seaport	Settled
05/03/12	09/06/12	3,000,000.00	58.750	1,762,500	UBS	Settled
05/03/12	09/06/12	2,000,000.00	58.500	1,170,000	UBS	Settled
05/03/12	07/23/12	5,000,000.00	59.000	2,950,000	Jefferies	Settled
05/04/12	05/31/12	247,259,046.62	60.250	148,973,576	Jefferies	Settled
10/04/12	11/30/12	19,417,287.99	78.500	15,242,571	Jefferies	Settled
10/23/12	02/06/13	3,000,000.00	83.750	2,512,500	UBS	Settled
11/15/12	01/08/13	7,997,057.00	81.750	6,537,594	Jefferies	Settled
12/12/12	6/11/13	2,000,000.00	84.000	1,680,000	Goldman Sachs	Settled

Trade Date	Closing Date	Par	Price	Cost	Counterparty	Status
12/13/12	03/12/13	7,000,000.00	86.000	6,020,000	Jefferies	Settled
12/20/12	04/09/13	14,782,302.32	85.500	12,934,515	UBS	Settled
12/28/12	03/13/13	15,000,000.00	88,500	13,275,000	Jefferies	Settled
01/02/13	03/07/13	20,000,000.00	89.125	17,825,000	Jefferies	Settled
01/02/13	04/05/13	6,000,000.00	89.125	5,347,500	Jefferies	Settled
01/03/13	03/07/13	17,999,999.97	89.250	16,065,000	Jefferies	Settled
01/07/13	05/24/13	7,000,000.00	89.500	6,265,000	Jefferies	Settled
01/14/13	05/24/13	9,410,420.00	91.500	8,610,534	Jefferies	Settled
02/01/13	07/23/13	20,000,000.00	91.875	18,375,000	JPM	Settled
03/25/13	05/24/13	88,262,536.00	93.375	84,180,394	Jefferies	Settled
03/28/13	-	168,759,227.85	96.000	162,008,859	Jefferies	Unsettled
04/01/13	6/25/13	5,500,000.00	96.000	5,280,000	Seaport	Settled
04/19/13	6/14/13	122,250,172.79	96.000	117,360,166	Jefferies	Settled
04/26/13	6/18/13	145,712,408.57	96.000	139,883,912	Jefferies	Settled
04/26/13	6/18/13	46,186,366.57	96.00	44,338,912	Jefferies	Settled
Total Purchased		1,013,082,326.30	84.45	855,567,877		
Total Settled		844,323,097.83		693,559,018		Settled
Total Unsettled		168,759,227.85				Unsettled

(*See* PX0859 at 4.)

D. Mr. Ergen's Desire to Obtain a Blocking Position in LP Debt

90. Mr. Ergen's strategy in acquiring LP Debt included the acquisition of a blocking position that would enable SPSO to enforce "certain rights" during the bankruptcy proceeding. (Jan. 10 Tr. (Kiser) 47:22-48:10, 56:11-14; Jan. 13 Tr. (Ergen) 172:10-174:2; DX047.)

91. Mr. Ergen understood that creditors could be treated differently as a result of his investments in Loral, which went through a bankruptcy process. Mr. Ergen ended up with equity while other investors ended up with cash. (Jan. 13 Tr. (Ergen) 52:6-11.) Based on that experience, Mr. Ergen believed that 33 percent was a "meaningful percentage in bankruptcy," and that with that percentage, he "couldn't get jammed with a different kind of currency than

somebody else in that class might get."[12] (Jan. 13 Tr. (Ergen) 51:12-18, 172:25-173:3.) Mr. Ergen had a sizeable enough position in LightSquared to protect that he decided to acquire a blocking position; he stated that he "knew there were ways that [he] might be able to protect [his] investment if [he] got a third that [he] wouldn't have if [he had] half of that." (Jan. 13 Tr. (Ergen) 51:12-24.)

92. At Mr. Ergen's direction, Mr. Kiser (through Sound Point) regularly monitored how close SPSO was to reaching a blocking position and kept a close eye on developments in the bankruptcy itself. (*See* PX0244; PX0264; PX0276; PX0288; PX0289; PX0375; PX0379; PX0306; Jan. 15 Tr. (Ketchum) 102:7-12; *see also* PX0064; PX0096; PX0413; PX0239; PX0344; PX0262.)[13]

93. After Mr. Ergen decided to acquire a 33 percent stake in the LP Debt, Mr. Kiser asked Mr. Ketchum to track whether SPSO had a blocking position and to supply Mr. Kiser with the information about the calculation of a blocking position. (Jan. 15 Tr. (Ketchum) 102:7-16; 25:11-26:18, 48:19-25, 102:7-12, 104:16-21; PX0244; PX0144.) Notwithstanding such request, Mr. Kiser did not share SPSO's investment strategy with Mr. Ketchum. (Jan. 15 Tr. (Ketchum) 102:7-16.)

94. On March 28, 2013 – the date on which Messrs. Ergen and Kiser believed they had achieved their goal of obtaining a blocking position – Mr. Ketchum sent an email to Mr. Kiser, stating "You just bought a spectrum company." Later in that same email chain, Mr. Ketchum observed to one of his colleagues that "we now control the company." (PX0385.)

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[12] Mr. Kiser understood that a blocking position is desirable and protects one's investment by preventing others from unilaterally changing one's rights. (Jan. 10 Tr. (Kiser) 54:11-17.)

[13] Although Mr. Ketchum initially testified that he did not recall discussing acquiring a blocking position with Mr. Kiser, he later admitted that Mr. Kiser told him that "he was very interested in tracking whether or not SPSO had a blocking position with respect to LightSquared." (Jan. 15 Tr. (Ketchum) 102:7-12.)

V. Mr. Ergen Acted, at Least in Part, for the Benefit of DISH in Acquiring LP Debt Through SPSO

95. In the course of amassing a substantial position in LP Debt, Mr. Ergen used DISH's employees, resources, facilities, and counsel. Members of the DISH and EchoStar boards and DISH's management also were made aware of Mr. Ergen's purchases; there was no evidence presented reflecting any action or investigation by the DISH Board with respect to SPSO's LP Debt trades.

96. It is within the scope of Mr. Ergen's broad authority to lead strategic acquisitions of spectrum assets for DISH and EchoStar. (Jan. 10 Tr. (Kiser) 69:3-6, 69:23-70:9; Jan. 13 Tr. (Ergen) 95:6-16, 96:15-24; Howard Dep. 33:25-34:12; *see also* PX0010.) Mr. Ergen, as the Chairman of the Boards of DISH and EchoStar, is an officer and a full-time, salaried employee of DISH and EchoStar. (Jan. 13 Tr. (Ergen) 11:13-14, 94:4-18, 94:8-18; PX0349 at 20, 31; PX0350 at 17, 34.) In that capacity, Mr. Ergen "focus[es] on [the] strategic direction of the company" which includes acquisitions and strategic investments. (Jan. 13 Tr. (Ergen) 95:6-16; Jan. 10 Tr. (Kiser) 69:3-9; Howard Dep. 33:25-34:11; *see also* PX0010.) His responsibilities include the strategic pursuit of spectrum assets, which Mr. Ergen sees as necessary to compete with the large wireless carriers, to further DISH's strategic goal of diversifying away from its core Pay-TV business. (Jan. 10 Tr. (Kiser) 70:10-19; Jan. 13 Tr. (Ergen) 96:15-24, 100:25-101:4; Howard Dep. 30:15-31:13, 33:10-35:13; PX349 at ii.)

97. Mr. Ergen's role in managing the strategic direction of DISH and EchoStar includes the companies' attempts to acquire, or merge with, numerous spectrum-owning companies. (Jan. 13 Tr. (Ergen) 101:5-103:5.) Mr. Ergen is "responsible for what DISH does in connection with the LightSquared bankruptcy" and he "leads bids of this nature" as part of his responsibilities for DISH. (PX0767 (Goodbarn Nevada Dep.) at 186:25-96, 232:12-17.)

98. Mr. Kiser testified that Mr. Ergen "typically" is involved in strategic investments, and Mr. Kiser could not point to a single strategic investment made by DISH and EchoStar that Mr. Ergen had opposed. (Jan. 10 Tr. (Kiser) 69:23-70:9.) Further, Mr. Ergen, who achieves board consensus before bringing issues to vote, has not voted against a single board resolution in the past five years. (Jan. 13 Tr. (Ergen) 236:3-8.)

99. DISH has two policies governing investments made on behalf of the company. (Jan. 10 Tr. (Kiser) 23:10-11.) One policy governs the company's cash management projects and outlines how Bear Creek may invest the company's money. (Jan. 10 Tr. (Kiser) 23:11-21.) The second policy governs the company's strategic investments and states that "[a]ny investment not otherwise permitted by the Corporation's cash management policy shall not exceed $125 million in any single transaction or series of related transactions without approval of the Board of Directors; and investments not otherwise permitted by the Corporation's cash management policy shall not exceed $200 million in aggregate in any calendar quarter without approval of the Board of Directors." (DX331; Jan. 10 Tr. (Kiser) 23:10-24:5; Olson Dep. 12:15-23, 20:7-23.)

A. Mr. Kiser's Role in SPSO's LP Debt Purchases

100. Mr. Kiser has been employed by DISH and its predecessor companies for 27 years. (Jan. 10 Tr. (Kiser) 14:4-9, 15:25-16:1, 69:10-22; Jan. 13 Tr. (Ergen) 21:12-14.) As DISH's Treasurer, he focuses on corporate development, including capital-raising, investor relations, strategic acquisitions and investments, and the purchase of marketable securities. (Jan. 10 Tr. (Kiser) 16:2-6, 108:16-20, 140:6-18; Jan. 17 Tr. (Cullen) 139:18-140:5.) Mr. Kiser also performs corporate development services for EchoStar pursuant to a management services agreement between DISH and EchoStar. (Jan. 10 Tr. (Kiser) 69:10-22.)

101. As Treasurer of DISH, Mr. Kiser reports directly to Mr. Ergen. Under DISH's bylaws, Mr. Kiser must "perform all duties commonly incident to his office and such other duties

as may, from time to time, be assigned to him by . . . the Chairman of the Board of Directors." (PX0821 at § 5.2(f).) Accordingly, Mr. Kiser receives authorization from Mr. Ergen in making strategic investments for DISH's portfolio. (Jan. 10 Tr. (Kiser) 69:3-9.)

102. In the course of his duties, Mr. Kiser likewise has been involved in numerous proposed or actual transactions on behalf of DISH or EchoStar, including transactions involving Clearwire, Sprint, Blockbuster Inc., DBSD, and TerreStar. (Jan. 17 Tr. (Cullen) 139:16-140:9; Kiser Dep. 117:23-118:6, 173:18-21.) Mr. Ergen testified that "Kiser, in his role at DISH over the years, had been involved in a number of transactions and was familiar with looking at capital structures and interpreting those capital structures and determining things such as who could buy debt or if—and if there were any restrictions." (Jan. 13 Tr. (Ergen) 162:9-16.)

103. The scope of Mr. Kiser's employment and authority extends to transacting and monitoring trades on behalf of DISH, including purchases of other companies' debt and interacting with Bear Creek. (Jan. 10 Tr. (Kiser) 21:23-22:18.)

104. For example, when DISH made a decision sometime in early 2012 to make a strategic investment in LodgeNet, a company that provides pay-per-view movie services to hotel rooms, Mr. Ergen authorized Mr. Kiser to acquire LodgeNet debt on behalf of DISH, and Mr. Kiser – without authorization from the DISH Board – worked with Sound Point to execute the trades. (Jan. 13 Tr. (Ergen) 128:12-129:20; Jan. 15 Tr. (Ketchum) 14:11-18.) Similarly, when DISH acquired DBSD, Mr. Kiser checked for restrictions on competitors purchasing debt and then executed the trades of distressed debt. (Jan. 10 Tr. (Kiser) 106:21-107:16, 108:8-15.)

105. Mr. Kiser acted on direction from Mr. Ergen when he purchased the LP Debt, interacted with Bear Creek, and oversaw and monitored the LP Debt trades – precisely the same functions Mr. Kiser performs for DISH and EchoStar. (*See*, *e.g.*, Jan. 10. Tr. (Kiser) 84:13-22,

86:18-87:23; PX0031; PX0037; PX0064; PX0068; PX0078; PX0096; PX0136; PX0239; PX0344; PX0422; PX0295; PX0331; PX0390.)

106. Even after Mr. Ergen began purchasing the LP Debt, there were times when it was unclear to Mr. Kiser whether he was working for Mr. Ergen personally or for DISH. When he investigated whether the restrictions on DISH purchases had fallen away in the bankruptcy, he "asked a question for the company . . . I think I've also got an obligation to the company just as he does. I'm a fiduciary for the company." (Jan. 10 Tr. (Kiser) 83:19-84:24.) Further illustrating these overlapping and conflicting roles, Mr. Kiser testified that "I think I took one hat off and put the other hat on." (Jan. 10 Tr. (Kiser) 84:23-24.)

B. Mr. Ergen Uses DISH Employees, Resources, and Legal Counsel to Facilitate the LP Debt Purchases

107. Prior to and throughout the period in which Messrs. Ergen and Kiser were amassing LP Debt, other DISH employees, including Mr. Cullen – another member of DISH's corporate development group – closely monitored news relating to LightSquared and reported on those events to Messrs. Ergen and Kiser. (PX0018; PX0033; PX0075; PX0187; PX0223; PX0195; PX0393; PX0407; PX0408; PX0438.)

108. Mr. Kiser transacted business on behalf of SPSO from his DISH office,[14] using DISH's computers, phone lines, and email and outside investment bankers during general business hours.[15] (Jan. 10 Tr. (Kiser) 42:4-8; PX0042.) Although the purchases were purportedly done on Mr. Ergen's behalf, Kiser received no compensation apart from his salary at DISH for directing nearly $1 billion in LP Debt trades. Compensation was allegedly

[14] Mr. Ergen also used his assistant at DISH to assist with SPSO matters. (PX0560; PX0059.)

[15] Mr. Kiser kept no log of the amount of time he spent working for Mr. Ergen personally compared to how much time he was working for DISH. (Jan. 10 Tr. (Kiser) 103:9-17.)

unnecessary because Kiser (a 27-year veteran of DISH/EchoStar) performed the trades "for the experience" and because, as Mr. Ergen testified, "he gets to spend time with me and I think he likes that." (Jan. 10 Tr. (Kiser) 26:13-19, 74:25-75:7; Jan. 13 Tr. (Ergen) 23:15-24:1, 133:7-10.)

109. Mr. Ergen has a family office, a personal asset manager (Bear Creek), and stock brokers that he uses regularly. (Jan. 13 Tr. (Ergen) 23:3-4, 26:15-17, 126:15-21, 127:2-3; Jan. 10 Tr. (Kiser) 21:6-12.) He has also made personal investments through a hedge fund, GSO. (Jan. 13 Tr. (Ergen) 126:22-127:3.) Yet, Mr. Ergen used DISH employees and facilities to acquire the LP Debt. (Jan. 13 Tr. (Ergen) 127:4-13.)

110. Mr. Kiser consulted DISH's outside counsel at Sullivan & Cromwell (whom Mr. Ergen never retained as personal counsel) to determine initially whether DISH and, later, Mr. Ergen, was prohibited from purchasing the LP Debt. (Jan. 10 Tr. (Kiser) 29:10-30:9, 33:9-34:7, 77:11-18, 80:4-6, 119:16-120:4, 120:11-24; PX0144.) Mr. Ergen relied on this advice for months, and did not retain personal counsel until the spring of 2013, after SPSO gained its blocking position. (Jan. 13 Tr. (Ergen) 67:1-11.)

C. DISH Board Members and Management Take No Action Upon Learning of Mr. Ergen's LP Debt Acquisition

111. In May 2012, news reports began speculating that Mr. Ergen was behind Sound Point's purchases of LP Debt. (PX0121; PX0898.) Mr. Ergen testified that no DISH or EchoStar Board member asked him about his purchases prior to his May 2, 2013 presentation to the DISH Board. (Jan. 13 Tr. (Ergen) 119:20-120:3; Jan. 10 Tr. (Kiser) 37:10-24.) In response to questioning from the Court, Mr. Ergen testified that once he learned that he could purchase the LP Debt personally, he did not apprise the DISH Board, its general counsel, or Mr. Cullen that he was acquiring the LP Debt because he did not believe that he had a fiduciary obligation to do

so once he confirmed it was not a corporate opportunity for DISH or EchoStar. (Jan. 13 Tr. (Ergen) 37:17-38:9.)

112. On May 10, 2012, *The Denver Post* reported that Charlie Ergen "has snatched up $350 million worth of debt in LightSquared." (PX0898.) A DISH spokesman declined to comment on the article. After reading the *Denver Post* article, DISH board member Gary Howard sent an email that same day to Stanton Dodge, DISH's General Counsel ("Dodge"), Tom Ortolf, a member of the Boards of Directors of DISH and EchoStar, and Mr. Goodbarn, a member of the Board of Directors of DISH, asking if the article was accurate. (DX397.)

113. In response to Mr. Howard's email, Mr. Dodge sent an email on May 16, 2012 to the entire DISH Board, including Mr. Ergen and DISH's associate counsel, Brandon Ehrhart, stating:

> further to [G]ary's email below and since another board member inquired about the recent press reports regarding LightSquared bonds, [I] wanted to send a brief note to the full board. [T]he company did not buy any LightSquared bonds.

(DX397.) What follows in the email is redacted.

114. Mr. Dodge's email did not answer the Board members' pointed question whether Ergen was buying the LP Debt. When Mr. Dodge asked Mr. Ergen about the news report, Mr. Ergen responded that there "might be some truth" to the report. (Jan. 13 Tr. (Ergen) 116:3-22, 118:23-119:19.) There is no evidence in the record that (i) Mr. Dodge made further inquiry or (ii) Mr. Ergen ever told Mr. Dodge that, in the fall of 2011, Mr. Kiser had investigated whether DISH could purchase LP Debt and had consulted on that topic with Sullivan & Crowmwell. There is also no evidence that Mr. Dodge, who has fiduciary obligations to DISH, informed the DISH Board whether a corporate opportunity was implicated by Mr. Ergen's LP Debt purchases.

115. Shortly thereafter, on July 23, 2012, Mr. Ehrhart attended a call with DISH's outside counsel, Scott Miller, of Sullivan & Cromwell, to discuss "LightSquared debt." (PX0892.) Mr. Miller previously handled DISH's mergers and acquisition work, including with respect to Sling Media, Sirius, and TerreStar. (PX0918.)

116. Carl Vogel, a DISH Board member, asked Mr. Kiser, as well as others, if the news reports about Mr. Ergen's purchases were true. Mr. Kiser testified that he never responded to Mr. Vogel's email because Mr. Vogel's question was addressed to multiple people and because "it was Charlie's personal business." (Jan. 10 Tr. (Kiser) 37:16-38:9.) When Mr. Vogel received an email on August 9, 2012 from Jim Millstein, of Millstein & Co., L.P., a restructuring firm, inquiring whether DISH was purchasing LightSquared's debt, he did not deny DISH's involvement. Rather, he forwarded the email to Mr. Cullen and advised Mr. Millstein to "contact Tom Cullen or Charlie to discuss." (PX0232.) Similarly, Mr. Ehrhart received an email from Brendan O'Neill of Canadian law firm Goodmans LLP, stating, "[n]ot sure if DISH is involved at all from the press, but thought I might just reach out in case any assistance was required from us." Like Mr. Vogel, Mr. Ehrhart did not deny DISH's involvement, only replying "[h]ope you are well too Brendan." (PX0420.)

117. In April 2013, DISH spokesman Bob Toevs ("Toevs"), head of Corporate Communications, also sent several emails to Mr. Ergen and several senior officers, including Messrs. Cullen, Dodge, Clayton, and Jeff Blum (a Senior Vice President and Deputy General Counsel), about a news article discussing DISH amassing LightSquared debt through Sound Point, and noting that Mr. Toevs "has not commented." (PX0393; PX0407; PX0408.) Mr. Toevs' April 2, 2013 email referred to past coverage on the very same issue and had links to news stories dating back to May 2012. (PX0393; PX0408.) None of these top DISH executives

responded to the e-mail to inquire whether Mr. Ergen in fact was buying the LP Debt, and Mr. Ergen testified that, apart from Messrs. Kiser, Cullen, and Dodge, he did not speak to anyone regarding his LP Debt purchases until the May 2, 2013 board presentation. (Jan. 13 Tr. (Ergen) 116:3-22, 119:20-24.)

118. Mr. Cullen, a Federal Rule of Civil Procedure 30(b)(6) representative for DISH, testified that Mr. Kiser was the only person at DISH who knew about Mr. Ergen's LP Debt purchases prior to May 2013. (Jan. 17 Tr. (Cullen) 121:21-122:9.) Mr. Cullen testified that he reached this conclusion without speaking to any DISH board members or senior management, other than Mr. Olson, DISH's Chief Financial Officer, and Mr. Kiser. (*Id.* 122:12-123:4.)

119. Mr. Cullen works closely with Mr. Ergen in the corporate development group, is considered to be "Ergen's closest confidante on all things wireless," and leads DISH's strategic acquisitions. (PX0890 (May 3, 2013 *Reuters* article.)) When news stories surfaced in the second quarter of 2012 about Mr. Ergen buying LightSquared debt and Mr. Cullen asked Mr. Ergen about these reports, Mr. Ergen confirmed to Mr. Cullen that there either "is" or "might be" "some truth" to the reports and said nothing else. (Jan. 17 Tr. (Cullen) 117:8-18; Jan. 13 Tr. (Ergen) 116:3-22.)

120. Mr. Cullen acknowledged that he, Mr. Ergen, and Mr. Kiser discussed LightSquared, among other several other "MSS[16] players," "continuously," throughout 2012. (Jan. 17 Tr. (Cullen) 134:9-18.) While Mr. Cullen testified that he did not know that Mr. Kiser was assisting Mr. Ergen with his LP Debt acquisitions, he confirmed that he repeatedly sent emails to Messrs. Ergen and Kiser about LightSquared during the period in which the purchases were made. (Jan. 17 Tr. (Cullen) 110:22-111:7, 112:2-13, 119:12-120:12, 133:7-134:8; PX0075;

[16] "MSS" stands for Mobile Satellite Services.

PX0195; PX0223; PX0393.) Although Mr. Cullen testified that it was routine practice for him to send updates about MSS companies to the corporate development group, he generally did not include any of the other group members on the emails concerning LightSquared. (Jan. 17 Tr. (Cullen) 134:4-135:8; PX0075; PX0195; PX0393; PX0438.) In fact, when Mr. Toevs forwarded an article regarding an inquiry from *The Wall Street Journal* regarding the Sound Point purchases to Mr. Cullen, Mr. Cullen forwarded that email only to Mr. Kiser. (PX0393.)

121. Mr. Cullen acknowledged that, as an executive, he owed fiduciary obligations to DISH. Nevertheless, he testified that when he learned that Mr. Ergen was buying the LP Debt: (i) he did not ask Mr. Ergen why DISH was not buying the debt, (ii) he did not ask in-house counsel whether there was an issue with Mr. Ergen making a personal investment in the debt, and (iii) he did not take any steps to determine whether Mr. Ergen's purchases were a corporate opportunity. (Jan. 17 Tr. (Cullen) 143:1-20.)

122. Further, when Mr. Cullen learned through news reports in May 2013 that Mr. Ergen's entity, LBAC, made a bid for LightSquared's spectrum assets (see ¶¶ 136-38, *infra*) he did not ask Mr. Ergen if he was usurping a corporate opportunity. (Jan. 17 Tr. (Cullen) 143:25-145:16.) Indeed, Mr. Cullen, who typically is involved in DISH's acquisition process, stated that he did not know for over two months that LBAC's bid had been presented to DISH on May 2, 2013 as an opportunity. (Jan. 17 Tr. (Cullen) 144:3-146:19; PX0890.)

D. Mr. Ergen Controls the Boards of DISH and EchoStar

123. Mr. Ergen, as the holder of a majority share of voting rights (approximately 88 percent and 79.4 percent of the total voting power in DISH and EchoStar, respectively), has the ability to elect a majority of the directors for the companies and control all other matters requiring the approval of their stockholders.

124. When asked if "[i]t was [his] view that nobody else could act in an independent way of Charlie," DISH's independent director, Mr. Goodbarn, responded, "[t]hat is correct." (PX0767 (Goodbarn Nevada Dep.) at 233:25-234:3.)

125. DISH and EchoStar, in public filings, state that their "future success will depend to a significant extent upon the performance of Charles W. Ergen," the loss of whom "could have a material adverse effect [on the companies'] business, financial condition and results of operation," and "place substantial weight on Mr. Ergen's recommendations in light of his role as Chairman and as co-founder and controlling shareholder of DISH Network." (PX0349 at 32; PX0350 at 27; PX0372 at 24; PX0371 at 21.)

E. Soon After Acquiring a Blocking Position, Mr. Ergen Makes a Presentation to the DISH Board that Contemplates a DISH Bid

126. As noted, by March 28, 2013, Mr. Ergen achieved a blocking position, having contracted to purchase $168 million in LP Debt on that date.[17] (Jan. 13 Tr. (Ergen) 174:20-178:3; PX0379; PX0859.)

127. Mr. Ergen testified that, in April 2013, he began to contemplate making a "personal" acquisition of LightSquared because of changes in the wireless industry and at the FCC. (Jan. 13 Tr. (Ergen) 65:4-9; Jan. 10 Tr. (Kiser) 65:12-16.) At that time, the wireless industry was going through a "seismic shift," including the consolidation of several companies and an increasing transmission of data. (Jan. 13 Tr. (Ergen) 65:10-19.) As Mr. Kiser explained,

> [T]here were a lot of pieces in the wireless industry that were moving around; a lot of the industry was consolidating at a pace

[17] On March 28, 2013, believing it could buy LP Preferred Interests, SPSO entered into a bundled trade of LP Debt and LP Preferred Interests. (PX0859; DX136.) The March 28, 2013 bundled trade remained open for several months afterwards but never closed, and Mr. Ergen does not own the LP Debt that was the subject of this trade. Regardless, Mr. Ergen's subsequent purchases of LP Debt in April 2013 brought him to a "blocking position." (PX0859.)

> that's probably unlike any other. So, you know, the company had been in discussions, and we're still in discussions with other wireless companies, companies that had spectrum and were complimentary to the portfolio assets that DISH had. And as the pieces on the chessboard were starting to move and avenues were – people were getting lined up, companies like MetroPCS had been acquired, you know, Sprint and ClearWire were on the block, and, you know, DISH was making attempts to purchase them, I think as Charlie saw those pieces start to move, it started to look more interesting to potentially own the asset.

(Jan. 10 Tr. (Kiser) 65:17-66:8.)

128. Mr. Ergen also testified that he believed in April 2013 that if he wanted to make a bid for LightSquared, he would have to do so by July 15, 2013 – the date on which the Debtors' exclusive periods would terminate pursuant to the Exclusivity Stipulation.[18] (Jan. 13 Tr. (Ergen) 66:9-15.) Given the risk that a consensual plan of reorganization might be negotiated before exclusivity expired, Mr. Ergen understood that he had to act quickly if he wanted to try to acquire LightSquared's assets and provide "the opportunity for DISH and EchoStar to participate if they chose to do so." (Jan. 13 Tr. (Ergen) 66:9-15; 67:5-11; 77:8-20.)

129. Once he became interested in LightSquared as an acquisition target, Mr. Ergen asked Mr. Kiser to retain bankruptcy counsel. (Jan. 13 Tr. (Ergen) 67:1-11; Jan. 10 Tr. (Kiser) 66:9-19.) In April 2013, Mr. Ergen hired Willkie Farr & Gallagher LLP ("Willkie Farr"), who

[18] On January 17, 2013, the Debtors filed a motion to further extend their exclusive periods to file a chapter 11 plan to July 20, 2013. ([Bankr. Docket Nos. 485-88]; DX352.) After a contested hearing on January 31, 2013, LightSquared negotiated the Stipulation Between Parties in Interest Regarding Entry of Order Pursuant to 11 U.S.C. § 1121(d) Further Extending LightSquared's Exclusive Periods To File a Plan of Reorganization and Solicit Acceptances Thereof (the "Exclusivity Stipulation"). On February 13, 2013, this Court entered an order incorporating the terms of the Exclusivity Stipulation. ([Bankr. Docket No. 522]; PX0852.) The Exclusivity Stipulation extended the Debtors' exclusive periods to July 15, 2013, and it required the parties to engage in good faith negotiations regarding the terms of a consensual chapter 11 plan. (PX0852 at 3-4; Jan. 13 Tr. (Ergen) 77:3-20.) If a consensual plan was not reached by July 15, a sales process of LightSquared's assets would begin. (PX0852 at Ex. A ¶6.)

had represented DISH in the TerreStar bankruptcy, to serve as his bankruptcy counsel. (Jan. 13 Tr. (Ergen 180:23-181:10.)

130. By early May 2013, Mr. Ergen had concluded that he was interested in a potential acquisition of LightSquared. (Jan. 13 Tr. (Ergen) 77:3-78:2.) At that time, DISH was consumed with a potential acquisition of Sprint, and if DISH acquired Sprint, DISH would not have enough capital to acquire LightSquared also. (Jan. 13 Tr. (Ergen) 67:21-68:2; PX0767 (Goodbarn Nevada Dep.) 32:11-23.) DISH also was considering a potential acquisition of Clearwire at that time. PX0767 (Goodbarn Nevada Dep.) 30:15-25; Jan. 13 Tr. (Ergen) 20:17-21.)

131. On May 1 and 2, 2013 – just over a month after obtaining a blocking position – Mr. Ergen made presentations to the Boards of EchoStar and DISH, respectively, informing them about his acquisition of LightSquared debt and his proposal for DISH and/or EchoStar to acquire LightSquared's assets for $2 to $2.1 billion (the "Ergen Presentation"). (PX0867; PX0767 (Goodbarn Nevada Dep.) at 21:1-18; Howard Dep. 55:3-15, 56:24-57:13, 87:11-88:3, 141:13-20; Jan. 13 Tr. (Ergen) 77:3-7, 77:21-78:2, 78:17-79:9, 80:11-13; PX0480; PX0492.)

132. The Ergen Presentation informed the Boards that Mr. Ergen's blocking position in the LP Debt could help facilitate any bid for LightSquared's assets:

> [Ergen's] substantial interests in L2 debt and preferred stock compliment [*sic*] any acquisition strategy and could have significant influence in L2's chapter 11 cases.

(PX0867; Jan. 13 Tr. (Ergen) 182:11-183:11.)

133. The Ergen Presentation proposed a course of action, stating: "[s]ubmit offer now, subject to minimal conditions, and require prompt acceptance (e.g., by May 15) before marketing process gets underway." (PX0867 at SPSO-00011828.) If, however, LightSquared did not accept the proposal, the presentation continued: "NewCo will have the ability to see results of marketing process and, if process is unsuccessful, revert with different bid later." The Ergen

Presentation also described the chapter 11 timing considerations: "L2 has the exclusive right to file a chapter 11 plan until July 15. L2 likely to begin exploring strategic alternatives in early June if no restructuring or sale strategy emerges." (PX0867 at SPSO-00011828.) The presentation contained an "Illustrative Transaction Timeline" that outlined a schedule of events related to a potential transaction, including the execution of a purchase agreement by May 31, 2013. (PX867.)

134. At the time of the Ergen Presentation, Mr. Ergen understood that the DISH Board[19] had not performed any analysis of LightSquared. (Jan. 13 Tr. (Ergen) 207:15-17.)[20] Mr. Ergen understood that the DISH Board had not authorized a DISH bid in May 2013, and it had not passed a resolution authorizing him to make a bid personally. (Jan. 13 Tr. (Ergen) 208:4-13.)

VI. DISH Contemplates and Makes a Bid for LightSquared at Mr. Ergen's Behest

A. DISH Forms a Special Committee to Evaluate a DISH Bid and the Propriety of Mr. Ergen's LP Debt Purchases

135. Shortly after Mr. Ergen made his May 2, 2013 presentation to the DISH Board regarding a potential acquisition of LightSquared's assets, on May 8, 2013, the Board formed a special committee consisting of directors independent of Mr. Ergen – Messrs. Goodbarn and Howard – to examine the propriety of Mr. Ergen's purchases of the LP Debt and the prospect of a DISH bid for LightSquared's assets. Pursuant to resolutions recorded in the May 8, 2013 minutes of the DISH Board, the Special Committee was vested with the power and authority to:

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[19] On May 31, 2013, after a "long series of discussions," a committee of the EchoStar Board rejected the opportunity to participate in the LBAC bid because it involved more speculative risk than the company wanted to take on given its financial resources at the time, and participation in the bid would limit EchoStar's ability with respect to other potential strategic investments. (Rayner Dep. 25:17-26:3; 26:18-27:9.)

[20] As both Mr. Goodbarn and Mr. Howard testified, at that time, DISH was consumed with a potential acquisition of Sprint and Clearwire, and the DISH Board could not focus on a potential acquisition of LightSquared, which was a far lower priority than the other two potential acquisitions. (PX0767 (Goodbarn Nevada Dep.) 32:4-23, 88:5-10, 88:14-20, 95:20-24, 104:9-12, 123:13-20; Howard Dep.176:11-177:2, 177:25-178:10; Jan. 17 Tr. (Cullen) 102:8-103:4, 121:15-20.)

(i) review and evaluate a potential bid (including any potential conflicts of interest) and engage in discussions and/or negotiations; (ii) negotiate definitive agreements with the parties concerning the terms and conditions of the potential bid; and (iii) determine whether such terms and conditions are fair to DISH. (PX0768 (Howard Nevada Affidavit) ¶¶ 8-10; PX0491 at DISH_NY000000002-4.) The Board formally resolved that the Special Committee's authority would expire *only* upon the Special Committee's "determination, in its sole and absolute discretion, as set forth in its written notice to the Chairman of the Board of Directors" as long as a bid for LightSquared remained viable. (PX0491 at DISH_NY0000000005.)

B. Mr. Ergen Makes a "Personal" Bid That Sets the Floor and Ensures He Will Be Repaid in Full

136. Without consulting the newly-formed Special Committee, on May 15, 2013, Mr. Ergen submitted an unsolicited bid for LightSquared LP's spectrum assets for $2 billion (the "LBAC Bid"). (PX0768 (Howard Nevada Affidavit) ¶ 14; PX0504; PX0513; Jan. 13 Tr. (Ergen) 80:11-19.) LBAC did not exist at the time the offer was made and was not formed until two weeks later, on May 28, 2013. (PX0837-838; Jan. 13 Tr. (Ergen) 191:8-192:25.)[21]

137. The LBAC Bid expressly stated the buyer of the LightSquared assets would be "owned by one or more of Charles Ergen, affiliated companies and/or other third parties." (PX0504 at GH_L2_00450.) As detailed in the Ergen Presentation, Mr. Ergen priced the bid at $2 billion, approximately the total amount of the outstanding LP Debt, in what he characterized as an effort to induce serious consideration by LightSquared's LP Debt creditors. (PX0504; PX0867.)

[21] At the time LightSquared received the bid, it had not been formally disclosed that Mr. Ergen was behind the SPSO LP Debt purchases. (Jan. 16 Tr. (Falcone) 69:22-25, 71:24-72:2.)

138. A key feature of the LBAC Bid, which was non-binding and expired on May 31, 2013, was LBAC's apparent "willingness to fund the Purchase Prices, on a non-refundable basis," prior to receipt of FCC and Industry Canada approvals and authorizations. (Jan. 13 Tr. (Ergen) 80:20-81:7; PX0504.) The $2 billion bid would have enabled Mr. Ergen to be paid in full on his LP Debt investment and receive $140 million in profit as well as "significant" interest. (Jan. 13 Tr. (Ergen) 132:20-133:6, 134:6-15, 233:20-234:7.)

139. When asked what would have happened if the DISH Board had wished to offer a lower price than Mr. Ergen's, Mr. Ergen stated that "[a]ll they needed to say was, Charlie, don't do it." (Jan. 13 Tr. (Ergen) 207:18-20.)

140. Mr. Ergen's testimony that he was prepared to proceed with the LBAC Bid as a "personal investment" was not credible. (Jan. 13 Tr. (Ergen) 245:17-247:9.) At the time of the LBAC Bid, Mr. Ergen did not have any financing agreements lined up with investors and had not even received a term sheet related to a possible financing of the "acquisition." He did not receive as much as a draft term sheet until July 18, 2013 – two months *after* his bid would have expired. (Jan. 13 Tr. (Ergen) 185:20-186:7, 193:15-25, 195:23-196:13; DX285.) Even then, under the term sheet, Mr. Ergen would have had to provide over a billion dollars in cash. (Jan. 13 Tr. (Ergen) 87:3-88:20.) To obtain that amount of cash, Mr. Ergen testified that he would have used $300-$500 million of his personal liquid cash and borrowed the rest against his EchoStar stock. (Jan. 13 Tr. (Ergen) 88:21-89:1.)

C. The DISH Special Committee

141. On or about May 17, 2013, the Special Committee set out to engage independent counsel and independent financial advisors, as authorized by the resolutions of the DISH Board. (PX0910; PX0534; PX0491 at DISH_NY000000004; PX0768 (Howard Nevada Affidavit) ¶ 11.) When Mr. Ergen learned that the Special Committee wished to engage counsel, he was opposed

to the idea, emailing "[w]hy would we have special committee counsel. You are way ahead of your skis here." (DX188.) As a result, the Special Committee, following Mr. Ergen's direction, delayed the engagement of independent advisors. (PX0768 (Howard Nevada Affidavit) ¶¶ 22, 25, 26.) At a May 31, 2013 meeting, Mr. Ergen suggested that the Special Committee should delay engaging its financial advisor, as, in Mr. Ergen's view, there would "be little activity, if any, in the coming weeks" regarding a LightSquared transaction. (PX0768 (Howard Nevada Affidavit) ¶ 25.) Perella Weinberg ("PWP"), the financial advisor to the Special Committee, was ultimately retained on June 28, 2013, after the Sprint and Clearwire deals had failed to proceed. (*See* DX0224 (email from Gary Howard to DISH Board); PX0768 (Howard Nevada Affidavit) ¶ 33.)[22]

142. After delaying the retention of its professionals and keeping the committee in what Mr. Howard later described as a "holding pattern," Mr. Ergen suddenly reversed course in early July, urging the Special Committee to complete its evaluation quickly and make a recommendation to the DISH Board. (PX0768 at ¶ 34.)

143. According to its members, the Special Committee did not have documents detailing Mr. Ergen's ownership of LightSquared debt and preferred stock other than what Mr. Ergen presented to the Board in May. (Howard Dep. 76:8-15.) Following that meeting, the Special Committee requested that Mr. Ergen provide the Committee with information regarding SPSO's trades. (PX0767 (Goodbarn Nevada Dep.) 92:23-93:1; Jan. 13 Tr. (Ergen) 82:18-83:13.) The Special Committee made repeated requests for such information from Mr. Ergen.

[22] In addition to PWP, the Special Committee also retained Cadwalader, Wickersham & Taft LLP as counsel. (Jan. 13 Tr. (Ergen) 82:1-8; 85:9-21; Howard Dep. 190:8-13; DX224; DX255.)

144. On June 2, 2013, the Special Committee again requested information regarding further details of the bank debt and preferred stock purchases Mr. Ergen made through SPSO. (DX213; Howard Dep. 143:15-144:24.) As of June 5, 2013, the Committee still had not received the schedule of Mr. Ergen's trades. (DX219; PX0767 (Goodbarn Nevada Dep.) 128:25-129:12.)

145. The June 17, 2013 meeting minutes make it clear that the Special Committee was still looking for information relating to Mr. Ergen's trades: "The Committee discussed the need for additional information from Mr. Ergen regarding his acquisition of LightSquared debt and/or preferred stock, as well as regarding the rationale and business case for an acquisition by the Corporation of LightSquared's L-Band Mobile Satellite Service Spectrum." (DX238.)

146. Following the June 17 meeting, the Special Committee sent Mr. Ergen a letter requesting information regarding his trades in LightSquared debt. (DX244; DX238; Jan. 13 Tr. (Ergen) 83:14-85:8.) The letter stated that "[w]e would also appreciate further detail regarding your relationship with Sound Point Capital Management and its affiliate SP Special Opportunities, LLC . . . as it relates to the LightSquared opportunity and your acquisition, whether directly or indirectly, of any interests in any claims, loan obligations or preferred equity securities of LightSquared." (DX244 at GH_L2_000111.)

147. On July 6, 2013, Mr. Howard informed the DISH Board that the Special Committee had "no further insight into the bond purchases made by Charlie's entity." (DX224; Goodbarn Nevada Dep. 165:3-10, 165:16-21.) As of July 21, 2013, the Special Committee still had not received the information it requested regarding Mr. Ergen's trades in LightSquared debt. (PX0767 (Goodbarn Nevada Dep.) 208:5-12.)

148. Mr. Howard testified that the Special Committee was interested in determining whether there was a way that DISH could have bought LP Debt notwithstanding the transfer

restrictions. (Howard Dep. 204:14-205:15.) Mr. Ergen never provided the Special Committee with the requested information on his trades. (PX0767 (Goodbarn Nevada Dep.) at 92:10-93:15, 128:16-129:12, 129:21-130:5; PX0768 (Howard Nevada Affidavit) ¶¶ 27, 28, 30; PX0605; PX0663; DX224; PX0654.) Mr. Goodbarn testified that Mr. Ergen did not share information regarding his trades with the Special Committee as a ploy to insulate himself from this adversary proceeding. (PX0767 (Goodbarn Nevada Dep.) at 104:23-105:6.)

149. Upon learning of the LBAC Bid from news alerts on May 20 and 21, 2013,[23] Mr. Howard stated that he was surprised, as it "was [his] expectation that Mr. Ergen would not make any LightSquared bid without first discussing it with the DISH Board and the Special Committee in order to get their approval, since any such bid could impact DISH's own strategy vis-à-vis LightSquared."[24]

150. When asked whether the Special Committee considered proposing that DISH make a bid for LightSquared's spectrum in an amount below that of the LBAC Bid, Mr. Goodbarn stated that the LBAC Bid "made it difficult socially to do that . . . [b]ecause [Ergen's] put a line in the sand on a bid and we're part of a, you know, a DISH board and he owns a majority of the company." (PX0767 (Goodbarn Nevada Dep.) at 100:7-21.) Pressed further on why it would be difficult for DISH to make a bid lower than Mr. Ergen's bid, Mr. Goodbarn explained that if Mr. Ergen had committed to a $2 billion bid with no other bidder present, and the Special Committee then bid $1.5 billion, Mr. Ergen may take "a big loss" on his debt

[23] Mr. Howard stated that he was not aware that Mr. Ergen had made a personal bid to purchase LightSquared's assets until Mr. Goodbarn forwarded to him an updated Charles Schwab news alert on May 21, 2013. (*See* PX0768 (Howard Nevada Affidavit) at ¶ 15.) He confirmed that the Special Committee had not been advised of and had not approved of the LBAC Bid. (*Id.* at ¶ 20.) He was concerned that, by making the bid, "Mr. Ergen was narrowing the scope and ability of the Special Committee to fully explore alternative strategies for DISH to pursue with respect to LightSquared, as well as to define and/or negotiate Mr. Ergen's role with respect to DISH's strategy." (*Id.* at ¶ 21.)

[24] *Id.* at ¶ 15.

investment and "that does not make a very happy chairman." (PX0767 (Goodbarn Nevada Dep.) at 100:22-101:5.)

151. On July 3, 2013, Mr. Ergen sent to Messrs. Goodbarn, Howard, and David Moskowitz, an in-house attorney and a Senior Vice President for DISH and EchoStar, via email (the "Ergen Transmittal Email"), a presentation for the Special Committee and the DISH Board. (PX0927.)

152. In the Ergen Transmittal Email, Mr. Ergen states, "This is just a high level view of lightsquared and its potential relation to dish. Please feel free to share with the board or advisors. Also, not on here would be the possibility of freeing up at least two of the existing dbsd/terrestar satellites that could possibly be monetized." (*Id.* at DISH_PLAN000003150.)

153. The six-page presentation, attached to the Ergen Transmittal Email, was dated July 8, 2013 and was entitled "Strategic Investment Opportunity – L-Band Acquisition, LLC" (the "Ergen July 8 Presentation"). (PX0928.) The Ergen July 8 Presentation was delivered to the Special Committee and PWP, among other recipients, at a special meeting of the DISH Board on July 8, 2013.

154. The Ergen July 8 Presentation provided, for discussion purposes in the context of considering whether DISH would participate in the LBAC Bid, certain valuation information relating to LightSquared's spectrum as of that date.

155. Under a line item entitled "Implied Net Primary Asset Value," the Ergen July 8 Presentation lists a range of values of between $3.341 billion and $5.213 billion, with a mid-point of $4.277 billion, referring to Mr. Ergen's estimate of the value of 20 MHz of LightSquared's spectrum assets and its satellites, excluding its 10MHz of lower downlink spectrum.

156. Under the heading "Implied Supplemental Asset Value," the Ergen July 8 Presentation lists a range of values of between $1.833 billion and $3.783 billion, with a mid-point of $2.308 billion, for what it identifies as the total of (i) 5.0 MHz of "Reclaimed Unuseable [*sic*] AWS-4," (ii) 5.0 MHz of "Reclaimed Impaired AWS-4," and (iii) "L-Band Downlink Spectrum." *Id.* at 5 (DISH_PLAN000003114). The Implied Supplemental Asset Value was Mr. Ergen's estimate of (a) the increase in value of DISH's existing spectrum that would flow from DISH's acquisition of LightSquared's spectrum, which would permit unusable and impaired uplink AWS-4 spectrum to be converted to downlink and (b) his range of values for 20 MHz of LightSquared's downlink spectrum. In other words, the supplemental value of LightSquared's assets to DISH was estimated by Mr. Ergen to be between $1.833 billion and $3.783 billion.

157. Combined with the Implied Net Primary Asset Value of $3.341 billion to $5.213 billion, the total value of LightSquared's assets in DISH's hands (the "Combined Implied Net Primary and Supplemental Asset Value") was estimated by Mr. Ergen to be between $5.174 billion and $8.996 billion, with a midpoint of $7.085 billion.

158. On or about July 21, 2013, PWP provided two reports to the DISH Board – a nine-page presentation entitled "Project Discus Summary Conclusions," dated July 21, 2013 and a 69-page PWP document, dated July 2013, entitled "Project Discus Discussion Materials" (the "PWP Report"). (PX0929; PX0930.) In a section captioned "Illustrative Value of DISH's Use Cases Related to LightSquared," the PWP Report concludes, "The cumulative value of the illustrative use cases that leverage the LightSquared LP acquisition is estimated to be $4.4-$13.3bn." (*Id.* at 39 (DISH_PLAN135).) The PWP Report also recites that "In June 2013, [SPSO] joined the Ad Hoc Secured Group to prevent termination of LightSquared LP's obligations of the Exclusivity stipulation." (PX930 at 66 (DISHSC_PLAN00000162).)

159. On July 21, 2013, the Special Committee presented its conclusions to the DISH Board, recommending that DISH pursue the LBAC Bid for $2.2 billion, subject to five express conditions, four of which implicated further review and decision making by the Special Committee:

(i) that any material changes to the terms of the bid and/or APA would be subject to the review and approval of the Committee;

(ii) that DISH would acquire one hundred percent of LBAC, to the exclusion of EchoStar;

(iii) that the Committee and its legal and financial advisors would remain involved in all negotiations regarding the proposed transaction going forward;

(iv) that the Committee would review and approve the terms of the acquisition by DISH of Mr. Ergen's interest in LBAC; and

(v) that the Committee expressly reserved the right to obtain all of the requested information regarding Mr. Ergen's acquisition of debt and/or other securities issued by LightSquared as well as the right to evaluate potential corporate opportunity issues.

(PX0716 at GH_L2_000973-74; PX0768 at ¶ 47.)

160. Immediately after the Special Committee delivered its conditional approval of the LBAC Bid, the DISH Board disbanded the Special Committee without giving any advance notice to the Special Committee. Other than Messrs. Howard and Goodbarn, who abstained, the Board's vote was unanimous (PX0768 (Howard Nevada Affidavit) ¶¶ 49-52; DX400), notwithstanding that (i) the conditions set forth in the Special Committee's conditional approval had not been satisfied (PX0736) and (ii) the resolutions creating the Special Committee allowed disbandment only upon the Special Committee's decision, with the bid remaining viable. (PX0491 at DISH_NY0000000005.)

161. After the Special Committee was disbanded, on July 22, 2013, DISH agreed to buy LBAC from Mr. Ergen for a dollar, without the Special Committee reviewing the terms of the acquisition agreement. (Howard Dep. 315:10-316:3; Jan. 13 Tr. (Ergen) 195:6-8.)

162. On July 23, 2013, DISH announced its intention to bid through LBAC for LightSquared's spectrum for $2.2 billion (the "DISH/LBAC Bid"). Mr. Howard learned of the bid through the "wires" and did not even know whether the bid was submitted by DISH or by Mr. Ergen. (PX0725.) On July 24, 2013, the Special Committee wrote a letter to the DISH Board expressing its surprise at its disbandment and noting that the five conditions remained unsatisfied. (PX0736.) On July 25, 2013, Mr. Howard resigned from the DISH Board, an action taken so suddenly that DISH risked delisting from the NASDAQ. (PX0746; *see also* PX0741; DX313.)

163. On July 23, 2013, DISH announced that it had executed a Plan Support Agreement (the "PSA"), pursuant to which LBAC would act as the stalking horse bidder for the Ad Hoc Secured Group's plan of reorganization (the "Ad Hoc Secured Group Plan"). (Jan. 13 Tr. (Ergen) 195:6-12; PX0730.) There was no document submitted into evidence reflecting the involvement of the Special Committee in (i) the negotiation and documentation of DISH's purchase of LBAC from Mr. Ergen or (ii) the negotiation of documents that were critical to the LightSquared acquisition – the PSA and the Asset Purchase Agreement (the "APA"). Mr. Howard stated that neither the Special Committee nor its advisors were ever asked to participate in negotiations with the Ad Hoc Secured Group, and neither the Special Committee nor its counsel had been involved in negotiating the APA. (PX0768 (Howard Nevada Affidavit) at ¶¶ 42, 46.)

164. The APA, incorporated by reference into the PSA, contained a broad release for all claims against Mr. Ergen, DISH, EchoStar, and SPSO (an entity which purportedly has no ties or relationship with DISH). (PX0823 § 7.6; PX0841 at 11, n.9, 70, 88; 17 C.F.R. § 240.12b-2.)

VII. LightSquared as a Strategic Investment for DISH

A. DISH and EchoStar's Prior Acquisitions of Spectrum Assets

165. DISH's strategic goals include participation in the wireless space and contemplate the need for a great deal of spectrum. (Jan. 13 Tr. (Ergen) 26:18-20, 96:18-98:22, 100:25-101:4.) Mr. Ergen testified that spectrum is a limited resource that currently suffers from a shortage, with the amount of data flowing over available spectrum doubling every year. (Jan. 13 Tr. (Ergen) 47:3-48:10, 96:5-14; PX0747 at SPSO-00012492.) Mr. Falcone concurred with Mr. Ergen's view of spectrum, referring to wireless spectrum as "beachfront property." (Jan. 16 Tr. (Falcone) 15:17-16:1).

166. DISH and EchoStar have for years been attempting to acquire, or merge with, numerous spectrum-owning companies, including actual and potential transactions involving DBSD, TerreStar Networks ("TerreStar"), Sirius XM Holdings, Inc., Clearwire Corp., Sprint Corp., and Inmarsat plc. (Jan. 13 Tr. (Ergen) 95:6-96:4, 101:5-103:5, 105:11-108:10.)

167. DISH and EchoStar have a history of purchasing distressed or discounted debt of their targets as a step toward an eventual acquisition, including acquiring a blocking position in distressed satellite companies in bankruptcy, such as DBSD and TerreStar, enabling them to acquire the companies' spectrum assets at a discount. (Jan. 13 Tr. (Ergen) 100:25-103:9; Jan. 10 Tr. (Kiser) 108:21-109:6, 106:24-107:3; Howard Dep. 285:15-24.)

168. In DISH's acquisition of TerreStar through bankruptcy, Mr. Ergen and DISH employed a three-step strategy. First, EchoStar became the largest secured creditor of TerreStar

and the second-biggest shareholder in the parent, TerreStar Corp. (PX0012 (EchoStar 10-Q Jun. 30, 2011 at 14).) Second, DISH became the ultimate purchaser of TerreStar as a stalking horse bidder, repaying EchoStar in full. (DX008 (DISH 8-K Jun. 16, 2011 at 2).) Third, DISH entered into a purchase agreement with TerreStar whereby both the debt-buyer (EchoStar) and the acquirer (DISH) obtained broad releases that ensured EchoStar's claims would be paid in full. (Jan. 13 Tr. (Ergen) 105:14-17; PX0011 at 1, 5, 9 n.4, 61.)

169. DISH's acquisition of DBSD through the bankruptcy process, in which Mr. Ergen was also intimately involved, employed a similar strategy. (Jan. 13 Tr. (Ergen) 106:7-10.) DISH acquired a blocking position in DBSD's first lien debt and attempted to acquire a blocking position in DBSD's second lien debt to facilitate its acquisition. (Jan. 13 Tr. (Ergen) 104:4-10, 105:11-13, 106:2-10; PX0831 (*In re DBSD North America, Inc*., 634 F.3d 79, 104 (2d Cir. 2011) ("DISH purchased the claims as votes it could use as levers to bend the bankruptcy process toward its own strategic objective of acquiring DBSD's spectrum rights, not protecting its claim")); PX0864 (*In re DBSD North America, Inc*., 421 B.R. 133, 136 (Bankr. S.D.N.Y. 2009) (quoting DISH document stating that DISH "believe[d] there is a strategic opportunity to obtain a blocking position in the 2nd Priority Convertible Notes and control the bankruptcy process for this potentially strategic asset.").) Despite the bankruptcy court's designating DISH's votes, DISH ultimately acquired DBSD's spectrum assets and was repaid in full on its debt holdings. (PX0864, 421 B.R. at 143 (designating DISH's votes).)

170. In March 2012, DISH gained control of DBSD and TerreStar's spectrum, now known as AWS-4 spectrum, which, as of at least January 17, 2014, DISH had still not deployed. (Jan. 13 Tr. (Ergen) 101:5-14, 147:22-25; Jan. 17 Tr. (Cullen) 111:21-24; DX024; Jan. 10 Tr. (Kiser) 109:7-9; Jan. 17 Tr. (Cullen) 139:2-9.)

B. Mr. Ergen's Consideration of LightSquared's Spectrum Assets

171. Mr. Ergen testified that in 2011, he considered, for at least a second time, a DISH investment in LightSquared.[25] (Jan. 13 Tr. (Ergen) 109:3-9.) Mr. Ergen believed that LightSquared was "very similar" to DBSD and TerreStar – companies DISH had recently acquired – and that its spectrum "could fit with the existing spectrum [that DISH owns] in the long-term."[26] (Jan. 13 Tr. (Ergen) 109:10-16, 111:5-16; PX747.)

172. In order for DISH to operate a terrestrial wireless network, it needs uplink spectrum to pair with its downlink spectrum; because LightSquared has clean uplink spectrum,[27] this creates a natural synergy. (Jan. 9 Tr. (Smith) 125:4-21.) LightSquared's L-Band spectrum is a "natural pairing" for DISH, given that LightSquared's uplink spectrum is "safe to use as uplink spectrum." (Jan. 9 Tr. (Smith) 114:22-126:2.) LightSquared's spectrum could be repurposed as uplink-only spectrum and paired with the spectrum DISH acquired with TerreStar and DBSD, which can be converted to downlink[28] – thereby avoiding known interference

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[25] Many years earlier, EchoStar had been interested in LightSquared's predecessor company, SkyTerra, prior to Harbinger's own investment. (Jan. 13 Tr. (Ergen) 111:23-112:9; Jan. 16 Tr. (Falcone) 15:12-16:11.)

[26] Mr. Ergen recognized the value in LightSquared's spectrum, testifying that it is "great collateral." (Jan. 13 Tr. (Ergen) 214:25-215:9.) Had DISH been able to directly purchase the LP Debt, which constituted discounted notes supported by oversecured collateral, it would have realized the same economic benefits as Mr. Ergen. (*Id*. 215:13-17, 215:25-216:8; *see also* PX0587.)

[27] The interference issues raised before the FCC relate primarily to LightSquared's downlink spectrum.

[28] After DISH acquired 40 MHz of AWS-4 spectrum from DBSD and TerreStar, it applied for a waiver of the ATC requirement, which would allow DISH to build out a terrestrial-only wireless network. In December of 2012, the FCC issued a decision that authorized DISH to use its AWS-4 spectrum on a standalone terrestrial basis. However, the FCC's authorization came with a restriction: because DISH's AWS-4 uplink spectrum is immediately adjacent to downlink H-block spectrum – and the presence of uplink and downlink spectrum immediately adjacent to one another results in interference between the bands – there was a need for a "guard band" or transition zone, in between the two spectrum bands. Accordingly, the FCC imposed strict power limitations of 5mW EIRP on mobile transmissions at 2000-2005Mhz and a requirement that DISH accept all interference flowing from the H-block into this 5 MHz of DISH's AWS-4 spectrum. This requirement meant that 5 MHz of DISH's acquired spectrum became largely unusable, and DISH only has 35 MHz usable spectrum of the 40 MHz that it acquired from DBSD and TerreStar. To maximize the full value of the 40MHz of its newly acquired AWS-4 spectrum, DISH would have to convert all of the AWS-4 spectrum to downlink spectrum (which it requested in September 2013 and obtained approval for in December 2013) and find uplink spectrum elsewhere. (DX411 (October 21, 2013 DISH letter summarizing meetings requesting waiver from FCC); DX339 (December 20, 2013 FCC order granting waiver).)

problems with the uplink portion of that spectrum. (PX0154; PX0195; Jan. 13 Tr. (Ergen) 151:18-25.)

173. LightSquared has significant blocks of usable uplink spectrum. Indeed, LightSquared is presently, and has been for some time, the only significant source of available uplink spectrum to acquire. (*See* PX0195 ("one potentially logical technical solution that could combine LightSquared's spectrum (as uplinks) with the TerreStar and DBSD spectrum (if that was all converted to downlinks)").)

174. Mr. Ergen testified that had he acquired LightSquared, his plan would entail "two or three years to clean up LightSquared['s spectrum]," *i.e.*, obtain the necessary FCC approvals, and that he believed "at the end of the process, there would be . . . twenty megahertz of uplink spectrum." (Jan. 13 Tr. (Ergen) 245:17-246:21.)

175. The DISH Special Committee concluded in June 2013 that the purchase of LightSquared's spectrum assets "would be an attractive opportunity for the Corporation's shareholders, given that such an acquisition could enhance the value of the spectrum already owned by the Corporation." (PX0716 at GH_L2_000972.) DISH and Mr. Ergen were aware of the inherent value in LightSquared's spectrum and its actual and potential synergies with DISH's spectrum.

176. As set forth in paragraphs 153-57 *supra*, the Ergen July 8 Presentation was delivered to the DISH Special Committee and PWP, financial advisor to the DISH Special Committee, among other recipients, at a special meeting of the DISH Board on July 8, 2013. The Combined Implied Net Primary and Supplemental Asset Value listed in the presentation – *i.e.*, the estimated total value of LightSquared's assets in DISH's hands – was estimated by Mr. Ergen to be between $5.174 billion and $8.996 billion, with a midpoint of $7.085 billion.

177. Mr. Ergen acknowledged during a DISH earnings call on August 6, 2013 that LightSquared's spectrum would be beneficial to DISH: LightSquared is "interesting to [DISH]" because the spectrum "potentially could fit with the existing spectrum that [DISH has] in long term. . . . So putting all that spectrum together at the same time maintaining the ability to use the satellite for voice and data . . . makes a lot of sense." (PX0747 at SPSO-00012486.)

C. DISH'S Pursuit of Sprint and Clearwire

178. At the same time that DISH was ostensibly pursuing the Sprint and Clearwire transactions,[29] Mr. Ergen was simultaneously pursuing LightSquared's assets to preserve optionality for DISH in case DISH's bids for Sprint and Clearwire fell through. Mr. Ergen has stated publicly that: "I like, strategically, to have a lot of optionality and it's easier to make good choices when you have options." (PX0839 at 7.) Thus, he pursued LightSquared as an alternative for DISH if the Sprint and Clearwire acquisitions fell through—as they ultimately did. (PX0832 (Ergen Nevada Dep.) at 135:23-136:3 (a DISH bid for LightSquared could be a "Plan B" if potential deal with Sprint did not work out), 140:22-141:23 (Mr. Ergen made the bid for LightSquared's spectrum to preserve DISH and EchoStar's "optionality" to participate); Jan. 13 Tr. (Ergen) 186:25-187:20 (the bid "opened up the optionality for DISH to the extent they lost Sprint"); PX0908 at 10 ("we realize [SoftBank is] a formidable competitor and we have to be prepared to win and we have to be prepared to lose").)

VIII. Mr. Ergen's Assertion That He Was Making a Personal Investment Is Belied by the Evidence

179. Mr. Ergen's substantial purchases of LP Debt are not consistent with his historical personal investments. Mr. Ergen has a history of investing in low-risk, diversified, liquid assets

[29] On January 8, 2013, DISH made an unsolicited and non-binding bid for Clearwire, (DX106; PX0315). DISH ultimately withdrew its tender offer on June 26, 2013. (DX257.) On April 15, 2013, DISH made a bid for Sprint (DX153) but abandoned its bid for Sprint on June 21, 2013. (DX250.)

– not investing substantially all of his liquid assets in the distressed debt of a single company. Moreover, while Mr. Ergen's willingness to pay near par for the distressed LP Debt is consistent with a plan to obtain a blocking position – and indeed, a majority position – in order to acquire the underlying company, such purchases are somewhat inconsistent with a personal investment by a typical creditor seeking to make a profit on distressed debt by buying low and selling high.

A. SPSO's Purchases of LP Debt Were Inconsistent with Mr. Ergen's Personal Past Investment Strategy

180. Bear Creek manages investments for Mr. Ergen in a trust account known as the Lindsey Revocable Trust (the "Trust"). (Roddy Dep. 18:3-8.) Ordinarily, the Trust – in the names of both Mr. Ergen and his wife, as co-trustees – contains "almost all of [Mr. Ergen's] assets." (Jan. 13 Tr. (Ergen) 61:13-21.) The Trust account is conservatively managed, with most securities rated "A" or better, and diversified across "[m]unicipal taxable securities, [and] commercial paper." (Roddy Dep. 57:9-58:3, 58:20-22, 59:6-12; Jan. 13 Tr. (Ergen) 168:4-14.)

181. Mr. Ergen has never directed Bear Creek to invest in distressed debt, and Bear Creek has never invested more than 50 percent of Mr. Ergen's funds in the stock of a single issuer. (Roddy Dep. 60:20-61:5.) Indeed, no more than ten percent of Mr. Ergen's funds could be invested in any single issuer, and the only distressed debt investment that Mr. Kiser could recall Mr. Ergen investing in was an indirect investment through the portfolio of a hedge fund, GSO. (Roddy Dep. 74:5-13.) Moreover, prior to investing in the LP Debt, Mr. Ergen had never invested his personal funds in a competitor of DISH or a company he considered to be a strategic opportunity for DISH, nor had he previously invested in spectrum assets or bought distressed debt in a company that owned spectrum assets. (Jan. 10 Tr. (Kiser) 100:2-21; Jan. 13 Tr. (Ergen) 122:18-123:4, 154:16-155:12, 156:11-14.)

182. When it came to LightSquared, however, Mr. Ergen deviated from his past investment practices, and invested nearly all of his non-DISH/EchoStar assets – approximately $700 million – to acquire the LP Debt. (Jan. 13 Tr. (Ergen) 170:20-172:9; PX0832 (Ergen Nevada Dep.) 105:19-106:10; PX0859.) Aside from his ownership in DISH and EchoStar, Mr. Ergen's investment in LightSquared is by far his largest personal investment. (Jan. 10 Tr. (Kiser) 102:2-14; Jan. 13 Tr. (Ergen) 153:17-21.) Bear Creek's managing director testified that Mr. Ergen transferred "probably" over $700 million from the Trust to the Bal Harbour Entities and SPSO, and that Bear Creek had never seen Mr. Ergen pull out that much money in a period of 13 months for the benefit of the same beneficiary or beneficiaries. (Roddy Dep. 95:16-96:6; *see also* PX0814 at BC001351-68; PX0811 at BC00428-497; PX0809; Jan. 13 Tr. (Ergen) 169:4-170:19.)[30]

183. According to Mr. Ergen, if the Ad Hoc Secured Group Plan had been confirmed per the proposed schedule, he would not only have been repaid in full, but he would have received approximately $150 million in profit plus a "significant" amount in interest. (Jan. 13 Tr. (Ergen) 132:22-133:6, 134:6-15, 233:20-234:7.)

184. Mr. Ergen testified that although he withdrew $700 million from a family trust, he never informed his wife – a co-trustee of the Trust – that he had used the money to invest in the LP Debt. (Jan. 13 Tr. (Ergen) 120:8-21, 252:8-20.) Indeed, although Mr. Ergen's wife is a DISH board member (and a co-founder of DISH and EchoStar), she purportedly never asked him whether he was purchasing the LP Debt prior to the May 2, 2013 board meeting. (Jan. 10 Tr. (Kiser) 15:5-21; Jan. 13 Tr. (Ergen) 119:20-120:7; PX0302 at 20.) Notably, Mrs. Ergen was

[30] Around that time, Bear Creek managed between $626 million and likely $750 million dollars for Ergen. (Roddy Dep. 71:11-18.) Today, it manages under $100 million. (Roddy Dep. 72:22-73:5.)

among the recipients of the May 2012 email DISH's general counsel sent stating, in response to a question over whether "charlie had bought $350 million light squared bonds," that "the company did not buy any LightSquared bonds." (DX397.)

185. Mr. Ergen testified that he was interested in purchasing the LightSquared assets personally if DISH declined to bid, but he had not made critical decisions essential to the acquisition of a company, such as who would run the business, where key employees would be officed, or how he would resolve the conflict of interest inherent in owning a DISH competitor. (Jan. 13 Tr. (Ergen) 244:11-245:12.)

B. The Price at Which Mr. Ergen Attempted to Purchase the LP Debt and Offered for the LP Preferred Interests Is Inconsistent with the "Great Investment" Premise

186. SPSO paid 96 cents on the dollar for approximately $320 million of LP Debt, prices which are consistent with DISH's past practices of paying at or close to par for strategic purposes. (PX0864 (*In re DBSD North America, Inc.*, 421 B.R. at 140) (discussing DISH paying par for debt); Jan. 13 Tr. (Ergen) 106:2-17.) Mr. Ergen stated that, in 2013, he felt the LP Debt was even more valuable because of changes in the industry and at the FCC, so he raised his limit up to nearly par – 96 cents on the dollar – and bought whatever people would sell at that level. (Jan. 13 Tr. (Ergen) 66:16-25.)

187. As discussed *supra*, in October 2012, Mr. Ergen instructed Mr. Kiser to increase his position in the LP Debt up to a level that would establish a blocking position. (PX0243.) By March 25, 2013, Mr. Ergen needed to purchase another $112 million in the debt to reach that goal. (Jan. 13 Tr. (Ergen) 175:7-176:14; PX0379.) On March 28, 2013, Mr. Ergen initiated a trade for $168 million in LP Debt at 96 cents on the dollar – which was 50 percent more than he initially paid in April 2012. (Jan. 13 Tr. (Ergen) 176:17-178:3; PX0859.) Mr. Ergen also sought to purchase the Preferred Stock of LightSquared LP ("LP Preferred Interests") that was bundled

with that 96 cents on the dollar LP Debt and offered to pay between 92 and 95 cents on the dollar for the LP Preferred Interests – approximately $122 million – just so, as Mr. Kiser testified, he could have the privilege of obtaining the LP Debt with which it was bundled. (Jan. 10 Tr. (Kiser) 136:7-14.) Mr. Ketchum testified that SPSO had been offered LP Preferred Interests numerous times in the past, but only pursued the offer when it was bundled with the $168 million in LP Debt. (Jan. 15 Tr. (Ketchum) 108:12-22; *see also* PX0412 (April 4, 2013 e-mail from Kiser telling Ketchum "We're only interested in the term loan.").) Mr. Ergen denied the fact that he was willing to pay that price because he wanted to get a blocking position. (Jan. 13 Tr. (Ergen) 174:3-18.) Mr. Ergen's testimony is inconsistent with Mr. Ketchum's testimony that Sound Point, Mr. Ergen, and Mr. Kiser shared the goal of obtaining a blocking position. (Jan. 15 Tr. (Ketchum) 54:19-22; PX0305.)

IX. LightSquared and Harbinger Were Aware or at Least Had a Strong Suspicion that Mr. Ergen Was Acquiring LightSquared Debt

A. Although Public Information Provided No Certainty as to Who Was Behind Sound Point's Purchases, There Was Ample Reason to Believe It Was Mr. Ergen

188. Starting in 2011, and continuing into 2013, Harbinger and LightSquared closely monitored the sales and transfers of LightSquared's bank debt. (Jan 16 Tr. (Falcone) 18:19-22; Montagner Dep. 85:18-86:21; DX108; DX139; DX156; DX159; DX164; DX173; DX211; DX391; DX392; PX0141; PX0324; PX0358; PX0373; PX0403.) Around May 2012, when LightSquared filed for bankruptcy, LightSquared was updating, several times a week, a list of the "pro forma" holders of LightSquared debt, which contained information on open and settled trades. (PX0141; Montagner Dep. 65:23-68:5.)

189. Ten days before LightSquared filed for bankruptcy protection, Mr. Falcone learned that SoundPoint was buying LightSquared debt. (Jan. 16 Tr. (Falcone) 20:17-20.)

However, given that Sound Point reportedly only had approximately $178 million in assets under management but was "purchasing" over $200 million of LP Debt, it prompted suspicion that Sound Point was not the identity of the ultimate purchaser. (Jan. 17 Tr. (Hootnick) 17:21-18:6; PX0122.)

190. The identity of the purchaser behind Sound Point was the subject of widespread speculation in the media. News reports and blogs at various times connected Mr. Ketchum and Sound Point to Mr. Ergen, Carlos Slim, and the Dolan family (which controlled Cablevision). (*See e.g.*, PX0095; PX0121; PX0122; PX0154; PX0195; DX144.)

191. On April 30, 2012, Paul Voigt of Jefferies privately told Mr. Falcone that he was going to trade $250 million of LightSquared debt the following day. (DX447.) Around this time, Mr. Falcone had heard rumors that Carl Icahn was looking to sell his $250 million of LP Debt. (Jan. 16 Tr. (Falcone) 94:20-95:15.) Mr. Falcone responded, "To?" (DX447.) Several days later, on May 4, 2012, Mr. Falcone answered his own question, and in an email to Mr. Voigt referring to the $250 million trade, wrote, "You sold to Ergen."[31] (DX033; Jan. 16 Tr. (Falcone) 30:11-31:15.) Mr. Falcone testified that he sent the email because "[he] believed, at that time, that Ergen was involved and that they may have sold to Ergen." (Jan. 16 Tr. (Falcone) 31:12-15.)

192. On May 4, 2012, Ian Estus, an analyst-trader at Harbinger Capital, investigated Sound Point and forwarded a November 2, 2011 article to Mr. Falcone noting that Mr. Ketchum

[31] Following SPSO's purchase of the $250 million piece of debt, news reports speculated that Mr. Ergen was buying the debt. (Jan. 10 Tr. (Kiser) 37:5-13.) On May 7, 2012, a *Reuters* story on the trade mentioned that Mr. Steven Ketchum of Sound Point previously counted Mr. Ergen as one of his investment banker clients and that DISH owned wireless airwaves "similar to LightSquared." (PX0121.) On May 9, 2012, an *LCD News* story carried the headline "LightSquared TL trades north of 70 as Ergen enters the picture." (DX045.) On May 10, 2012, a *Wall Street Journal* blog, "Deal Journal," published an entry titled "Ergen Builds Cash Pile Amid LightSquared Restructuring Talks." (DX396.)

had a relationship with the Dolan family. Mr. Estus noted, "This is the guy running Sound Point. An old article, but looks like the guy has close ties with the Dolan family." (PX0095.)

193. On May 5, 2012, Mr. Falcone responded to an email regarding Mr. Ergen from Mr. Cohen of Knighthead, and wrote, "Maybe we shouldn't file if he is circling the wagons. Though I think is [*sic*] a positive. May bring in another strategic." (Jan. 16 Tr. (Falcone) 33:8-12; DX035.) Mr. Falcone testified that he intended to convey that to "have a strategic kind of kicking the tires on your company . . . validate[s] the asset and it may bring in - - it may prompt other strategics to get involved." (Jan. 16 Tr. (Falcone) 35:3-10, 96:8-12.)

194. On May 6, 2012, Mr. Falcone emailed Matthew Goldstein of *Reuters* and wrote that Mr. Ergen bought LightSquared debt from Carl Icahn, and that Mr. Ergen's purchase would "prompt more strategics to step in." (DX036; DX037; Jan. 16 Tr. (Falcone) 36:17-22.) Later in the day, Mr. Goldstein told Mr. Falcone that he heard the buyer was Sound Point, and Mr. Falcone responded, "Fronting for [E]rgen." (DX037.) Mr. Falcone never indicated to Mr. Goldstein that he was speculating. (Jan. 16 Tr. (Falcone) 105:23-106:4.) When Mr. Falcone sent these emails to Mr. Goldstein, he believed Mr. Ergen was purchasing LightSquared's debt. (Jan. 16 Tr. (Falcone) 38:6-15, 102:3-7.)

195. On May 7, 2012, Mr. Falcone sent an email to Thomas Cullen of DISH and wrote, "Good purchase." (DX378; Jan. 16 Tr. (Falcone) 39:21-40:1.) Mr. Falcone testified that Mr. Cullen later called Mr. Falcone, but Mr. Falcone never called him back.[32] (Jan. 16 Tr. (Falcone) 40:2-7.)

[32] On December 18, 2012, Mr. Falcone again sent an email to Mr. Cullen and wrote, "We should talk. I know you guys are buying the bonds through Sound Point. One of his guys has been talking." (DX097.)

196. On May 7, 2012, Reuters published an article about the recent trade to Mr. Ketchum of a position formerly held by Carl Icahn, noting that Mr. Ketchum had previously worked as an investment banker and "one of his clients was Charlie Ergen's satellite company." (PX0121; *see also* PX0122.) Similarly, on May 10, 2012, a *Wall Street Journal* blog noted that the counterparty on the Icahn trade was a "small hedge fund with ties to Ergen" and speculated that DISH's then-recent sale of $1.9 billion worth of high yield bonds could be used to buy the LP Debt. However, the article, with the aid of DISH, refuted its own claim stating that "[t]he official line out of Dish is that the proceeds from the bond sale will go to pay down debt maturing in 2013 and 2014." (DX396.)

197. On May 8, 2012, Mr. Falcone emailed Gil Ha, a banker at Greenhill & Co. who had a relationship with AT&T, and wrote, "Ergen now involved in LS." (DX043.) Mr. Falcone testified that he sent this email because he thought that if AT&T knew Mr. Ergen was involved in LightSquared, AT&T might be more likely to invest in LightSquared. (Jan. 16 Tr. (Falcone) 41:20-22, 118:15-119:14.)

198. On May 8, 2012, Mr. Falcone emailed Ara Cohen of Knighthead, a senior creditor of LightSquared, and wrote, "I can understand why u guys balked; Charlie will definitely give u guys 25% and an independent board and your full claim." (DX382.)

199. On May 10, 2012, a Harbinger Capital employee advised Mr. Falcone that he had "heard from a couple of people that [E]rgen may not be the guy behind [K]etchum. Some rumors are that it might be the [D]olans, who like [E]rgen are close to [K]etchum." Mr. Falcone did not believe the employee was referring to the Dolans personally, but rather to Cablevision, which the Dolans control. (Jan. 16 Tr. (Falcone) 45:18-46:20; PX0149.)

200. On May 16, 2012, Mr. Falcone sent an email to Greg Bensinger, a reporter at *The Wall Street Journal*, saying that Mr. Ergen and Carlos Slim were involved in buying LightSquared's debt. (DX386.) Mr. Falcone also offered Mr. Bensinger an "exclusive" if he would write a story, stating, "Let me know before I tell someone else if u are going to write anything." (DX386.) Mr. Falcone understood that Mr. Bensinger may write an article based on the information Mr. Falcone had provided. (Jan. 16 Tr. (Falcone) 54:15-22, 108:25-109:4.)

201. On July 9, 2012, *Forbes* indicated that, while speculation following the Icahn trade had focused on Mr. Ergen, "holes have appeared in the thesis that Ergen is backing Sound Point" and "people involved have begun to speculate it might be Carlos Slim or others behind the purchase. Sources have speculated that Cablevision, owned by the Dolan family and one of the country's largest telecom and media company [*sic*], could be a potential suitor as well." (PX0304 at KCM0013841; *see also* PX0195 (Tim Farrar, *How many billionaires does it take to screw in a LightSquared?*).)

202. On October 10, 2012, Mr. Falcone was told by an employee at Jefferies, who said he was "very close to [Ergen's] right hand guy," that he would be "shocked if he is lying" about Mr. Ergen not being behind Sound Point's purchases of LP Debt. (PX0254.)

203. New reports continued to indicate throughout 2012 and into 2013 that Mr. Ergen and DISH may be behind Sound Point's LP Debt acquisitions, but no press article definitively confirmed Mr. Ergen's involvement. An April 4, 2013 *Wall Street Journal* article noted, "[i]t is unclear whether Mr. Ergen or his company, satellite-television operator Dish Network Corp. . . . has played a role in Sound Point's trading. Mr. Ergen hasn't addressed the trades, and the company declined to comment." (DX144.) The same day, an individual working in the telecommunications industry forwarded Mr. Falcone the article, telling him that Carlos Slim was

"with Charlie on the debt." The individual explained that he "was in Mexico and was told by [Slim's] investment guy . . . that Carlos and Charlie are very tight and Carlos owns Dish Mexico." (PX0409.)

204. Although representatives of LightSquared had, at times in the spring of 2012, speculated that Mr. Ergen, Mr. Slim, Cablevision, Telephonica, or SK Telecom were purchasing LightSquared debt through SPSO, as Mr. Montagner testified, "[i]t was all speculation at the time. No one knew." (Montagner Dep. 64:20-65:10.) Similarly, depending on the day and the information he received or the rumors that were circulating, Mr. Falcone suspected that anyone from Mr. Ergen on behalf of DISH or EchoStar; Sprint; James Dolan on behalf of Cablevision; Carlos Slim; AT&T; or one of the "big PE shops" was behind Sound Point's purchases. (Jan. 16 Tr. (Falcone) 23:24-24:10, 48:21-49:19, 51:2-21, 62:16-63:24, 72:25-74:9; *see also* PX0095; PX0167; PX0158; PX0312; PX0537; PX0540; PX0356.)

205. On October 4, 2012, Mr. Falcone sent an email to Omar Jaffrey, a banker who has worked in the telecommunications space (and now is the principal of Melody Capital, a plan sponsor), and wrote, "You may want to circle up w[ith] your contact at AT&T and let him know Ergen continues to buy bonds." (DX388; Jan. 16 Tr. (Falcone) 56:3-8.) When Mr. Falcone sent this email, he believed Mr. Ergen was the buyer of the debt. (Jan. 16 Tr. (Falcone) 123:14-18, 124:7-9.) Mr. Falcone also testified that he sent the email in the hope that Mr. Jaffrey would corroborate his belief that Mr. Ergen was buying debt and get AT&T interested in LightSquared. (Jan. 16 Tr. (Falcone) 56:9-57:5.)

206. Even as late as March 28, 2013, Drew McKnight of Fortress Investment Group, LLC ("Fortress") and Mr. Falcone both expressed in an email exchange that it was beneficial that

a potential strategic investor, Mr. Ergen, was buying Fortress' LightSquared preferred stock. (DX395; Jan. 16 Tr. (Falcone) 140:24-142:4.)

207. Mr. Falcone testified that he also "suspected" Carlos Slim or Cablevision might have been acquiring LightSquared debt. (Jan. 16 Tr. (Falcone) 23:24-24:10.) He also repeatedly characterized his emails that stated that Mr. Ergen was buying debt as "fishing expedition[s]" for information. (Jan. 16 Tr. (Falcone) 39:3-10, 41:20-42:9, 56:13-20, 124:20-125:7.)

208. In the spring of 2013, Harbinger and LightSquared were monitoring SPSO's open and closed trades particularly closely to determine whether SPSO's holdings would exceed the holdings of the Ad Hoc Secured Group, which would trigger the invalidation of certain provisions of the Exclusivity Stipulation, including the obligation to conduct a formal sale process for LightSquared's assets after the exclusivity period terminated: "[W]e were monitoring the holdings throughout the entire case. But at this point in time it was particularly relevant given a threshold in the exclusivity stip." (Jan. 17 Tr. (Hootnick) 74:8-15.)

209. Mr. Falcone testified that, at least as of March 2013, he wanted to "blow up" the Ad Hoc Secured Group because he did not want LightSquared to have to market or sell its assets. (Jan. 16 Tr. (Falcone) 142:20-143:17.)

B. Harbinger and LightSquared Add DISH to the List of Disqualified Companies Because They Believe Mr. Ergen Is Buying LP Debt

210. On May 6, 2012, in response to an email from Mr. Cohen of Knighthead regarding Mr. Ergen, Mr. Falcone wrote, "Well I'm working on giving him a nice surprise." (DX038.)

211. Three days later, on May 9, 2012, LightSquared amended its list of Disqualified Companies (see ¶¶ 25-26, *supra*), and Mr. Falcone sent a list of additional Disqualified

Companies under the Credit Agreement to Paul Voigt of Jefferies. (DX443; DX383; Jan. 16 Tr. (Falcone) 112:14-114:25.)

212. Two of the companies on the May 9 amendment to the list of Disqualified Companies, DISH and DBSD North America, Inc., are affiliated with Mr. Ergen, but none is affiliated with Mr. Slim. (Jan. 16 Tr. (Falcone) 115:6-16; DX443.) Mr. Falcone testified that he sent this email to Mr. Voigt because he thought Mr. Ergen or DISH was buying LightSquared debt through Sound Point. (Jan. 16 Tr. (Falcone) 114:16-25, 117:22-118:5.) Indeed, after DISH was added to the list of Disqualified Companies under the Credit Agreement, Mr. Falcone told Mr. Voigt that "DISH or soundpoint [*sic*] can no longer buy."[33] (DX384.)

C. Neither Harbinger Nor LightSquared Attempted to Use a Rule 2004 Subpoena to Determine Who Was Buying LightSquared Debt Through Sound Point

213. Had they been confused about the identity of the purchaser behind SPSO, Harbinger or LightSquared could have sought discovery under Bankruptcy Rule 2004. When asked about this option at trial, Mr. Falcone attempted to deny that he knew what a Rule 2004 subpoena was, initially testifying that he first heard of it a week before the Trial at his deposition on January 8, 2014 (Jan. 16 Tr. (Falcone) 129:8-130:8) and then backtracking, minutes later, when confronted with a May 16, 2013 email in which he wrote, "We should also put the '2004' item up as well." (Jan. 16 Tr. (Falcone) 131:22-132:10; DX405.)

[33] Based on this and other emails, it is clear that Jefferies, the market maker in LightSquared debt, was aware of the connection between Mr. Ergen and SPSO, and that Jefferies was talking to Mr. Falcone about SPSO's trades before they closed. (DX033 (May 4, 2012 Falcone email to Voigt: "You sold to Ergen"); DX377 (May 7, 2012 Falcone email to Voigt forwarding a list of Disqualified Companies including EchoStar: "not sure how Charlie gets around this one"); DX443 (May 9, 2012 Falcone email to Voigt attaching Notice to Administrative Agent: "not sure I would want to trade these anymore and get stuck"); DX055 (May 17, 2012 Falcone email to Voigt: "Ergen and Carlos Slim"); DX089 (November 16, 2012 Falcone email to Voigt: "[W]hat was the date the first block traded out of [I]cahn into [E]rgen[?]").)

214. Mr. Falcone then testified that, in fact, before Mr. Ergen publicly disclosed his interest in SPSO, he had discussions with his legal team regarding issuing a Rule 2004 subpoena. (Jan. 16 Tr. (Falcone) 131:24-132:22.)

215. Mr. Montagner testified that he understood LightSquared could have served a subpoena on the holders of its secured debt to identify who was behind SPSO. (Montagner Dep. 57:5-9.) Mr. Hootnick, a Managing Director at Moelis & Company ("Moelis"), LightSquared's financial advisor, also testified that he was involved in discussions with LightSquared regarding the use of discovery to find out who was purchasing LightSquared debt through Sound Point, but LightSquared decided not to pursue such discovery. (Jan. 17 Tr. (Hootnick) 67:10-22.)

216. Ultimately, neither Harbinger nor LightSquared ever tried to use a Bankruptcy Rule 2004 subpoena to find out who was behind SPSO's purchases of LP Debt. (Jan. 16 Tr. (Falcone) 131:10-132:22.)

D. LightSquared and Moelis Representatives Also Suspect Mr. Ergen Is Buying Debt Through Sound Point

217. Mr. Hootnick testified that it was "our view" that Mr. Ergen was purchasing LightSquared debt through Sound Point.[34] (Jan. 17 Tr. (Hootnick) 62:3-6; *see also id.* 16:13-23.) He further testified that Moelis "never really believed" that Mr. Slim was behind Sound Point. (Jan. 17 Tr. (Hootnick) 87:12-19.)

218. Mr. Montagner held the same beliefs. On May 7, 2012, after seeing news reports that Sound Point had purchased LightSquared debt, Mr. Montagner emailed Stan Holtz of Moelis and wrote, "Ketchum, with his 175 MM fund, bought 350 of the debt on Friday[.] He is probably a front for Charlie Ergen." (DX040; Montagner Dep. 60:21-61:15.)

[34] Mr. Hootnick's belief did not change with the passage of time. He testified that he understood, at least as of April 3, 2013, that *The Wall Street Journal* had very good sources saying that Mr. Ergen was behind Sound Point's purchases of LightSquared debt. (DX140; Jan. 17 Tr. (Hootnick) 63:11-21.)

219. Mr. Montagner testified that he was not aware of anyone at LightSquared doing anything to try to stop Sound Point's debt purchases. (Montagner Dep. 64:20-65:19, 104:19-25, 105:6-17.)

E. LightSquared and Harbinger Make Inquiries to Determine Who Is Behind Sound Point's LP Debt Purchases but Fail to Take Action Based on Their Suspicions

220. LightSquared and Harbinger made efforts before and after LightSquared's bankruptcy filing to uncover the identity of the party behind Sound Point's purchases. (Jan. 16 Tr. (Falcone) 23:12-15, 24:20-24.) In early May 2012, Mr. Icahn, a substantial holder of the LP Debt, sold a large block of LP Debt to Sound Point, spawning press speculation. (Jan. 9 Tr. (Smith) 127:25-128:18; Jan. 17 Tr. (Hootnick) 19:8-11; PX0121).)

221. Upon learning of Sound Point's purchase, Mr. Smith, having never heard of Sound Point, asked Messrs. Montagner and Hootnick to find out who was behind Sound Point's purchases. (Jan. 9 Tr. (Smith) 127:16-129:3.) Similarly, Harbinger instructed Barry Ridings of Lazard Freres & Co LLC to reach out to Mr. Ergen. (PX0899.) Despite trying "a number of times," they "could never verify who was behind Sound Point." (Jan. 9. Tr. (Smith) 129:4-13; *see also* Jan. 16 Tr. (Falcone) 47:4-9.) As Mr. Hootnick testified, "[t]here were a lot of suspicions that that was the case, but we could not get confirmation on that topic." (Jan. 17 Tr. (Hootnick) 54:18-55:10.)

222. Mr. Montagner also asked Kurt Haufler, Treasurer of LightSquared, to reach out to UBS to obtain information regarding LightSquared's debt trading activity. Mr. Haufler was not able to confirm through UBS who was behind Sound Point. (Montagner Dep. 49:9-50:17, 51:6-17.)

223. Further, both Messrs. Montagner and Holtz reached out directly to Mr. Ketchum to inquire who was behind SPSO. (Jan. 17 Tr. (Hootnick) 17:16-18:13, 59:14-60:20.) Mr. Ketchum intentionally rebuffed their inquiries. (*See* Jan. 15. Tr. (Ketchum) 88:22-89:22.)

224. Mr. Montagner left multiple voicemails for Mr. Ketchum in May 2012, around the time press reports surfaced connecting Mr. Ergen to the LP Debt purchases. Mr. Ketchum returned one call "late one night" and left a voicemail. That voicemail was the only direct communication Mr. Montagner had with Mr. Ketchum. (Jan. 15 Tr. (Ketchum) 88:22-89:14.) As Mr. Ketchum admitted, he understood that Mr. Montagner had contacted him seeking information about Sound Point and SPSO, but Mr. Ketchum intentionally avoided speaking with Mr. Montagner, only returning one call at an "odd hour" because he did not want to speak to him. (Jan. 15 Tr. (Ketchum) 88:22-89:14.)

225. Mr. Montagner also asked Mr. Holtz to schedule a meeting with Mr. Ketchum. Mr. Holtz told Mr. Montagner that Mr. Ketchum did not want to meet with LightSquared at that time. Mr. Holtz did not get any further information. (Montagner Dep. 53:25-54:21.) Mr. Ketchum admitted to receiving Mr. Holtz's inquiries, but did not give him information about Sound Point's LP Debt purchases. (Jan. 15 Tr. (Ketchum) 89:15-22.)

226. LightSquared's investigation continued in 2013. As reflected in the minutes of LightSquared's board of directors meeting on April 18, 2013, Moelis and Sound Point had a meeting, but Sound Point would not disclose its investors or beneficial owners. (Jan. 9 Tr. (Smith) 154:25-155:15; PX0443.)

227. Moelis persisted in its efforts, calling "Mr. Ketchum regularly and meet[ing] with him regularly, and . . . continu[ing] during that period [*i.e.*, spring 2013] to try and find out who Sound Point—if they were representing somebody and what their intention was." Mr. Ketchum

continued to refuse to identify Sound Point's investors or intentions. (Jan. 17 Tr. (Hootnick) 23:13-24; Jan. 15 Tr. (Ketchum) 88:22-89:22; PX0443.)

228. Further, Mr. Hootnick directly "ask[ed] Mr. Ketchum if he was working with Mr. Ergen . . . but [Ketchum] refused to answer any of those questions." (Jan. 17. Tr. (Hootnick) 19:8-20; Jan. 15 Tr. (Ketchum) 88:22-89:14; 89:18-22.) Mr. Hootnick also reached out to Rachel Strickland of Willkie Farr, who had represented Mr. Ergen in the TerreStar bankruptcy, to see whether she would shed light on whether Mr. Ergen was involved in SPSO's LP Debt purchases. (Jan. 17 Tr. (Hootnick) 19:21-21:3, 64:3-9.) Despite more than six phone calls and "a couple" of lunch meetings, Ms. Strickland would not confirm whether Mr. Ergen was involved. (Jan. 17 Tr. (Hootnick) 20:22-21:3.)

229. Aside from relying on LightSquared and its financial advisor to determine for whom Sound Point was purchasing the LP Debt, Mr. Falcone undertook his own extensive efforts to ascertain who was behind SPSO, "turn[ing] over every rock," including enlisting the help of LightSquared management and reaching out to "people on the street," reporters, Mr. Cullen of DISH, and representatives of AT&T and Sprint. (Jan. 16 Tr. (Falcone) 22:1-11.) Mr. Falcone further utilized Harbinger employees and advisors, as well as colleagues and acquaintances, to gather information. (Jan. 16 Tr. (Falcone) 36:17-37:15, 38:6-22, 39:3-10, 39:18-40:7, 40:8-12, 41:8-19, 43:23-44:2, 44:21-45:17, 47:4-9, 53:11-54:22, 55:14-56:1, 56:3-57:8, 59:11-20, 59:21-60:22; DX037; DX097; PX0142; DX358; DX378; DX386.) Neither Harbinger nor LightSquared took any legal action to determine the identity of the party behind SPSO.

F. On May 21, 2013, LightSquared and Harbinger Definitively Learn that Mr. Ergen is Behind SPSO

230. On May 21, 2013, counsel for Mr. Ergen disclosed to counsel for LightSquared that Mr. Ergen was the sole investor in SPSO. (PX0539; Jan. 9 Tr. (Smith) 129:14-18; Jan. 16 Tr. (Falcone) 24:11-19; Jan. 17 Tr. (Hootnick) 15:25-16:12.)

231. Hours before receiving confirmation, Mr. Falcone advised representatives and advisors for Harbinger and LightSquared that "[i]f I were a betting man I would say that Sound Point is Slim." (Jan. 16 Tr. (Falcone) 72:25-73:18; PX0540.) Upon receipt of counsel's email confirming that Mr. Ergen was in fact the ultimate purchaser of Sound Point's LP Debt, Mr. Falcone responded "[f]ortunately, I'm not a betting man." (Jan. 16 Tr. (Falcone) 73:19-74:9; PX0537.)

X. SPSO Delays Closing Hundreds of Millions of Dollars in LP Debt Trades for Several Months During a Critical Time in LightSquared's Bankruptcy Case

232. Messrs. Ergen and Kiser testified that there were "economic" reasons for leaving the LP Debt trades open for as long as possible, that they were prepared to close "as soon as the upstreams paperwork" was done, and that they never intended to delay the settlement of the trades. (Jan. 10 Tr. (Kiser) 64:5-25, 128:20-23; Jan. 13 Tr. (Ergen) 63:7-9.) The documentary evidence is to the contrary. Efforts were undertaken to delay the closing of SPSO's LP Debt trades in that, among other things: (i) Mr. Ergen was insistent on holding onto his money for as long as possible; (ii) Mr. Ketchum – at Mr. Kiser's direction – gave false excuses to SPSO's counterparties to delay the closing of the trades; (iii) Mr. Ergen had no incentive to close the LP Debt trades because he could direct the vote on the trades even before they settled; (iv) there is no evidence in the record that a decision to settle the LP Debt trades was driven by a return Mr. Ergen received on his assets held at Bear Creek; (v) a delay in settling the LP Debt trades was not due to liquidity concerns because hundreds of millions of dollars of Mr. Ergen's Bear Creek

investments were liquidated and held in Mr. Ergen's account and additional investments could have been liquidated in a matter of days; and (vi) inconsistent and contradictory testimony was given regarding the reasons why settlement was delayed, including the need to complete "upstreams paperwork." (*See, e.g.*, PX0204; PX0481; PX0466; PX0498; PX0495; Jan. 10 Tr. (Kiser) 64:5-25, 95:20-23, 128:24-131:23; Roddy Dep. 66:7-25, 85:17-86:4, 87:9-16.)

A. Mr. Kiser, with Sound Point's Assistance, Delays the Closing of LP Debt Trades

233. Mr. Kiser testified that Mr. Ergen delayed closing hundreds of millions of dollars in LP Debt trades because Mr. Ergen was insistent on holding onto his capital for as long as possible and would only fund trades when they needed to close. (Jan. 10 Tr. (Kiser) 57:4-6; Jan. 13 Tr. (Ergen) 59:13-22.) Thus, when Sound Point entered into a trade for LP Debt, Mr. Kiser would have to create the liquidity necessary to fund the purchases and wire the funds to the accounts set up for SPSO. (Jan. 10 Tr. (Kiser) 87:13-23.) Prior to closing a trade, Messrs. Kiser and Ergen provided Bear Creek – the financial manager for DISH, EchoStar, and Mr. Ergen – with a wire transfer authorization and Bear Creek would liquidate assets to fund the trades. (Jan. 10 Tr. (Kiser) 21:23-22:18, 57:7-58:12; Jan. 10 Tr. (Ergen) 57:7-15; Roddy Dep. 42:18-43:14, 45:3-19.)

234. Of the 25 trades entered into by SPSO for purchases of LP Debt, eighteen of them took over two months to settle, and, of those eighteen trades, six took over four months to settle. (PX0859.) By May 20, 2013, SPSO had contracted for, but had failed to settle, approximately $593,757,000 in face amount of LP Debt trades (and approximately $610,000,000 counting trades held by brokers on that date) – more than 33 percent of the total outstanding LP Debt obligations—and had kept open a number of trades that it had entered into as far back as December 12, 2012. *Id.*

235. SPSO's counterparties to the hundreds of millions of dollars in open LP Debt trades repeatedly reached out to Sound Point to settle the trades and were paper-work ready to do so. (Jan. 15 Tr. (Ketchum) 80:23-81:6, 85:15-25, 105:4-16, 109:8-111:12; PX0279; PX0495 at SPSO-00003025; PX0859; PX0204; PX0209; PX0270; PX0308; PX0319; PX0328; PX0339.) Messrs. Kiser and Ergen, contrary to their testimony, delayed closing even when they knew counterparties were anxious to close. To assuage the concerns of SPSO's counterparties, Sound Point offered various excuses to counterparties. Mr. Ketchum testified that he did not know specifically why SPSO was unable to close the LP Debt trades timely and only knew Mr. Kiser wanted to delay. (Jan. 15 Tr. (Ketchum) 69:3-16; *see, e.g.*, PX0204 (Sound Point employee emailing Mr. Ketchum on June 4, 2012 regarding a LightSquared trade entered into on May 3, 2012 and stating, "Jefferies is looking to settle the other two trades. Do you want to? Or delay?"); PX0481; PX0523.)

236. For example, on January 14, 2013, UBS sought to close a trade with SPSO that had been pending for months. Mr. Ketchum, in an email to his colleague, said he "forwarded this to EchoStar." Three days later, the colleague asked Mr. Ketchum, "would you mind following up with EchoStar [because] UBS has asked to close again." By January 24, 2013, UBS again was pressuring Sound Point to close the trades, "emailing to close daily," and Sound Point continued to delay. "Try and hold them off for another day," another Sound Point employee responded. (PX0348; *see also* PX0319 (Sound Point on January 14, 2013, replying "[s]orry but we are not able to settle that one right now" in response to weekly inquiries from UBS); PX0328 (Sound Point internally discussing following up with "Echostar" regarding UBS trade); PX0364 (March 7, 2013 Sound Point email stating it would be able to settle "next week" in response to repeated inquiries since February 2013 regarding a December 2012 trade).)

237. On February 19, 2013, a Sound Point employee asked Mr. Ketchum to follow up with Mr. Kiser regarding ongoing email and telephone requests from Jefferies to close multiple trades, with trade dates going back as early as October 23, 2012. (PX0347; PX0859.) The employee reminded Mr. Ketchum that "[w]e have been pushing Jefferies off for nearly 3 weeks." (PX0347.)

238. Then, on April 23, 2013, Mr. Ketchum wrote to Mr. Kiser, "Kevin [of Sound Point] thinks we can hold [Jefferies] off on any payments until at least May 15" in connection with over $289 million in LP Debt that had not settled. (PX0458; PX0441; PX0859.) Jefferies followed up with Sound Point on April 25, 2013, seeking to close $88 million of the open LP Debt purchases. (PX0466.) Mr. Ketchum inquired internally as to whether he could blame SPSO's delay on the "upstreams," *i.e.*, the work required to trace back the chain of ownership to original lenders, but he was told by Sound Point personnel that such work had already been completed. (PX0466; Jan. 15 Tr. (Ketchum) 76:9-77:8.)

239. When a Sound Point employee asked Mr. Ketchum for a "reason and an eta" to give Jefferies, another employee suggested telling Jefferies "we are waiting on funding from our investor." Mr. Ketchum rejected that idea, and proposed a different excuse: "Let's not say that. Let's just say we are in the process of exiting some other large positions we have to pay for this and that I have spoken with Steve Sander (head of sales) [at Jefferies] about this." (PX0466; *see also* PX0468 (Mr. Ketchum stating that they should tell Sound Point that "our LP wants time to dispose of other assets"); PX0308 (Jefferies repeatedly inquiring whether funds are available); PX0341 (Sound Point writing to Jefferies that they are "still waiting on the funds"); Jan. 10 Tr. (Kiser) 63:15-20.)

240. On May 9, 2013, Jefferies emailed Sound Point again, imploring Mr. Ketchum to address the open trades. (PX0498.) As of that date, SPSO had seven open trades with Jefferies, totaling approximately $588 million in LP Debt from trades dating back as far as January 2013. (PX0859.) Mr. Sanders of Jefferies pleaded in an email to Mr. Ketchum: "this is a big problem for me. I would like to come down and talk to you this afternoon around 4 or 5pm mano a mano[.] Is this possible?" Mr. Ketchum replied, offering the party line established the day before – that he was waiting for other "trades to settle." Mr. Ketchum went on to state that he had "already pushed extremely hard to get to where we are now in terms of closing." (PX0498.) Notwithstanding the pressure from Jefferies, none of the open trades closed for another several weeks. (PX0859.)

241. Knowing Jeffries was anxious to close the open trades and aware that the volume of unsettled LP Debt trades was substantial, Sound Point prepared a schedule of "Proposed Settlement Dates" to send to Mr. Kiser – selecting proposed dates up to four months or more after the initiation of the trade as illustrated by the following chart included in an email exchanged between Messrs. Ketchum and Kiser on May 8, 2013:

Proposed Settlement Dates

Trade Date	Cost	Type	Desk	Settlement Date	Cumulative
01/07/13	[redacted]	TLB	JEFF	05/17/13	[redacted]
01/14/13		TLB	JEFF	05/17/13	
12/12/12		TLB	GS	06/01/13	
03/25/13		TLB	JEFF	06/01/13	
02/01/13		TLB	JPM	07/01/13	
03/28/13		TLB	JEFF	07/01/13	
04/01/13		TLB	SEAPORT	07/01/13	
03/28/13		Pref	JEFF	07/15/13	
04/19/13		TLB	JEFF	08/01/13	
04/26/13		TLB	JEFF	08/15/13	

(PX0495 at SPSO-00003025; *see also* PX0460; PX0461; PX0474; PX0497; PX0454 (April 22, 2013 internal Sound Point email noting that the amount of unsettled trades had "jumped to almost $404 [million]"); Jan. 15 Tr. (Ketchum) 109:1-111:12.) Sound Point provided the proposed settlement dates to Jefferies to give assurance (even though there was none) that the LP Debt trades would close. (Jan. 15 Tr. (Ketchum) 123:12-124:1.) Mr. Ketchum stated that the "proposed settlement dates" in the schedule he emailed to Mr. Kiser on May 8 were suggested by Mr. Ketchum as a "compromise solution" in order to get the open Jefferies trades settled, and he proposed the schedule to Mr. Kiser before conveying such dates to Jefferies in order to see if a schedule of this kind was capable of execution by SPSO. (Jan.15 Tr. (Ketchum) 124:12-17.)[35] Mr. Ketchum's testimony that these dates were "projections" of the dates upon which he thought the open trades would close was not credible; rather, these dates reflect a gameplan for delaying the closings.[36]

242. Sound Point also performed an internal analysis on May 8, 2013 which showed that, to settle the LP Debt trades with Jefferies, SPSO took an average of 69 days after the trade date and 38 days after the "contractual settlement date" of "T+20," or twenty days after the trade date. (PX0493.) There is no reason for Sound Point to have performed such an analysis other than to provide support for its proposed further delays. Indeed, trade counterparties were keenly aware of SPSO's failure to adhere to the industry norms for the timing of settlements. For

[35] *See also* Jan. 15 Tr. (Ketchum) 132:8-15 ("my job was to find a date, propose a date to SPSO that I thought was reasonable in the context of closing distressed trades, obtain permission from SPSO, and in particular, Jason, to go back and offer those dates to Jefferies so that they could be mollified and feel that there was some sort of definition around when the trades would be closed.").

[36] Mr. Kiser testified that he instructed Mr. Ketchum to prepare a schedule for him showing unsettled trades and expected settlement dates so that he could have the money available on those dates, in order to avoid the "back-and-forth" with counterparties who may not have been ready to close when the funds were made available. (Jan. 10 Tr. (Kiser) 63:25-64:14 ("And it got to a point where I told Steve, hey, look, get me a list and tell me when these things will trade so that we can have the money available for them rather than doing this back-and-forth type of thing."). This testimony was also not credible.

example, Jefferies emailed Sound Point, "[w]e are past the T+20 date and would really like to get this off our books." (PX0205; *see also* PX0209; PX0270; PX0234.)

243. Frustrated with the unprecedented delay in closing the trades, Jefferies complained internally that "[w]hat the buyer has done is not market protocol" and separately to its immediate counterparty that "we remain beholden to [Sound Point] as far as continuing to make progress." (PX0538; PX0880.)

B. There was No True Economic Benefit for Messrs. Ergen and Kiser to Keep the LP Debt Trades Open

244. Messrs. Kiser and Ergen consistently testified that they were "in no rush to close" because it was to Mr. Ergen's economic benefit to wait as long as possible before closing on the trades. (Jan. 10 Tr. (Kiser) 97:23-99:14; Jan. 13 Tr. (Ergen) 157:16-158:6.) As Mr. Kiser testified, Mr. Ergen "was getting a return on his capital and his investments. So if he didn't have to pay for it and he can make money on another end where his money was invested, that seemed like a smart move." (Jan. 10 Tr. (Kiser) 98:3-6.) However, Bear Creek account statements reflect that Mr. Ergen earned a relatively low rate of interest on the funds in his trust accounts. (PX0796-818.)

245. On July 9, 2013, SPSO filed with the Court a joinder; annexed as Exhibit A to the joinder was an amended stipulation (the "SPSO Stipulation") stating that "the timing of closing of each of SPSO's acquisitions of Prepetition LP Obligations was primarily driven by the sellers of such claims." (PX0699 ¶ 16.) This was not true. A prior July 3, 2013 stipulation, which was modified and amended by the SPSO Stipulation, had stated that "SPSO's trade counterparties did not request that SPSO settle or close the trades for several months" and that "SPSO and Ergen took no action to delay" the closing of any of the trades. (PX0699; PX0858.) Each of these statements by SPSO's counsel was contradicted by Messrs. Ergen, Kiser, and Ketchum.

246. Mr. Ergen understood that he did not need to "rush" to close the trades because he could direct the vote of the LP Debt he had purchased without settling on the trade, as it was common practice for the seller of the LP Debt to give the buyer the option to vote on matters relating to the LP Debt. (Jan. 13 Tr. (Ergen) 163:1-10; Jan. 10 Tr. (Kiser) 64:17, 97:25, 129:7-13; PX0111.)

247. There were economic costs associated with leaving the LP Debt trades open for extended periods of time that were not taken into account, despite the parties' awareness of such costs. If SPSO failed to close certain LP Debt trades by the closing date specified in the purchase agreement, it was charged a penalty "cost of carry fee" and in some instances had to forgo receiving a share of Adequate Protection Payments[37] for the unsettled trade. (*See Agreed Final Order (A) Authorizing Debtors to Use Cash Collateral, (B) Granting Adequate Protection to Prepetition Secured Parties, and (C) Modifying Automatic Stay* [Bankr. Docket No. 136] at 18 (granting adequate protection for Lenders); Jan. 15 Tr. (Ketchum) 81:1-82:3; PX0493; *see, e.g.*, DX104 at LSQ-SPCD-000000176 (imposing "AP Payment" and "cost of carry" fees from T+20 to settlement date); DX109 at LSQ-SPCD-000000285; PX0851 at SPSO-00000072; PX0650 at LSQ-SPCD-000000073.) Despite these economic costs, Sound Point only closed one LP Debt trade – the May 4, 2012 purchase of $247 million in LP Debt from Carl Icahn's company Icahn Enterprises LP – within the contractual settlement period. (Jan. 15 Tr. (Ketchum) 82:7-15; PX0493; PX0859.)

[37] "Adequate Protection Payments" refer to the payments of $6,250,000, made on the first business day of each month, and distributed as interest payments to holders of LP Debt after the payment of nonprofessional and professional fees pursuant to the *Agreed Final Order (A) Authorizing Debtors to Use Cash Collateral, (B) Granting Adequate Protection to Prepetition Secured Parties, and (C) Modifying Automatic Stay* (Bankr. Docket No. 136 at 18), and the *Amended Final Order Authorizing Debtors to Use Cash Collateral, (B) Granting Adequate Protection to Prepetition Secured Parties, and (C) Modifying Automatic Stay*. (Bankr. Docket No. 136 at 18-19; Bankr. Docket No. 544 at 18-19.)

248. Neither Mr. Kiser nor Mr. Ergen monitored the interest earned on the specific assets of the Trust selected for liquidation, and they had no involvement in the selection of those assets. (Jan. 10 Tr. (Kiser) 128:24-131:23.)

249. Bear Creek, in its sole discretion, decided which assets to liquidate from the Trust, and Messrs. Ergen and Kiser both testified that they had no knowledge of how the assets were liquidated. (Jan. 13 Tr. (Ergen) 159:20-24.) Bear Creek's corporate representative testified that he selected assets for liquidation based on "which ones are the easiest to liquidate closest to the market value," and generally selected assets with low interest rates, consistent with the overall conservative nature of the Trust. (Roddy Dep. 57:9-58:3, 58:20-22, 59:6-12, 69:7-11.) The Bear Creek representative was not aware that SPSO may have to pay cost of carry fees and forego Adequate Protection Payments if the LP Debt trades were not closed by a certain date and, therefore, this had no impact on assets selected for liquidation. (Roddy Dep. 67:15-69:22, 86:5-87:3.) Only Messrs. Ergen and Kiser, and not the Bear Creek representatives, were aware that SPSO was accruing (and possibly missing out on) Adequate Protection Payments by delaying the closing of trades. (PX0258; PX0256; PX0259.)

C. LP Debt Trades Were Not Left Open Due to Liquidity Constraints

250. Messrs. Ergen, Kiser, and Ketchum offered two main explanations to account for the lengthy delays between the trade and settlement dates: (1) Mr. Ergen did not have immediate liquid funds available (Jan. 10 Tr. (Kiser) 129:23-131:18; Jan. 15 Tr. (Ketchum) 69:3-25); and (2) the necessary paperwork or "upstreams" were not complete. (Jan. 10 Tr. (Kiser) 62:1-17, 128:24-129:22.) Neither explanation is credible.

251. Mr. Kiser gave inconsistent testimony as to the role of liquidity in the settlement delays. At Trial, he denied that liquidity caused any delays. (Jan. 10 Tr. (Kiser) 128:24-129:13.)

When reminded that he had stated otherwise at his deposition, Mr. Kiser conceded that he "gave that as an example of one thing" that caused delays. (Jan. 10 Tr. (Kiser) 129:23-130:1.)

252. Contrary to the testimony of Mr. Kiser and Mr. Ketchum (Jan. 10 Tr. (Kiser) 129:23-131:18; Jan. 15 Tr. (Ketchum) 84:10-14), a lack of available liquidity does not explain the significant delays in closing. SPSO's LP Debt purchases were funded by Mr. Ergen's assets held in the Trust. When SPSO was ready to close a trade, Mr. Ergen would authorize a wire transfer from the Trust, which Bear Creek made available for transfer within several days. (Roddy Dep. 66:12-25, 85:17-86:4, 87:9-16; PX0091; PX0273; PX0353; PX0519.) Mr. Ergen testified: "As far as I know, I don't believe, other than several days, or perhaps a Friday where it didn't make economic sense to wire money, that there was [*sic*] any delays because of that reason." (Jan. 13 Tr. (Ergen) 159:13-19.)

253. Neither Mr. Kiser nor Mr. Ergen could identify a single instance in which liquidating assets to free up funds for SPSO took longer than a few days. (Jan. 10 Tr. (Kiser) 132:10-20; Jan. 13 Tr. (Ergen) 158:7-159:19.) In at least one case, liquid funds were readily available, but Mr. Kiser instructed Bear Creek to hold off on wiring funds. (*See* PX0530 (Kiser instructs Bear Creek on May 20, 2013 to "[w]ait for the green light from me prior [to] sending. Obviously it's not going today so just check with me each morning.").) The account statements produced by Bear Creek reflect that, as of April 30, 2013, some $461 million held in the Trust account had been liquidated, and, as of May 31, 2013, approximately $207 million in liquid funds still remained in the Trust account. (PX0810; PX0812.)

254. Despite acknowledging that he had testified at his deposition that liquidity issues were the sole cause for delay, Mr. Kiser testified at Trial that delays were primarily caused by the amount of time it took to complete the necessary paperwork, and that he waited until Mr.

Ketchum advised him that a LightSquared trade needed to close and then arranged for the necessary liquidity. (Jan. 10 Tr. (Kiser) 62:1-17, 95:20-96:4, 129:23-130:1.) Yet, Mr. Kiser admitted that, even when provided with notice that counterparties were ready to close, he sought to defer settlement as long as possible. (Jan. 10 Tr. (Kiser) 64:5-25, 97:23-98:6.) There were numerous instances over a course of months in which SPSO's counterparties repeatedly asked Sound Point to settle hundreds of millions in open trades before Messrs. Kiser and Ergen finally arranged for settlement. (*See e.g.*, Jan. 15 Tr. (Ketchum) 85:2-13; PX0859.)

255. Mr. Ketchum testified that he had no conversations with Mr. Kiser as to why funds were not available for closing and had no understanding of Mr. Ergen's liquidity at that time. (Jan. 15 Tr. (Ketchum) 70:7-15.) When funds did not arrive timely, he assumed, based on remarks "from Mr. Kiser that things had to be sold, cash had to be raised to settle those trades, and so informed counterparties." (Jan. 15 Tr. (Ketchum) 84:10-14.)

XI. LightSquared and its Creditors Were Injured by SPSO's Conduct

256. At various points during LightSquared's bankruptcy, LightSquared, Harbinger, and the Ad Hoc Secured Group attempted to work together on the terms of a consensual plan of reorganization. (Jan. 17 Tr. (Hootnick) 21:24-22:24; Jan. 9 Tr. (Smith) 130:3-18; Montagner Dep. 75:21-76:5.)

257. On February 13, 2013, this Court entered the Second Exclusivity Extension Order, incorporating the terms of the Exclusivity Stipulation. (Docket No. 522; PX0852.) The Exclusivity Stipulation extended LightSquared's exclusivity period to July 15, 2013, and required the parties to engage in good faith negotiations regarding the terms of a consensual chapter 11 plan. (PX0852 at 3-4.) If a consensual plan was not reached by July 15, 2013, a sales process for LightSquared's assets would begin. (PX0852 at Ex. A ¶6.) The Exclusivity

Stipulation also provided that it could be terminated if the Ad Hoc Secured Group, collectively, ceased to be the largest holder of the LP Debt. (Id. at ¶ 15.)

A. Negotiations with the Ad Hoc Secured Group Are Affected by SPSO's Pending LP Debt Trades

258. In late March 2013, Sound Point entered into trades with Fortress and Providence Capital LLC ("Providence") to purchase their significant LP Debt holdings, as well as their LP Preferred Interests. (DX136; DX139.) As a result of these trades, Fortress and Providence thereafter ceased participating in negotiations with respect to a consensual plan of reorganization for the Debtors. (Jan. 17 Tr. (Hootnick) 21:4-17, 22:4-23:7; Jan. 16 Tr. (Falcone) 75:13-76:8; PX0611; *see also* PX0617.) In an April 18, 2013 meeting of the LightSquared Board of Directors, Mr. Montagner reported that LightSquared had met with several large holders of the LP Debt to explore ideas for a consensual plan of reorganization. However, "further discussions were halted after Sound Point agreed to purchase the LP preferred stock from these investors." (PX0443 at L2AP0000924.)

259. As Sound Point continued to purchase large blocks of the LP Debt, LightSquared was not sure which lenders to negotiate with and whether the Ad Hoc Secured Group was able to carry a class such that it could enter into a binding commitment with respect to a plan. (Jan. 9 Tr. (Smith) 130:3-131:12; Jan. 17. Tr. (Hootnick) 69:1-12; Jan. 16 Tr. (Falcone) 14:9-20, 22:15-21, 145:5-15, 151:24-152:2; PX0465; PX0486.)

B. Once SPSO Discloses its Blocking Position and Joins the Ad Hoc Secured Group, Plan Negotiations Cease

260. Mr. Ergen made the LBAC Bid on May 15, 2013 and announced his LP Debt holdings on May 21, 2013. The LBAC Bid and Mr. Ergen's announcement were made at a time when LightSquared's Board and management team were exploring whether a joint venture or

strategic partnership would allow LightSquared to raise capital and form the basis for a plan to emerge from bankruptcy. (Jan. 17 Tr. (Hootnick) 27:11-22; Jan. 9 Tr. (Smith) 134:22-135:1.)

261. Beginning in late May 2013 and continuing thereafter, LightSquared's financial advisor Moelis contacted over 90 parties to discuss a joint venture or strategic partnership. (Jan. 17 Tr. (Hootnick) 28:6-16.) Parties approached included the "existing telecom parties with wireless operations in the United States: AT&T, Verizon, Sprint and T-Mobile." (Jan. 17 Tr. (Hootnick) 28:17-23, 77:16-18.) LightSquared and Moelis proposed a "low-cost option" for an equity investment by strategic investors, but advised that LightSquared was "certainly open to anything." (Jan. 9 Tr. (Smith) 140:21-142:11.)

262. On June 7, 2013, the Debtors received Court approval to enter into and perform under an engagement letter with Jefferies in connection with securing potential exit financing for the Debtors [Bankr. Docket No. 667], after which a "road show" kicked off to seek to raise capital.

263. On July 1, 2013, Mr. Montagner reported to the LightSquared Board that, after the Bankruptcy Court approved the engagement letter with Jefferies, LightSquared "immediately embarked on marketing efforts, including approximately 50 investor meetings. The Company is seeking a commitment from investors by July 15th with two pre-conditions to funding: 1) FCC approval of the Company's alternative spectrum plan and 2) court approval of a plan of reorganization." (PX0679; Montagner Dep. 165:25-166:22.)

264. According to Mr. Hootnick, with respect to meetings with Sprint, AT&T, and T-Mobile, "there was a lot of interest in the L-Band . . . [b]ut one of the main reactions was doesn't Charlie Ergen already own this." While Moelis went to "great lengths" to assure potential partners that Mr. Ergen did not own LightSquared, Mr. Hootnick stated that "it was somewhat

challenging" in light of a *Bloomberg* article reporting that Mr. Ergen was "on his way to acquiring LightSquared." (Jan. 17 Tr. (Hootnick) 28:17-23, 29:21-30:22, 77:13-78:1.)

265. Similarly, Mr. Smith, who attended the meetings with Sprint, AT&T, T-Mobile, and Verizon, testified that these parties questioned whether they should get involved in light of Mr. Ergen's blocking position and the LBAC Bid; strategics believed that LightSquared's ownership was a "foregone conclusion." (Jan. 9 Tr. (Smith) 137:9-138:13.)

266. Mr. Hootnick testified that potential strategic partners were also concerned about Mr. Ergen's involvement because they believed that he was acquiring spectrum "to warehouse" it and "not for a financial return." (Jan. 17 Tr. (Hootnick) 32:4-34:14.) At Trial, Mr. Cullen confirmed that, despite the fact that DISH has not yet deployed the spectrum assets it acquired from DBSD and TerreStar in March 2012, it continues to pursue additional spectrum, and intended to participate in the then-upcoming auctions for H Block and AWS-3 spectrum assets. He also testified that DISH intends to wait until it can "understand the totality of spectrum" that it can "partner or pair[,] before you start deploying on any towers." (Jan. 17 Tr. (Cullen) 149:5-150:3.)

267. On June 15, 2013, Mr. Hootnick advised Mr. Falcone that Moelis was "pushing forward with some of the strategic discussions and [we']re reviewing smaller capital raises" but "[c]learly the ad hoc group changes have chilled that avenue." (PX0645.)

C. Within Weeks of SPSO's Joining the Ad Hoc Secured Group, the LBAC Bid is Adopted

268. On June 13, 2013, SPSO joined the Ad Hoc Secured Group in order to keep the Exclusivity Stipulation in effect. (PX0858 at ¶ 13; PX0852 at Ex. A ¶¶ 7, 8.)[38] After SPSO

[38] SPSO's counsel also stated in closing arguments of the Trial that SPSO joined the Ad Hoc Secured Group solely for the purpose of maintaining the "lender protections" of the Exclusivity Stipulation. Mar. 17 Tr. (continued...)

joined the Ad Hoc Secured Group, neither Mr. Ergen nor SPSO participated in any meetings of the Ad Hoc Secured Group (Jan. 13 Tr. (Ergen) 89:7-9).

269. Within days of SPSO's joining the Ad Hoc Secured Group, several hundred million dollars of its "hung" trades closed, making SPSO the controlling member of the group by virtue of the size of its holdings. (PX0649 at L2AP0008732; PX0625; PX0859.)

270. On April 4, 2013, the Ad Hoc Secured Group had submitted a proposed plan term sheet to LightSquared and indicated its willingness to commence discussions with respect thereto. (PX0410.) The term sheet contemplated a plan in which all creditor and preferred equity classes would receive a full recovery and LightSquared would emerge from bankruptcy with its spectrum assets intact. (*Id*. at HARBAP00015399-400; *see also* Jan. 17 Tr. (Hootnick) 21:24-22:24.)[39] Also, on May 15, 2013 – the same day that Mr. Ergen submitted the LBAC Bid – the parties exchanged a revised term sheet for a consensual plan of reorganization. (PX0505; DX335; DX174.) The revised term sheet provided for an infusion of new capital to be obtained by Harbinger and/or LightSquared and a reorganization, such that a sale of LightSquared's assets would be avoided. (PX0505 at HARBAP00005107-13.)

271. On May 21, 2013, the parties began to consider a plan that bifurcated the class of creditors holding LP Debt by providing a different recovery scheme for SPSO and non-SPSO holders of LP Debt. For example, a term sheet exchanged with the Ad Hoc Secured Group on May 24, 2013 envisioned that SPSO would receive full cash recovery while non-SPSO lenders would receive cash recovery and warrants. (PX0561.)

(Strickland) 189:12-191:4 ("[SPSO] was very much focused on those lender protections, and that's why it joined the group.")

[39] While a sale of LightSquared's assets was a possible resolution, it was not the primary goal the parties contemplated at that time. Indeed, prior to the summer of 2013, Moelis did not engage in any discussions regarding a sale. (Jan. 17 Tr. (Hootnick) 83:15-23.)

272. Once SPSO had acquired a blocking position and joined the Ad Hoc Secured Group, LightSquared believed it was effectively impossible for it to reach a consensual deal with the Ad Hoc Secured Group. (Jan. 16 Tr. (Falcone) 182:23-183:2; 226:4-16.)

D. LightSquared's Negotiations with Creditors Come to an End After the Filing of the Ad Hoc Secured Group Plan

273. Approximately one month after SPSO joined the Ad Hoc Secured Group, on July 23, 2013, the Ad Hoc Secured Group filed the PSA, seeking approval of the DISH/LBAC Bid. (PX0823.) Negotiations towards a plan in which LightSquared would continue as a going concern came to an end. (Jan. 16 Tr. (Falcone) 76:9-25, 225:14-20; PX0823.)

274. The PSA bound the Ad Hoc Secured Group to support the DISH/LBAC Bid, stating that the parties to the PSA "[s]hall not directly or indirectly seek, solicit, support, or vote in favor of any other plan, sale, proposal, or offer of dissolution, winding up, liquidation, reorganization, merger, or restructuring of the Debtors other than the Plan[.]" (PX0823 at 1.1(a)(6).) Accordingly, at that time and pursuant to its contractual obligations, the Ad Hoc Secured Group ceased negotiating with any other party, including LightSquared, toward any other plan of reorganization.

E. LBAC and DISH Seek to Obtain Broad Releases for Themselves and Their Affiliates in the Ad Hoc Secured Group Plan

275. The Ad Hoc Secured Group Plan and the APA filed therewith included broad releases for LBAC and its affiliates, including DISH, EchoStar, and Mr. Ergen and his affiliates, including SPSO, requiring that SPSO's claim be allowed in its full face amount. (*See First Amended Joint Chapter 11 Plan for LightSquared LP, et al., Proposed by the Ad Hoc Secured Group of LightSquared LP Lenders* [Bankr. Docket No. 970, Ex. A] § 13.1; Stalking Horse Agreement, filed October 28, 2013 [Bankr. Docket No. 970, Ex. F] § 3.2(a)(ii) & n.9.)

276. On multiple occasions, Defendants represented that the DISH/LBAC Bid and SPSO's LP Debt purchases were separate and independent transactions. (PX0731 at 29:18-31:4; PX0766 at 9:4-24.) Other than characterizing the releases as "customary," Defendants were unable to explain why, if Mr. Ergen and SPSO were not acting for DISH, the APA – which was between DISH and LightSquared – included a release for Mr. Ergen personally as well as for SPSO. (PX0765; Dec. 10 Tr. 137:16-21.)

277. The Nevada Court presiding over the action captioned *In re DISH Network Corporation Derivative Litigation*, Case No.: A-13-686775-B also recognized the conflict of interest inherent in a DISH release that benefits Mr. Ergen personally. In granting a limited preliminary injunction on November 27, 2013, the Nevada Court found that "the U.S. Bankruptcy Trustee has made an objection to the scope of the release in the bankruptcy plans, including the Ad Hoc Secured Group's plan," and that while "DISH has a significant interest in exploring the possibility of . . . modifying the release and carving out claims against SPSO and Ergen," it was also the case that "DISH is unable to explore this option so long as DISH's actions in the LightSquared bankruptcy relating to the release provisions are controlled by Ergen." (PX0780 (Findings of Fact and Conclusions of Law, dated November 27, 2013, issued by District Judge Gonzalez) at 15.) Accordingly, the Nevada Court enjoined "Ergen or anyone acting on his behalf . . . from participation, including any review, comment, or negotiations related to the release . . . for any conduct which was outside the scope of his activities related to DISH and LBAC." (*Id.*)

DISCUSSION

I. Introduction

The Complaints assert a variety of causes of action against Defendants DISH, EchoStar, SPSO, and Mr. Ergen. The Complaints seek redress against Mr. Ergen and the entities he

controls for his allegedly unlawful conduct in purchasing the LP Debt in violation of the provisions of the Credit Agreement that prohibit Disqualified Companies from purchasing LP Debt. Under one or more of several theories of liability,[40] Plaintiffs maintain that SPSO is not an Eligible Assignee and that, therefore, the claim of SPSO[41] should be disallowed or, in the alternative, subordinated, pursuant to section 510(c) of the Bankruptcy Code. The Complaints also assert that SPSO and Mr. Ergen engaged in additional inequitable conduct during the course of these cases, conduct which Plaintiffs assert provides further reason for the Court to impose the remedy of equitable subordination to redress the harm caused to innocent creditors. For the reasons discussed below, the Court has determined that, although the SPSO Claim shall not be disallowed, it shall be equitably subordinated in an amount to be determined.[42]

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[40] Plaintiffs must prove their claims for breach of contract and tortious interference by a preponderance of the evidence. *See Dollar Phone Corp. v. Dun & Bradstreet Corp.*, No. 13-1428-cv, 2014 WL 1042916 at *1 (2d Cir. March 19, 2014) (holding that in order to recover from a defendant for breach of contract, a plaintiff must prove the elements of breach by a preponderance of the evidence) (citing *Diesel Props S.r.l. v. Greystone Bus. Credit II LLC*, 631 F.3d 24, 42 (2d Cir. 2011)); *Raymond v. Marks*, No. 96-9337, 1197 WL 345984 at*1 (2d Cir. June 24, 1997) ("Under New York law, the party asserting a breach of contract claim has the burden of proving the material allegations in the complaint by a fair preponderance of the evidence."); *In re Cross Media Marketing Corp.*, 367 B.R. 435, 460 (S.D.N.Y. 2007) (holding that plaintiff failed to meet the standard of proving tortious interference with a contract by a preponderance of the evidence). To establish a claim by a preponderance of the evidence means "to prove that something is more likely so than not so." *Abrams v. United States*, No. 66-CIV-1585, 1970 WL 432 at *1 (S.D.N.Y. Nov. 19, 1970).

[41] As a holder of LP Debt under the Credit Agreement, SPSO holds a secured claim against LightSquared LP on account of such debt. This claim will be referred to herein as the "SPSO Claim."

[42] The Court is permitted to make inferences from the evidence presented, including concerning a party's intent, motive and purpose. *See Bankr. Servs., Inc. v. Ernst & Young (In re CBI Holding Co.)*, 529 F.3d 432, 450-53 (2d Cir. 2008) (finding that the inferences made by the court from certain witness testimony were not "clearly erroneous" where there was an absence of "direct evidence" and such testimony was not contradicted by extrinsic evidence). While it is clear that an inferences must be "more than a guess" *Seneca Meadows, Inc. v. ECI Liquidating, Inc.*, 427 F. Supp. 2d 279, 300 (W.D.N.Y. 2006), the Court is permitted to make an inference that is reasonably drawn from the evidence proffered. *See Dep't of Econ. Dev.* v. *Arthur Andersen & Co. (U.S.A.)*, 924 F. Supp. 449, 474 (S.D.N.Y. 1996) ("An inference . . . is a logical conclusion drawn from facts . . . not a guess that is merely consistent with such facts."). "According to the Restatement, '[t]he word "intent" is used . . . to denote that the actor desires to cause consequences of his act, or that that he believes that the consequences are substantially certain to result from it.'" *Tronox Inc. v. Kerr McGee Corp. (In re Tronox Inc.)*, 503 B.R. 239, 279 (Bankr. S.D.N.Y. 2013) (citations omitted).

II. SPSO Cannot Be Held Liable for Breach of the Express Terms of the Credit Agreement

A. SPSO Was Not Technically Prohibited from Purchasing LP Debt

At the center of this contractual dispute is the term "Eligible Assignee," a common term included in loan agreements in order to limit a lending institution's ability to assign the loan to other entities. *See, e.g.*, *Meridian Sunrise Village, LLC v. NB Distressed Debt Investment Fund Limited (In re Meridian Sunrise Village LLC)*, No. 13-40342, 2014 WL 909219 (W.D. Wash. Mar. 7, 2014). Here, the Credit Agreement permits only "Eligible Assignees" to acquire LP Debt. Excluded from the definition of "Eligible Assignee" are (i) natural persons and (ii) "Disqualified Companies" and, as such, these entities are not eligible to purchase LP Debt. A "Disqualified Company" is defined in the Credit Agreement, in relevant part, as "any operating company which is a direct competitor of the Borrower," and set forth on Schedule 1.01(a), as well as "any known subsidiary thereof."[43] Although "Subsidiary" (uppercase) is defined in the Credit Agreement, in relevant part, as "any other person that is otherwise Controlled[44] by the parent and/or one or more subsidiaries of the parent," the word "subsidiary" as used in the definition of Disqualified Company is not capitalized.

As "Disqualified Companies" included on Schedule 1.01(a), DISH and EchoStar were not permitted to purchase the LP Debt. Nor was Mr. Ergen permitted to purchase the debt personally, as the Credit Agreement does not permit a "natural person" to be an Eligible Assignee. SPSO, however, was not precluded by the express terms of the Credit Agreement from purchasing the LP Debt, inasmuch as it is not an operating company which is a direct

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[43] DX5 (Credit Agreement) § 1.01.

[44] "Control" under the Credit Agreement is defined, in relevant part, as "the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a person, whether through ownership of voting securities, by contract or otherwise . . . ." Credit Agreement § 1.01.

competitor of LightSquared listed on Schedule 1.01(a). If, however, SPSO is a "known subsidiary" of a Disqualified Company, it cannot be an Eligible Assignee.

Because the capitalized term "Subsidiary" was not utilized in the definition of Disqualified Company, the Court looks to the commonly understood definition of the word "subsidiary." The dictionary definition of "subsidiary," used as a noun, is a shortened version of "subsidiary corporation," which is defined by *Black's Law Dictionary* as "[a] corporation in which a parent corporation has a controlling share."[45] Similarly, courts have held that a subsidiary is commonly understood to mean a corporation "that is controlled by another corporation by reason of the latter's ownership of at least a majority of the shares of the capital stock." *Nat'l Gear & Piston, Inc.* v. *Cummins Power Sys., LLC*, 975 F. Supp. 2d 392 (S.D.N.Y. 2013) (quoting William Meade Fletcher, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 26 (2012)). As the Delaware Supreme Court has observed, the "ordinary and plain meaning" of subsidiary requires ownership of more than half the stock of the subsidiary by the parent. *Liggett Grp., Inc*. v. *Ace Prop. & Cas. Ins. Co*., 798 A.2d 1024, 1035 (Del. 2002); *see* 18 AM. JUR. 2d *Corporations* § 41 ("a subsidiary corporation is one in which another corporation, a parent corporation, owns a majority of the shares of its stock"). Neither DISH nor EchoStar controls SPSO by reason of its ownership of a majority of the shares of SPSO. In fact, the evidence has established that Mr. Ergen wholly owns SPSO. SPSO is not a subsidiary of DISH or EchoStar.[46]

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[45] *Black's Law Dictionary* (9th Ed. 2009).

[46] Defendants also emphasize that, under established principles of contract interpretation, all words in a contract must be given effect. Under the express terms of the Credit Agreement, only an entity that is a "***known*** subsidiary" of a "Disqualified Company" may be ineligible to acquire the LP Debt. (Credit Agreement §§ 1.01, 10.04(b) (emphasis added).) By its terms, this provision requires that the "subsidiary" be "known" to the Lender, as Section 10.04 relates only to the Lenders' right to assign the LP Debt, and only a Lender can breach Section 10.04. (continued...)

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. *See Del. Ins. Guar. Ass'n* v. *Christiana Care Health Servs., Inc*., 892 A.2d 1073, 1077 (Del. 2006) ("[T]he terms 'affiliate' and 'subsidiary' carry their own legal significance[.] . . . Affiliate refers to a 'corporation that is related to another corporation by shareholding or other means of control,' and subsidiary refers to a 'corporation in which a parent corporation has a controlling share[.]'"). While SPSO may in fact be an affiliate of DISH and EchoStar, the definition of "Disqualified Company" in the Credit Agreement does not include the term "Affiliate" (which the Credit Agreement defines, in relevant part, as "with respect to a specified person, another person that . . . is under common Control with the person specified . . . ."). By its terms, the Credit Agreement does not prohibit affiliates of Disqualified Companies from buying LP Debt.

Moreover, as this Court previously observed in its Decision on the Motions to Dismiss, even if one were to assume that the term "subsidiary" as used in the definition of "Disqualified Company" has the meaning of the defined term "Subsidiary"[47] such that control by DISH or EchoStar was the key inquiry, Plaintiffs have not proven that DISH or EchoStar has the ability to control SPSO or that Mr. Ergen acts subject to the control of Dish or EchoStar as an agent would. In fact, Plaintiffs allege just the opposite – that Mr. Ergen controls DISH and EchoStar, makes decisions on their behalf, and acts with complete authority for DISH and EchoStar to

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There is no evidence in the record that any Lender knew that SPSO was a "subsidiary" of DISH or EchoStar, such that SPSO would be rendered a "known subsidiary."

[47] As noted *supra*, "Subsidiary" is defined in the Credit Agreement, in relevant part, as "any other person that is otherwise Controlled by the parent and/or one or more subsidiaries of the parent," and "Control" is defined, in relevant part, as "the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a person, whether through ownership of voting securities, by contract or otherwise . . . ." Credit Agreement § 1.01.

carry out those decisions. Accordingly, in analyzing the plain words of the Credit Agreement, SPSO is an Eligible Assignee, and the Court finds no breach of an express term of the Credit Agreement.[48]

III. SPSO's Acquisition of the LP Debt Violated the Spirit of the Credit Agreement and is a Breach of the Implied Covenant of Good Faith and Fair Dealing

Although the Court declines to find that SPSO breached an express term of the Credit Agreement, there nonetheless remains the question of whether SPSO's acquisition of LP Debt was made on behalf of DISH or for the benefit of DISH and, if so, what consequences flow from that conclusion. There is overwhelming evidence in the record that SPSO's acquisition of LP Debt, at least as of April 2013 and possibly earlier, was carried out for the benefit of DISH, with the tacit approval of (or at least no interference by) the members of the DISH Board and certain members of DISH senior management, including its CFO and General Counsel. The facts are these.

A. SPSO's LP Debt Purchases

1. Mr. Ergen Identifies LightSquared as "Attractive" in the Fall of 2011 and Begins Buying LP Debt in April 2012

Mr. Ergen testified that, in the fall of 2011, he believed the spectrum and satellites of LightSquared might be an attractive investment opportunity for DISH and therefore began looking into acquiring LightSquared's LP Debt. He asked Jason Kiser, the Treasurer of DISH and a Vice President of Corporate Development at DISH and EchoStar, to provide him with information. Mr. Kiser testified at Trial that, until it was clear that DISH and EchoStar could not

[48] The Complaints assert tortious interference claims against DISH, EchoStar, and Mr. Ergen. To recover on a claim for tortious interference, a party must prove (i) the existence of a valid contract between the plaintiff and a third party, (ii) defendant's knowledge of the contract, (iii) defendant's intentional procurement of the third party's breach of the contract without justification, (iv) actual breach of the contract, and (v) damages resulting therefrom. *See Kirch v. Liberty Media Corp.*, 449 F.3d 338, 401-02 (2d. Cir. 2006). Because the Court finds no breach of an express term of a contract, the Court also finds that Plaintiffs have failed to prove their claims against DISH, EchoStar, and Mr. Ergen for tortious interference with contract.

purchase the debt, the LightSquared investment was considered a corporate opportunity. After reviewing the Credit Agreement and consulting with Sound Point and Sullivan & Cromwell, DISH's corporate counsel (and not Mr. Ergen's personal counsel), Mr. Kiser determined that both DISH and EchoStar were prohibited from buying the LP Debt, and communicated this to Mr. Ergen. No evidence was submitted that Mr. Kiser or Mr. Ergen made a more formal inquiry to the Boards of Directors of DISH or EchoStar or consulted with management of either company prior to making any personal purchases of LP Debt. Having gotten the "all clear" from Mr. Kiser, Mr. Ergen, through Bal Harbour Capital and then SPSO, began purchasing the LP Debt in April 2012.

In order to enable Mr. Ergen to purchase the LP Debt, Mr. Kiser created two limited liability companies, the Bal Harbour Entities, which were subsequently replaced by two other entities: (i) Special Opportunities Holdings LLC, which is solely owned by Mr. Ergen, and (ii) its wholly owned subsidiary, SPSO. Mr. Kiser testified that the change to SPSO as the investment vehicle was necessary because the formation documents of the Bal Harbour Entities listed a Littleton, Colorado address, which Mr. Ergen and Mr. Kiser determined may have compromised Mr. Ergen's anonymity and "might lead people to Mr. Ergen's doorstep."[49] Defendants maintain that Mr. Ergen desires to keep his personal investments confidential; Plaintiffs allege that the desire for anonymity here stems from Mr. Ergen's intent to conceal his purchases of LP Debt to facilitate his intentional violation of the Credit Agreement.

2. The LP Debt is "a good investment"

Between April 13, 2012 and April 26, 2013, Mr. Ergen, through SPSO, contracted to purchase over $1 billion in face amount of LP Debt, of which SPSO actually closed trades for

[49] *See* Post-Trial Brief of Defendants SP Special Opportunities, LLC and Charles W. Ergen, p. 8.

approximately $844 million in face amount. Specifically, prior to LightSquared's Petition Date on May 14, 2012, SPSO purchased a total of approximately $287 million in face amount of LP Debt, with SPSO's largest purchase comprised of the May 4, 2012 purchase of Carl Icahn's approximately $247 million dollar position. These initial purchases were made at prices between 48.75 cents and 60.25 cents on the dollar. Mr. Ergen testified that, at this time, he believed the debt was "a good investment" and that he did not have an idea of how much debt SPSO would eventually buy.[50]

3. "I would have them vote no" on LightSquared's Forbearance Request

On May 4, 2012, after Mr. Ergen agreed to purchase Mr. Icahn's $247 million dollar position in the LP Debt but before the trade closed, SPSO was given the option of directing the seller's vote on whether to authorize an amendment to the Credit Agreement pursuant to which the Lenders would forbear from exercising remedies and which would have allowed LightSquared to continue to work toward a consensual arrangement with its lenders and possibly avoid a bankruptcy filing. Despite (i) being told that Mr. Icahn was inclined to support the request for a short forbearance and (ii) not having reviewed the terms of the amendment itself, Mr. Ergen directed a "no" vote on the Friday evening prior to the Monday response deadline. His testimony that he voted "no" because he had been unable to review the proposed amendment was not credible, as the evidence reveals that the amendment documents could have been obtained by Sound Point, had Mr. Ergen and Mr. Kiser indicated an interest in reviewing them over the weekend.[51] There was also no evidence introduced that Mr. Kiser or Mr. Ergen made

[50] Jan. 13 Tr. (Ergen) 43:17-44:8.

[51] When confronted at Trial with the information that Mr. Kiser had been told by Sound Point that it could potentially obtain the documents for Mr. Kiser's review, Mr. Ergen blamed Mr. Kiser, testifying, "I'm disappointed that [Kiser] answered no. . . . That's not the way I would have done it." (Jan. 13 Tr. (Ergen) 262:13-263:8.)

any effort to discuss the proposed amendment with any of the other Lenders. While the Debtors argue that these actions on the part of Mr. Ergen reveal that, with respect to LP Debt, Mr. Ergen was not interested in acting like a traditional creditor, it is worth noting that there is nothing that requires a creditor to support a forbearance request. That Messrs. Kiser and Ergen failed to testify truthfully about the reasons for the "no" vote is significant, however, and it is part of a troubling pattern of non-credible testimony.

4. There "might be some truth" to the Press Reports of Mr. Ergen's LightSquared LP Debt Purchases

After SPSO purchased Mr. Icahn's $247 million dollar position in the LP Debt, *The Denver Post* reported that Mr. Ergen had "snatched up" $350 million of LightSquared debt. This article prompted an email from Gary Howard, a DISH Board member, to Stanton Dodge, DISH's General Counsel, and two other members of the DISH Board, asking if the story was accurate. Mr. Dodge's May 16, 2012 email reply, on which he copied the entire DISH Board, including Mr. Ergen, stated, "further to gary's email below and since another board member inquired about the recent press reports regarding LightSquared bonds, I wanted to send a brief note to the full board. [T]he company [DISH] did not buy any LightSquared bonds."

Notably, Mr. Dodge's reply did not address the direct question of whether Mr. Ergen had purchased LightSquared debt personally and there is no evidence that any member of the DISH Board followed up in order to receive a clear response to this question, consistent with the fiduciary duties owed by the DISH directors to examine whether the purchases may have been a corporate opportunity. While the Court will not insert itself in matters of DISH corporate governance that are the province of DISH and its shareholders, the Court will infer from this inaction that the members of the DISH Board, who, from press reports, had more than an inkling of Mr. Ergen's purchases, were tacitly acquiescing to Mr. Ergen's foray into LightSquared's

capital structure, and they did not see fit to double check the corporate opportunity questions it obviously raised. Mr. Dodge's reply reveals the apparent attitude of members of the DISH Board and senior management that, where Mr. Ergen was concerned, it was best not to ask a lot of questions and to let him conduct his business as he saw fit.

Members of DISH senior management also first learned from the press of Mr. Ergen's LP Debt purchases, made their own inquiries to Mr. Ergen directly, and were rebuffed. After Mr. Ergen did not provide them with candid answers, they also did not inquire further. Specifically, when Mr. Dodge confronted Mr. Ergen about a press report of his purported purchases of the LP Debt, Mr. Ergen responded, coyly, that there "might be some truth" to the report.[52] There is no evidence that Mr. Dodge made further inquiry.[53] Mr. Cullen, who, as Executive Vice President of Corporate Development, leads DISH's strategic acquisitions and is considered to be "Ergen's closest confidante on all things wireless," also asked Mr. Ergen about the reports of his LightSquared debt purchases but was only able to elicit confirmation from Mr. Ergen that there either "is" or "might be" "some truth" to the reports.[54] At Trial, Mr. Cullen acknowledged that he owed fiduciary duties to DISH, but testified that, upon learning of Mr. Ergen's purchases of LP Debt, he (i) did not ask Mr. Ergen why DISH was not buying the debt, (ii) did not ask in-house counsel whether there was an issue with Mr. Ergen making a personal investment in the

[52] Jan. 13 Tr. (Ergen) 116:3-22, 118:23-119:19. There also no evidence in the record that Mr. Ergen ever told Mr. Dodge that Mr. Kiser had investigated previously whether DISH could purchase the debt and consulted on that topic with Sullivan & Cromwell.

[53] At Trial, in response to a question from the Court about whether no stone had been left unturned to find a way for DISH to participate in purchasing LightSquared Debt, Mr. Ergen testified that, before any trades closed, he "had a conversation" with Mr. Dodge and it was his "understanding that [Mr. Dodge] checked with outside counsel himself as to whether there was any opportunity for DISH." (Jan. 13 Tr. (Ergen) 243:7-19.) This testimony is inconsistent with all other evidence in the record that Mr. Ergen checked solely with Mr. Kiser, who checked with Mr. Ketchum and with Sullivan & Cromwell, before purchasing LP Debt.

[54] Jan. 17 Tr. (Cullen) 117:8-18; Jan. 13 Tr. (Ergen) 116:3-22.

debt, and (iii) did not take any steps to determine whether Mr. Ergen's purchases were a corporate opportunity.[55]

Together, these emails and conversations reveal a striking lack of candor between Mr. Ergen and members of DISH's board of directors and senior management. In addition to demonstrating that Mr. Ergen directed the actions of the DISH Board, as stated by one of its members,[56] the inquiries (or lack thereof) posed to Mr. Ergen also suggest that the DISH Board and senior executives may have been unconcerned about Mr. Ergen's personal LightSquared debt purchases (and later, his LBAC Bid) because they had confidence that his strategy would inure to the benefit of DISH. Regardless, it is notable that there were no further inquiries; Mr. Ergen testified at Trial that, apart from Messrs. Kiser, Cullen, and Dodge, he did not speak to anyone regarding his LP Debt purchases until the May 2 board presentation.[57]

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

After his initial purchases in April and May of 2012, Mr. Ergen did not pursue any purchases of LP Debt until October 4, 2012. Around that time, Mr. Ergen asked Mr. Kiser to check whether the restrictions on DISH's ability to acquire LightSquared debt had changed as a result of LightSquared's bankruptcy filing. After Mr. Kiser wrote to Mr. Ergen that he could not get confirmation that the restrictions on DISH purchasing the debt had fallen away, Mr. Ergen

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55 Jan. 17 Tr. (Cullen) 143:1-24. In April 2013, DISH spokesman Bob Toevs also sent several emails to Mr. Ergen and several senior officers, including Messrs. Cullen, Dodge, Clayton, and Jeff Blum (a Senior Vice President and Deputy General Counsel), about a news article discussing DISH amassing LightSquared debt through Sound Point, and noting that Toevs "has not commented." (PX0393; PX0407; PX0408.) Mr. Toevs' April 2, 2013 email referred to past coverage on the very same issue and had links to news stories dating back to May 2012. (PX0393; PX0408.) No evidence was provided that any of these top DISH executives responded to the e-mail to inquire whether Mr. Ergen in fact was buying the LP Debt.

56 DISH's independent director, Mr. Goodbarn, acknowledged Mr. Ergen's domination of the DISH Board. When asked if "[i]t was [his] view that nobody else [on the Board] could act in an independent way of Charlie," Mr. Goodbarn responded, "[t]hat is correct." (PX0767 (Goodbarn Nevada Dep.) at 233:25-234:3.)

57 Jan. 13 Tr. (Ergen) 116:3-22, 119:20-24.

responded, "[i]f we can't be sure the company can buy them, then I am interested to increase my position at the 75 level at least up to a 33% ownership level of the class."[58]

This statement by Mr. Ergen establishes that, at least as of that moment in time, the preferred purchaser of the LP Debt was DISH. Mr. Kiser's testimony that the reason for again checking the Credit Agreement was to confirm that there was no corporate opportunity for DISH was not credible and is not consistent with the precise words of Mr. Ergen's directive. In fact, it would appear that there did exist a path for DISH to become a Lender under the Credit Agreement: the Credit Agreement, by its express terms, contains no restrictions on affiliates of Disqualified Companies becoming Lenders. The Court was presented with no evidence that the DISH Board was in fact aware of this and considered whether to create an affiliate to purchase LP Debt, nor any other evidence to support the contention that Mr. Ergen's focus was on making sure that he was not usurping a DISH corporate opportunity.[59] Notwithstanding, from Mr. Ergen's choice of words in inquiring about whether DISH could purchase the LP Debt, the Court can reasonably draw an inference that Mr. Ergen's oft-repeated statement that his investment was conceived of and always intended to be purely for personal purposes was not truthful. It is clear that DISH was the preferred purchaser.

After Mr. Ergen decided to acquire, through SPSO, at least a 33 percent stake in LightSquared debt, Mr. Kiser asked Mr. Ketchum to track whether SPSO had a blocking

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[58] PX0243.

[59] Mr. Howard, one of two independent board members on the Special Committee formed by the DISH Board of directors on May 8, 2013, testified that, while the Special Committee had been advised by Mr. Ergen of "his view" that the Credit Agreement precluded DISH from acquiring LightSquared securities, "[t]he Special Committee did not, however, reach a conclusion regarding whether the LightSquared credit agreement resolved the issue . . . ." (PX0768 (Howard Nevada Affidavit) at ¶ 17.) Mr. Howard also testified at his deposition that the Special Committee was interested in determining whether there was a way that DISH could have bought LP Debt notwithstanding the transfer restrictions. (Howard Dep. 204:14-205:15.)

position.[60] Although Mr. Ketchum initially testified that he did not recall discussing with Mr. Kiser the acquisition of a blocking position, he later admitted that Mr. Kiser told him "he was very interested in tracking whether or not SPSO had a blocking position with respect to LightSquared."[61] Mr. Ketchum was not a credible witness on this point and many others.

6. March 28, 2013: "you just bought a spectrum company"

When asked about the desire for a blocking position, both Mr. Kiser and Mr. Ergen testified that 33 percent ownership of the LP Debt would provide SPSO, and therefore Mr. Ergen, with a "blocking" position such that SPSO could enforce "certain rights" during the bankruptcy proceeding.[62] However, neither Mr. Ergen nor Mr. Kiser would admit to any intended linkage between obtaining a blocking position in LP Debt and a making a bid for LightSquared, or how the former could pave the way for the latter – DISH's acquisition of LightSquared spectrum.[63]

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[60] As Defendants point out, the term "blocking position" refers to acquiring one-third of a debt issuance, but it does not formally "block" anything. Section 1126(c) of the Bankruptcy Code provides that a class of creditors is deemed to have voted in favor of a plan of reorganization if two-thirds in amount and more than one-half in number of such creditors votes in favor of the plan, meaning that a class of creditors with more than one-third in amount voting to reject a plan will not be an accepting class.

[61] Defendants emphasize that Mr. Ergen turned down three offers to purchase large amounts of LP Debt on October 9, 2012 (which purchases would have given Mr. Ergen a blocking position) because the prices were too high as proof that SPSO's purchases of LP Debt were for investment purposes only. The Court find that this fact only proves that Mr. Ergen's acquisition strategy may not yet have been fully formed at that point in time, and thus, he was in fact acting primarily as an investor in the fall of 2012.

[62] (Jan. 10 Tr. (Kiser) 47:22-48:10, 56:11-14; Jan. 13 Tr. (Ergen) 172:10-174:2; DX047.) Mr. Ergen testified that he believed that 33 percent was a "meaningful percentage in bankruptcy," and that with that percentage, he "couldn't get jammed with a different kind of currency than somebody else in that class might get." (Jan. 13 Tr. (Ergen) 51:12-18, 172:25-173:3.) Mr. Ergen testified that he had a sizeable enough position in LightSquared to protect that he decided to get a blocking position. (Jan. 13 Tr. (Ergen) 51:12-24.)

[63] Plaintiffs emphasize how DISH and EchoStar have executed this "loan-to-own strategy" in other cases – namely, DBSD and Terrestar – where acquisition of a blocking position in the debt facilitated an acquisition of the assets at a discount. Plaintiffs argue that the purchase of LightSquared debt here reprises the strategy that DISH and EchoStar have pursued before. (*See* Plaintiff's Post-Trial Brief [Adv. Docket No. 133] at pp. 8, 17.) The Court is disinclined to consider Defendants' past practices as proof of anything in this matter and, accordingly, gives little weight to such comparisons.

It is clear from the evidence, however, that such a strategy began to emerge by late March/early April of 2013. By March 25, 2013, Mr. Ergen needed to purchase another $112 million of LP Debt to reach a blocking position. On March 28, 2013, he initiated a trade for $168 million face amount of LP Debt at 96 cents on the dollar – almost double the price he initially paid for LP Debt in April 2012. Notably, in this trade, he also sought to purchase the LP Preferred Interests that were bundled with the LP Debt and offered to pay between 92 and 95 cents on the dollar for that – or approximately $122 million – just so, as Mr. Kiser testified, Mr. Ergen could have the "privilege" of obtaining that LP Debt.[64] At Trial, Mr. Ergen continued to deny the fact that he was willing to pay that price because he wanted to secure a blocking position, instead stating that he bought substantial amounts at close to par because he "loved the investment."[65] Notwithstanding, on March 28, 2013 – the date Messrs. Ergen and Kiser believed they had achieved their intended goal of obtaining a blocking position, provided the trade closed[66] – Mr. Ketchum sent an email to Mr. Kiser, stating "You just bought a spectrum company." Later in that same email chain, Mr. Ketchum noted internally to his colleague, "we now control the company."[67]

B. Mr. Ergen's Conduct in the Spring of 2013 Establishes that He Was Acting for DISH

Mr. Ergen acknowledged at Trial that his LightSquared strategy had changed as of April 2013. Mr. Ergen testified that, at that time, because of changes in the wireless industry and at the FCC, he saw a "window of opportunity." He stopped looking at LightSquared as a debt

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64 Jan. 10 Tr. (Kiser) 136:7-14.

65 Jan. 13 Tr. (Ergen) 174:3-18.

66 As set forth in footnote 17, *supra*, the March 28, 2013 bundled trade remained open for several months afterwards but never closed, and Mr. Ergen does not own the LP Debt that was the subject of this trade. Regardless, Mr. Ergen's April 2013 trades brought him to a "blocking position."

67 PX0385.

investment and began to view it as a potential acquisition candidate.[68] Mr. Ergen testified that he had a general understanding of the Exclusivity Stipulation and believed that if he wanted to make a bid for LightSquared, he would have to do so by July.[69] He hired Willkie Farr as bankruptcy counsel because, in his words, "I don't need them for an investment, but I need then if I'm going to reach out, if I'm potentially going to look at LightSquared as an acquisition."[70]

1. $320 million of LP Debt at 96 Cents on the Dollar and Confidence in the Collateral

Through four separate trades entered into between April 1, 2013 and April 26, 2013, Mr. Ergen, through SPSO, purchased approximately $320 million of LP Debt at 96 cents on the dollar. These were the final purchases of LP Debt completed by SPSO, bringing its total ownership of LP Debt to approximately $844 million in face value, the face amount it still owns today. When asked about his substantial purchases at 96 cents on the dollar, Mr. Ergen testified that he "was very confident in the collateral" and, as a result, he bought whatever people would sell at that price because he "felt that it was a great investment."[71]

Noticeably absent from the picture painted by Mr. Ergen's testimony is the fact that SPSO's April 2013 acquisitions of $320 million face amount of LP Debt at 96 cents on the dollar (which gave SPSO more than 50 percent ownership of the LP Debt) achieved by indirection something that it could not have achieved directly – the creation of leverage for DISH to acquire

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[68] Jan. 13 Tr. (Ergen) 65:4-66:3.

[69] Jan. 13 Tr. (Ergen) 66:9-15 (". . . and then there also was the fact that the bankruptcy was coming up in July. And if I was interested, I would have to . . . – either you're going to make a bid there or somebody else was going to. And while I didn't know in that time frame that I would make a bid, I knew that it would take time to prepare."). The Court understands Mr. Ergen's mention of the "bankruptcy coming up in July" to refer to the stipulated date for termination of the Debtors' exclusive periods to file a plan, which was approaching on July 15, 2013.

[70] Jan. 13 Tr. (Ergen) 67:1-11.

[71] Jan. 13 Tr. (Ergen) 66:19-25.

LightSquared's assets. It is within the scope of Mr. Ergen's broad authority as chairman of the Boards of Directors of both DISH and EchoStar to lead DISH and EchoStar's strategic acquisitions of spectrum assets, and the evidence demonstrates that Mr. Ergen's objective beginning in April 2013 included preserving for DISH the option to bid for LightSquared's spectrum assets. While, in May 2012, it may have been unclear even to Mr. Ergen whether he was investing in LP Debt for his own benefit or for the benefit of DISH, as of April 26, 2013 – a few days before Mr. Ergen formally presented the opportunity to DISH – there is no doubt that he was acting for the benefit of DISH.[72]

2. "Mr. Ergen's substantial interests in L2 debt and preferred stock compliment [*sic*] any acquisition strategy"

Mr. Ergen's actions at the DISH and EchoStar board meetings held on May 1 and 2, 2013 – shortly after SPSO obtained its blocking position and DISH completed the April 3 Capital Raise – further reveal his intention to benefit DISH by his debt acquisition and pave the way for DISH to acquire LightSquared's spectrum assets. After disclosing his LP Debt acquisition to the boards of DISH and EchoStar for the first time, Mr. Ergen gave the Ergen Presentation, indicating his proposal for "any combination of Mr. Ergen, EchoStar, and/or DISH based on

[72] Approximately one week after Mr. Ergen acquired a blocking position in the LP Debt, and at the same time he was contemplating making what he has characterized as a personal bid for LightSquared's assets, DISH issued a series of notes that raised $2.3 billion in capital (the "April 3 Capital Raise"), approximately the same amount as DISH's ultimate bid for LightSquared. DISH's press release for the April 3 Capital Raise specifically stated the "net proceeds of the offering are intended to be used for general corporate purposes, which may include wireless and spectrum-related strategic transactions." (PX0847; Jan. 13 Tr. (Ergen) 178:4-179:2; PX0904; PX0906.) Defendants, under no obligation to do so, did not provide any evidence regarding DISH's intended use of the funds from the April 3 Capital Raise, and Plaintiffs did not meet their burden to show that the intended use of the April 3 Capital Raise was to pay for a DISH acquisition of LightSquared's assets. Accordingly, the Court will draw no inferences on this topic. The Court has been informed that the notes issued in connection with the April 3 Capital Raise remained outstanding as of the date of the conclusion of Trial.

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
VOLUME 22 of 44

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Date	Document Description	Volume	Bates No.
2014-08-29	Affidavit of Service re Second Amended Complaint Kyle Jason Kiser	Vol. 18	JA004272 – JA004273[1]
2014-08-29	Affidavit of Service re Second Amended Complaint Stanton Dodge	Vol. 18	JA004268 – JA004271
2014-08-29	Affidavit of Service re Second Amended Complaint Thomas A. Cullen	Vol. 18	JA004274 – JA004275
2013-08-22	Affidavit of Service re Verified Shareholder Complaint	Vol. 1	JA000040

[1] JA = Joint Appendix

Date	Document Description	Volume	Bates No.
2013-08-22	Affidavit of Service re Verified Shareholder Complaint	Vol. 1	JA000041
2013-08-22	Affidavit of Service re Verified Shareholder Complaint	Vol. 1	JA000042
2013-08-22	Affidavit of Service re Verified Shareholder Complaint	Vol. 1	JA000043
2013-08-22	Affidavit of Service re Verified Shareholder Complaint	Vol. 1	JA000044
2013-08-22	Affidavit of Service re Verified Shareholder Complaint	Vol. 1	JA000045
2013-08-22	Affidavit of Service re Verified Shareholder Complaint	Vol. 1	JA000046
2013-08-22	Affidavit of Service re Verified Shareholder Complaint	Vol. 1	JA000047
2013-08-22	Affidavit of Service re Verified Shareholder Complaint	Vol. 1	JA000048
2016-01-27	Amended Judgment	Vol. 43	JA010725 – JA010726
2014-10-26	Appendix, Volume 1 of the Appendix to the Report of the Special Litigation Committee of DISH Network Corporation (No exhibits attached)	Vol. 20	JA004958 – JA004962
2014-10-27	Appendix, Volume 2 of the Appendix to the Report of the Special Litigation Committee of DISH Network Corporation (No exhibits attached)	Vol. 20	JA004963 – JA004971

Date	Document Description	Volume	Bates No.
2014-10-27	Appendix, Volume 3 of the Appendix to the Report of the Special Litigation Committee of DISH Network Corporation and Selected Exhibits to Special Litigation Committee's Report: Exhibit 162 (Omnibus Objection of the United States Trustee to Confirmation dated Nov. 22, 2013); Exhibit 172 (Hearing Transcript dated December 10, 2013); and Exhibit 194 (Transcript, Hearing: Bench Decision in Adv. Proc. 13-01390-scc., Hearing: Bench Decision on Confirmation of Plan of Debtors (12-12080-scc), In re LightSquared Inc., No. 12-120808-scc, Adv. Proc. No. 13-01390-scc (Bankr. S.D.N.Y. May 8, 2014)); Exhibit 195 (Post-Trial Findings of Fact and Conclusion of Law dated June 10, 2014 (In re LightSquared, No. 12-120808 (Bankr. S.D.N.Y.)); Exhibit 203 (Decision Denying Confirmation of Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of Bankruptcy Code (In re LightSquared, No. 12-120808 (Bankr. S.D.N.Y.))	Vol. 20 Vol. 21 Vol. 22 Vol. 23	JA004972 – JA005001 JA005002 – JA005251 JA005252 – JA005501 JA005502 – JA005633
2014-10-27	Appendix, Volume 4 of the Appendix to the Report of the Special Litigation Committee of DISH Network Corporation (No exhibits attached)	Vol. 23	JA005634 – JA005642

Date	Document Description	Volume	Bates No.
2014-10-27	Appendix, Volume 5 of the Appendix to the Report of the Special Litigation Committee of DISH Network Corporation and Selected Exhibits to Special Litigation Committee's Report: Exhibit 395 (Perella Fairness Opinion dated July 21, 2013); Exhibit 439 (Minutes of the Special Meeting of the Board of Directors of DISH Network Corporation (December 9, 2013). (In re LightSquared, No. 12-120808 (Bankr. S.D.N.Y.)) **(Filed Under Seal)**	Vol. 23	JA005643 – JA005674
2014-10-27	Appendix, Volume 6 of the Appendix to the Report of the Special Litigation Committee of DISH Network Corporation (No exhibits attached)	Vol. 23	JA005675 – JA005679
2014-06-18	Defendant Charles W. Ergen's Response to Plaintiff's Status Report	Vol. 17	JA004130 – JA004139
2014-08-29	Director Defendants Motion to Dismiss the Second Amended Complaint	Vol. 18	JA004276 – JA004350
2014-10-02	Director Defendants Reply in Further Support of Their Motion to Dismiss the Second Amended Complaint	Vol. 19	JA004540 – JA004554

Date	Document Description	Volume	Bates No.
2013-11-21	Errata to Report to the Special Litigation Committee of Dish Network Corporation Regarding Plaintiff's Motion for Preliminary Injunction	Vol. 13	JA003144 – JA003146
2013-08-12	Errata to Verified Shareholder Complaint	Vol. 1	JA000038 – JA000039
2013-11-27	Findings of Fact and Conclusion of Law	Vol. 14	JA003316 – JA003331
2015-09-18	Findings of Fact and Conclusions of Law Regarding The Motion to Defer to the SLC's Determination That The Claims Should Be Dismissed	Vol. 41	JA010074 – JA010105
2013-09-19	Hearing Transcript re Motion for Expedited Discovery	Vol. 5	JA001029 – JA001097
2013-11-25	Hearing Transcript re Motion for Preliminary Injunction	Vol. 13 Vol. 14	JA003147 – JA003251 JA003252 - JA003315
2013-12-19	Hearing Transcript re Motion for Reconsideration	Vol. 14	JA003332 – JA003367
2015-07-16	Hearing Transcript re Motion to Defer	Vol. 41	JA010049 – JA010071
2015-01-12	Hearing Transcript re Motions including Motion to Defer to the Special Litigation Committee's Determination that the Claims Should be Dismissed and Motion to Dismiss **(Filed Under Seal)**	Vol. 25 Vol. 26	JA006228 – JA006251 JA006252 – JA006311

Date	Document Description	Volume	Bates No.
2015-11-24	Hearing Transcript re Plaintiff's Motion to Retax	Vol. 43	JA010659 – JA010689
2013-10-04	Minute Order	Vol. 7	JA001555 – JA001556
2015-08-07	Minute Order	Vol. 41	JA010072 – JA010073
2015-10-12	Notice of Appeal	Vol. 41	JA010143 – JA010184
2016-02-02	Notice of Appeal	Vol. 43	JA010734 – JA010746
2016-02-09	Notice of Appeal	Vol. 43 Vol. 44	JA010747 – JA010751 JA010752 – JA010918
2016-01-28	Notice of Entry of Amended Judgment	Vol. 43	JA010727 – JA010733
2015-10-02	Notice of Entry of Findings of Fact and Conclusions of Law re the SLC's Motion to Defer	Vol. 41	JA010106 – JA010142
2016-01-12	Notice of Entry of Order Granting in Part and Denying in Part Plaintiff's Motion to Retax	Vol. 43	JA010716 – JA010724
2013-10-16	Notice of Entry of Order Granting, in Part, Plaintiffs Ex Parte Motion for Order to Show Cause and Motion to (1) Expedite Discovery and (2) Set a Hearing on Motion for Preliminary Injunction on Order Shortening Time and Plaintiff's Motion for Preliminary Injunction and for Discovery on an Order Shortening Time	Vol. 7	JA001562 – JA001570

Date	Document Description	Volume	Bates No.
2015-02-20	Notice of Entry of Order Regarding Motion to Defer to The SLC's Determination that the Claims Should Be Dismissed	Vol. 26	JA006315 – JA006322
2016-01-08	Order Granting in Part and Denying in Part Plaintiff's Motion to Retax	Vol. 43	JA010712 – JA010715
2013-10-15	Order Granting, in Part, Plaintiffs Ex Parte Motion for Order to Show Cause and Motion to (1) Expedite Discovery and (2) Set a Hearing on Motion for Preliminary Injunction on Order Shortening Time and Plaintiff's Motion for Preliminary Injunction and for Discovery on an Order Shortening Time	Vol. 7	JA001557 – JA001561
2015-02-19	Order Regarding Motion to Defer to the SLC's Determination that the Claims Should Be Dismissed	Vol. 26	JA006312 – JA006314
2013-09-13	Plaintiff's Appendix of Exhibits to Motion for Preliminary Injunction and For Discovery on an Order Shortening Time	Vol. 1 Vol. 2 Vol. 3 Vol. 4 Vol. 5	JA00132 – JA00250 JA00251 – JA00501 JA00502 – JA00751 JA00752 – JA001001 JA001002 – JA001028
2013-10-03	Plaintiff's Appendix of Exhibits to Status Report	Vol. 5 Vol. 6	JA001115 – JA001251 JA001252 – JA001335
2014-06-06	Plaintiff's Appendix of Exhibits to Status Report	Vol. 14 Vol. 15 Vol. 16	JA03385 – JA003501 JA003502 – JA003751 JA003752 – JA003950

Date	Document Description	Volume	Bates No.
2013-11-13	Plaintiff's Appendix of Exhibits to Supplement to Motion for Preliminary Injunction Vol. 1 Part 1 **(Filed Under Seal)**	Vol. 7 Vol. 8	JA001607 – JA001751 JA001752 – JA001955
2013-11-13	Plaintiff's Appendix of Exhibits to Supplement to Motion for Preliminary Injunction Vol. 1 Part 2 **(Filed Under Seal)**	Vol. 8 Vol. 9 Vol. 10	JA001956 – JA002001 JA002002 – JA002251 JA002252 – JA002403
2013-11-13	Plaintiff's Appendix of Exhibits to Supplement to Motion for Preliminary Injunction Vol. 1 Part 3 **(Filed Under Seal)**	Vol. 10 Vol. 11 Vol. 12 Vol. 13	JA002404 – JA002501 JA002502 – JA002751 JA002752 – JA003001 JA003002 – JA003065
2015-06-18	Plaintiff's Appendix of Exhibits to their Supplemental Opposition to the SLC's Motion to Defer to its Determination that the Claims Should be Dismissed **(Filed Under Seal)**	Vol. 27 Vol. 28 Vol. 29 Vol. 30 Vol. 31 Vol. 32 Vol. 33 Vol. 34 Vol. 35 Vol. 36 Vol. 37	JA006512 – JA006751 JA006752 – JA007001 JA007002 – JA007251 JA007252 – JA007501 JA007502 – JA007751 JA007752 – JA008251 JA008002 – JA008251 JA008252 – JA008501 JA008502 – JA008751 JA008752 – JA009001 JA009002 – JA009220
2013-09-13	Plaintiff's Motion for Preliminary Injunction and for Discovery on an Order Shortening Time	Vol. 1	JA000095 – JA000131
2015-11-03	Plaintiff's Motion to Retax	Vol. 43	JA010589 – JA010601

Date	Document Description	Volume	Bates No.
2014-09-19	Plaintiff's Opposition to the Director Defendants' Motion to Dismiss the Second Amended Complaint and Director Defendant's Motion to Dismiss the Second Amended Complaint **(Filed Under Seal)**	Vol. 18 Vol. 19	JA004453 – JA004501 JA004502 – JA004508
2014-12-10	Plaintiff's Opposition to the SLC's Motion to Defer to its Determination that the Claims Should be Dismissed **(Filed Under Seal)**	Vol. 24	JA005868 – JA005993
2014-09-19	Plaintiff's Opposition to the Special Litigation Committee's Motion to Dismiss for Failure to Plead Demand Futility	Vol. 19	JA004509 – JA004539
2015-11-20	Plaintiff's Reply in Further Support of its Motion to Retax	Vol. 43	JA010644 – JA010658
2015-12-10	Plaintiff's Response to SLC's Supplement to Opposition to Plaintiff's Motion to Retax	Vol. 43	JA010700 – JA010711
2013-10-03	Plaintiff's Status Report	Vol. 5	JA001098 – JA001114
2014-06-06	Plaintiff's Status Report	Vol. 14	JA003368 – JA003384
2014-10-30	Plaintiff's Status Report	Vol. 23	JA005680 - JA005749
2015-04-03	Plaintiff's Status Report	Vol. 26	JA006323 – JA006451
2013-11-18	Plaintiff's Supplement to its Supplement to its Motion for Preliminary Injunction	Vol. 13	JA003066 – JA003097

Date	Document Description	Volume	Bates No.
2013-11-08	Plaintiff's Supplement to Motion for Preliminary Injunction **(Filed Under Seal)**	Vol. 7	JA001571 – JA001606
2014-06-16	Plaintiff's Supplement to the Status Report	Vol. 16 Vol. 17	JA003951 – JA004001 JA004002 – JA004129
2014-12-15	Plaintiff's Supplemental Authority to its Opposition to the SLC's Motion to Defer to its Determination that the Claims Should be Dismissed	Vol. 24 Vol. 25	JA005994 – JA006001 JA006002 – JA006010
2015-06-18	Plaintiff's Supplemental Opposition to the SLC's Motion to Defer to its Determination that the Claims Should be Dismissed **(Filed Under Seal)**	Vol. 26 Vol. 27	JA006460 – JA006501 JA006502 – JA006511
2014-10-24	Report of the Special Litigation Committee **(Filed Under Seal)**	Vol. 19 Vol. 20	JA004613 – JA004751 JA004752 – JA004957
2014-07-25	Second Amended Complaint **(Filed Under Seal)**	Vol. 17 Vol. 18	JA004140 – JA004251 JA004252 – JA004267
2013-11-20	Special Litigation Committee Report Regarding Plaintiff's Motion for Preliminary Injunction **(Filed Under Seal)**	Vol. 13	JA003098 – JA003143
2015-01-06	Special Litigation Committee's Appendix of Exhibits Referenced in their Reply In Support of their Motion to Defer to its Determination that the Claims Should Be Dismissed	Vol. 25	JA006046 – JA006227

Date	Document Description	Volume	Bates No.
2015-07-02	Special Litigation Committee's Appendix of Exhibits to Supplemental Reply in Support of their Motion to Defer **(Filed Under Seal)** (Includes Exhibits: C, D, E, J and K)	Vol. 39	JA009553 – JA009632
2015-07-02	Special Litigation Committee's Appendix of Exhibits to their Supplemental Reply in Support of their Motion to Defer (Exhibits Filed Publicly) (Includes Exhibits: A, B, F, G, H, I, L and M)	Vol. 37 Vol. 38	JA009921 – JA009251 JA009252 – JA009498
2015-07-02	Special Litigation Committee's Appendix of SLC Report Exhibits Referenced in Supplemental Reply in Support of the Motion to Defer **(Exhibits Filed Under Seal)** (Includes SLC Report Exhibits 298, 394, 443, 444, 446, 447 and 454)	Vol. 41	JA0010002 – JA010048
2015-07-02	Special Litigation Committee's Appendix of SLC Report Exhibits Referenced in Supplemental Reply in Support of the Motion to Defer (Exhibits Filed Publicly) (Includes SLC Report Exhibits 5, 172, and 195)	Vol. 39 Vol. 40	JA009633 – JA009751 JA009752 – JA010001
2015-10-19	Special Litigation Committee's Memorandum of Costs	Vol. 41 Vol. 42 Vol. 43	JA010185 – JA010251 JA010252 – JA010501 JA010502 – JA010588
2014-11-18	Special Litigation Committee's Motion to Defer to its Determination that the Claims Should Be Dismissed	Vol. 23 Vol. 24	JA005750 – JA005751 JA005751 – JA005867

Date	Document Description	Volume	Bates No.
2014-08-29	Special Litigation Committee's Motion to Dismiss for Failure to Plead Demand Futility	Vol. 18	JA004351 – JA004452
2015-11-16	Special Litigation Committee's Opposition to Plaintiff's Motion to Retax	Vol. 43	JA010602 – JA010643
2014-10-02	Special Litigation Committee's Reply in Support of Their Motion to Dismiss for Failure to Plead Demand Futility	Vol. 19	JA004555 – JA004612
2015-01-05	Special Litigation Committee's Reply in Support of their Motion to Defer to its Determination that the Claims Should Be Dismissed	Vol. 25	JA006011 – JA006045
2013-10-03	Special Litigation Committee's Status Report	Vol. 6 Vol. 7	JA001336 – JA001501 JA001502 – JA001554
2015-04-06	Special Litigation Committee's Status Report	Vol. 26	JA006452 – JA006459
2015-12-08	Special Litigation Committee's Supplement to Opposition to Plaintiff's Motion to Retax	Vol. 43	JA010690 – JA010699
2015-07-02	Special Litigation Committee's Supplemental Reply in Support of the Motion to Defer to the SLC's Determination that the Claims Should Be Dismissed **(Filed Under Seal)**	Vol. 38 Vol. 39	JA009499 – JA009501 JA009502 – JA009552
2013-09-12	Verified Amended Derivative Complaint	Vol. 1	JA000049 – JA000094

Date	Document Description	Volume	Bates No.
2013-08-09	Verified Shareholder Derivative Complaint	Vol. 1	JA000001 – JA000034

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

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

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

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

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

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

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

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

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

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

MR. DUGAN: Thank you.

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

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

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

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

those who participate in Chapter 11 proceedings.

A) Applicable law.

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

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

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

First articulated in the seminal case Pepper v.

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

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

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

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

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

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

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

In order to identify the precise type of conduct

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

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

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

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

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

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

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

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

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

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

inequitable conduct at issue.

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

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

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

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

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

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

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

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

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

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

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

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

I'm sparing you a million citations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Even though Sound Point knew that SPSO was funded with

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

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

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

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

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

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

Bear Creek, which independently selected which of Mr.

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

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

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

Mr. Kiser's testimony on the liquidity issue lacks

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

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

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

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

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

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

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

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

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

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

In particular, Jefferies, the executing broker for the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"A. Yes."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

exclusive period meaningless was ignored.

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

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

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

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

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

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

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

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

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

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

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

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

D. Remedy.

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

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

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

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

CONCLUSION:

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

We're going to take a short break.

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

(Recess from 3:23 p.m. until 3:44 p.m.)

THE COURT: Please have a seat. All right. Same provisos and qualifications apply with respect to the form of this decision, which is a bench decision on confirmation of the debtor's plan.

Before the Court is the debtors' third amended joint plan of reorganization.

The plan enjoys the support of every significant party-in-interest in these cases save one: SPSO, a special purpose entity owned and controlled by Mr. Charles Ergen. SPSO opposes confirmation of the plan. SPSO holds approximately 844 million dollars face amount of the outstanding LightSquared LP pre-petition secured debt.

The facts and circumstances surrounding SPSO's acquisition of its claim and the conduct of Mr. Ergen and certain of its affiliated entities in these cases are the subject of a separate adversary proceeding pending in this court and are also at issue in connection with the consideration of confirmation of the plan.

Among other things, the debtors seek to disallow or subordinate the SPSO claim in its entirety and have also moved pursuant to Section 1126(e) of the Code to designate SPSO's vote.

Pointing to SPSO's connection to Mr. Ergen and DISH, the debtors, Harbinger, and the ad hoc group LightSquared LP

lenders have constructed a plan that purports to follow the blueprint laid out by the decisions in DBSD to address conduct by Mr. Ergen that they maintain is even more egregious than the conduct at issue in DBSD.

The plan proponents separately classify the SPSO claim, seek to designate its vote and disregard the class, 7-B, in which the SPSO claim is the sole classified claim and seek to confirm the plan without satisfying the requirements of Section 1129(b) of the Code, among others.

In the alternative, the plan proponents assert that the treatment of the SPSO claim, which is markedly different from the treatment the plan affords to the other holders of LightSquared LP pre-petition secured debt provides SPSO with the indubitable equivalent of its claim and satisfies all requirements for confirmation, including those embodied in Section 1129(b).

It is no understatement to say that the parties have waged a lengthy and increasingly nasty litigation war against each other over the past year and the confirmation hearing was a particularly vivid display of the parties' animosity towards each other. The parties continued to file motions and cross-motions for weeks after the evidentiary record on confirmation was to be closed and for weeks after the evidentiary record in the adversary proceeding was to be closed.

This decision will address confirmation of the plan

and all pending motions related to the confirmation hearing.

The evidentiary hearing on confirmation was conducted over the course of eight days. The Court heard live testimony from the following witnesses and rebuttal witnesses called by the debtors, the ad hoc secured group, and SPSO: 1, Mr. Christopher Rogers, a member of the special committee of the boards of directors of LightSquared Inc. and LightSquared GP Inc.; 2, Mr. Robert McDowell, offered by the debtors as an expert on FCC-related matters; 3, Mr. Douglas Smith, the debtor's CEO; 4, Mr. Mark Hootnick, a managing director of Moelis, the debtor's financial advisor; 5, Mr. John Jacob Rasweiler, V, a principal of Sublime Wireless offered by debtors as an expert with respect to certain technical issues; 6, Mr. Charles Ergen who is, among other things, the ultimate owner of SPSO, the controlling shareholder of DISH and the chairman of DISH's board of directors; 7, Mr. Philip Falcone, the controlling member of Harbinger Capital Partners, which is one of the plan sponsors and is also the principal shareholder of LightSquared; 8, Mr. Douglas Hyslop of Wireless Strategy, LLC and SmartSky Networks, LLC, offered by SPSO as an expert with respect to certain technical issues; 9, Mr. Omar Jaffrey, a principal of Melody Capital partners, a private investment firm which is one of the sponsors in the plan; 10, Mr. J. Soren Reynertson, a managing director of GLC Advisors & Co., offered by SPSO as an expert on valuation issues; and 11, Mr. Steven

Zelin a managing director of The Blackstone Group and financial advisor to the ad hoc secured group.

The testimony of Mr. Marc Montagner, the debtor's chief financial officer, was presented by a videotape and deposition transcript designations. Several volumes of documentary exhibits have also been admitted into evidence.

Detailed proposed findings of facts and lengthy post-trial memoranda were also submitted by the parties, which submissions were in addition to the pre-trial memoranda filed by the parties prior to the commencement of the confirmation hearing.

As indicated there are also numerous confirmation-related motions pending before the Court and the various objections and responses thereto. They are: one, LightSquared's motion for entry of an order designating the vote of SPSO; two, LightSquared's confirmation-related motion for an order approving post-petition financing and seeking related relief; three, LightSquared's motion to strike portions of the expert testimony of Douglas Hyslop and J. Soren Reynertson; four, SPSO's motion to strike certain of the testimony of Robert McDowell and Mark Hootnick; and five, SPSO's motion to admit SPSO Confirmation Exhibit 2.

And in addition to all of the foregoing, numerous joinders and statements in support of and in opposition to confirmation of the plan have been filed on the docket of these

cases and considered by the Court.

While the Courts findings of facts will be set forth in a more detailed final version of this decision which will be filed as soon as practicable, the Court offers the following summary of the evidence presented at the hearing in order to provide the necessary context for the legal analysis that follows.

THE WITNESSES.

The debtors' first witness was Mr. Christopher Rogers. Mr. Rogers serves as a member of the three-member special committee of the boards of directors of LightSquared Inc. and LightSquared GP Inc., which was constituted in the fall of 2013.

Against the backdrop of allegations by SPSO that the plan process was driven not by the special committee, but by Harbinger and those parties that Mr. Falcone wished to protect, including Harbinger, Fortress, Melody and JPMorgan, Mr. Rogers testified as to his personal involvement in the plan formulation and negotiation process and that of the special committee.

He estimated that he had spent around 500 hours working on the plan and related issues, although he did not provide much, if any, detail into how he or other members of the special committee had been involved in negotiating the economics of the plan.

For the most part his testimony was credible but superficial and consistent with the proposition that he and other members of the special committee were involved in some discussions regarding the plan process from the time of their appointment through the present.

However, in the face of a great deal of evidence that the economic terms of the plan have been largely dictated by Harbinger, and in particular by Mr. Falcone, Mr. Rogers shed little light on how the economic terms of the plan emerged and evolved or on the involvement of the special committee and those negotiations.

Because the session committee has asserted a broad common interest privilege with respect to communications among it, the plan sponsors, and the ad hoc secured group, there are no documents that were produced in discovery or are in evidence that reflect any communications on this point during the relevant time frame.

Mr. Robert McDowell, a former FCC commissioner, is the debtors' retained expert on Federal Communication Commission matters. He left the FCC in May 2013. During the confirmation hearing he offered his opinion that he agreed with LightSquared's forecast that it would receive FCC approval of its proposed twenty by ten license modification by December 31st, 2015 and that a portion of the downlink included in the license modification would be made available from the so-called

NOAA spectrum, a 5 megahertz band of spectrum between 1675 megahertz and 1680 megahertz.

In addition, Mr. McDowell testified that he believed it was very likely that the FCC would also approve LightSquared's use of its 10 megahertz of lower downlink, 1526 megahertz to 1536 megahertz, for terrestrial use within the seven years contemplate by the plan.

Mr. McDowell did not pick these dates. Rather he was simply giving the dates reflected in the plan.

Although he testified that he had participated in and had knowledge of matters related to LightSquared during his tenure at the FCC, he acknowledged that he is precluded by government rules and regulations from having any contact with the FCC during the two years subsequent to his departure from the agency. Accordingly, since that two-year period has yet to expire, Mr. McDowell has had no contact whatsoever with FCC personnel regarding matters pending before it relating to LightSquared.

Nevertheless, he offered his opinions based on his thirty years of experience that the FCC will grant LightSquared's license modification application before the end of 2015, will not require an auction of the NOAA spectrum, and will approve the use of the lower downlink spectrum by the end of seven years. Although he admitted that the FCC could commence a rulemaking proceeding with respect to the NOAA

spectrum, which could take years, and acknowledged that the FCC had filed a statement in these cases indicating that it could give no assurances about what its decision would be or the timing of the decision, Mr. McDowell nonetheless offered his opinions on the critical timing issues on which the plan is premised. The only other support he offered for his opinions was the fact that no so-called petitions to deny had been filed with respect to the proposed license modification application.

Mr. McDowell pointed to no evidence indicating that the FCC will proceed along the time line suggested, offered no evidence that he had any knowledge of how or when NTIA or any coordinate agency intends to act with respect to LightSquared's application, and could not credibly estimate or state when any required rulemaking proceeding may be commenced or how long it would take. His opinion is simply an educated guess and cannot be afforded significant weight.

Mr. Douglas Smith, the debtor's CEO, testified at length about a variety of topics relating to the conduct of these cases, including the plan process and the involvement of LightSquared's management and plan negotiations.

He also testified about a host of issues relating to the FCC process and certain technical issues relating to LightSquared's spectrum assets. He explained the basis of his belief that the December 31st, 2015 license modification date and seven-year downlink approval process time line were

achievable.

In support of his opinion, Mr. Smith pointed to four specific points: one, the completion of two common cycles with respect to use of the two upper 10 megahertz of uplink spectrum; two, the fact that great progress had been made with NOAA; three, the observation that the latest U.S. budget reflects NOAA-related costs that are not inconsistent with LightSquared's projections and objectives; and four, the fact that a petition for rulemaking with respect to the lower 10 megahertz of downlink has already been filed with the FCC and could be complete in three to five years.

In addition to testifying about the FCC approval process, Smith gave substantial testimony regarding the technical issue raised by LBAC with respect to LightSquared's spectrum and the basis of LightSquared's belief that the issue does not exist or can easily be managed at minimal cost.

Mr. Smith, though soft spoken, is powerfully earnest and credible as a witness and it is clear that he has been working tirelessly in pursuit of LightSquared's business and strategic goals.

The debtors next called Mr. Mark Hootnick of Moelis to testify in support of the valuation issues that undergrow the plan and that provide the basis and support for SPSO's treatments under the plan.

Mr. Hootnick relied on Mr. McDowell's opinions

regarding the timing and outcome of the license modification process. He also relied on the opinions of Mr. Smith with respect to certain regulatory matters.

For the purposes of preparing the Moelis valuation, Mr. Hootnick assumed that the FCC would grant LightSquared a license for 30 megahertz of spectrum, including the 5 megahertz of NOAA spectrum for terrestrial use on or before the end of 2015.

He further assumed that the lower 10 megahertz of downlink would be approved for terrestrial use within seven years. He did not take into account any of the alleged technical issues that have been raised by SPSO. He acknowledged that the FCC's filed a statement in these cases means that the FCC is making no promises on timing, and he has had no personal contact with any FCC personnel on any issues related to LightSquared.

Mr. Hootnick's valuation rises or falls with Mr. McDowell's opinions on the timing of FCC approval.

The details of Mr. Hootnick's valuation opinion will be discussed in detail below.

Mr. Marc Montagner, the debtor's chief financial officer, gave testimony regarding numerous issues which testimony was viewed by the Court on videotape. In addition, designated portions of his March 6, 2014 videotaped deposition transcript were placed on the record and reviewed by the Court.

Mr. Montagner testified, among other things about, one, his participation in the plan process which he described as "being mostly on the receiving end"; two, his preparation of financial forecasts for use in connection with the plan; three, his views with respect to FCC matters; and four, his knowledge of the technical issue.

Mr. Montagner was forthright in his testimony, as he has been in the past in connection with other contested hearings in these matters.

SPSO called Mr. Douglas Hyslop of Wireless Strategy, LLC and Smart Sky Networks, LLC, engineering consulting firms which provide engineering services for wireless operators. SPSO retained Mr. Hyslop to provide expert testimony on the technical issue. He was retained on February 28th, 2014 and formed his opinions by March 3rd, 2014.

His deposition was conducted on March 8th, 2014.

The debtors have moved to strike a portion of Mr. Hyslop's testimony on the basis that it reflects, in his own words, a new opinion regarding guard bands that first occurred to him after he gave his deposition testimony and thus was first revealed to the debtors at trial.

The parties dispute whether or not this opinion should be considered new and whether or not gamesmanship is implicated in the debtors' (sic) approach to eliciting the opinion.

For the reasons set forth in the debtors' motion to

strike portions of the Hyslop testimony, the motion shall be granted.

The remainder of Mr. Hyslop's testimony, as to which the Court will make detailed findings under seal, does not lend credible support to SPSO's position with respect to the existence and the magnitude of the technical issue.

SPSO also offered the expert testimony of Mr. J. Soren Reynertson of GLC Advisors. Mr. Reynertson was paid 1.25 million dollars by SPSO for his work and was given three weeks to form his opinions.

The debtors raised a Daubert challenge to Mr. Reynertson's qualifications under Federal Rule of Evidence 702, which was overruled by the Court in part because there had been no notice of such a challenge prior to the witness taking the stand and in part based on the Court's conclusion that a Daubert exclusion was inappropriate on the merits.

The debtors have renewed their objection to a portion of Mr. Reynertson's testimony and in their motion to strike.

Mr. Reynertson testified that he relied one hundred percent on the opinions of Mr. Hyslop with respect to the amount of spectrum that will be available to and usable by LightSquared, including with respect to uplink 1 and uplink 2.

Many aspects of Mr. Reynertson's testimony are noteworthy. One, he had never previously valued satellites for spectrum. Two, he applied certain faulty and arbitrary

assumption in his valuation methodology. And three, he was not provided with the valuation analyses that had been prepared by Mr. Ergen and by Perella Weinberg during the summer of 2013, and when presented with such analysis at the confirmation hearing, he admitted that seeing these would have helped him and may have changed what he did in connection with forming his opinions.

Mr. Reynertson's analysis was rife with inconsistencies and flaws. It was on the whole an unimpressive piece of work and will not be afforded significant weight.

In addition a portion of Mr. Reynertson's testimony relied on the expert opinion of Mr. Hyslop. As the Court finds that portions of Mr. Hyslop's expert opinion shall be stricken from the record, the portion of Mr. Reynertson's expert valuation that relies on the stricken Hyslop testimony shall be afforded little weight.

Mr. Charles Ergen was called as a witness by the ad hoc secured group and testified for a full day, taking the witness stand at 10 in the morning and stepping down at approximately 7:45 in the evening. He was questioned extensively on a number of topics having already given substantial testimony during the trial in the adversary proceeding relating to SPSO's acquisition of its holding in the LP debt.

His testimony focused on, among other things, one, the

valuation analysis he prepared and presented to the DISH board in July 2013 with respect to the LightSquared spectrum assets, which valued the LP assets between 5.17 billion and 8.99 billion dollars, including value that would be realized by DISH based on its enhanced ability to utilize its existing spectrum; two, his knowledge of the Perella Weinberg fairness opinion and valuation; three, his knowledge of the so-called technical issue and how he believes it affects the value of the LightSquared spectrum; four, his participation on behalf of DISH in the LightSquared auction process in December 2013, including the readiness of DISH to increase its bid and DISH's ultimate decision to terminate the LBAC bid; and five, whether or not he views SPSO and/or DISH as competitors of LightSquared.

Mr. Ergen's testimony leaves little doubt that he has a tremendous amount of knowledge and expertise with respect to the wireless telecommunications industry, displaying great command of detail with respect to spectrum issues and spectrum deployment strategy. And yet his testimony becomes remarkably less precise and straightforward when queried about his involvement in the events leading to the termination of the LBAC bid, and his answers with respect to potential competition between DISH and LightSquared were facile and disingenuous.

Moreover, his testimony with respect to actions taken by DISH with respect to the alleged technical issue supports

the conclusion that once it was allegedly identified by DISH, there was no meaningful effort made to identify a solution that would preserve the billions of dollars in value that DISH would realize by a consummation of the LBAC bid.

This defies common sense. Mr. Ergen's testimony on this point was not credible. His testimony with respect to his dealings with Inmarsat was also not credible.

The ad hoc secured group also called its financial advisor, Mr. Steve Zelin of Blackstone, to testify. Mr. Zelin detailed the various plan alternatives he had explored with the ad hoc secured group in 2013 and earlier and described his participation in the negotiations leading to the execution of a plan support agreement in connection with the LBAC bid.

He described in some detail his reaction to what he viewed as strange conduct and comments by DISH, SPSO and their counsel in connection with the technical issue and in connection with pursuit of the LBAC bid in the time period leading up to and subsequent to the scheduled December 11th LightSquared auction and he shared his theories about why LBAC terminated its bid.

Mr. Zelin's testimony was credible, but it added little of substance to the issues at the heart of this proceeding.

SPSO next called Mr. Omar Jaffrey to testify. Mr. Jaffrey testified that he contacted Mr. Falcone in the summer

of 2013 to find a way for his firm, Melody Capital Partners, to invest in LightSquared.

Melody was first retained by Harbinger to provide a 550 million dollar commitment for a debtor-in-possession financing for a plan of reorganization to be proposed by Harbinger.

Pursuant to that commitment, Melody was entitled to the payment of an eight percent per annum commitment fee so long as the commitment remained outstanding, as well as a four million upfront fee and a double-digit breakup fee in the event that LightSquared was sold, all payable by Harbinger. It was Mr. Jaffrey's believe that Melody's commitment to Harbinger was still outstanding as of the date of his testimony on March 28th, 2014.

Correspondence between Mr. Jaffrey and others was introduced into evidence reflecting Mr. Jaffrey's view that as of the time Melody entered into this commitment with Harbinger, there was a ninety percent chance that Mr. Ergen would purchase LightSquared out of the bankruptcy such that the Melody financing would never be needed.

Extensive testimony was elicited from Mr. Jaffrey regarding the evolution of the economic terms of what eventually became the plan.

E-mail correspondence from the January 2014 time frame indicates that even as the trial in the adversary proceeding

was unfolding, there was close coordination among Mr. Jaffrey, Mr. Falcone, and Drew McKnight of Fortress regarding the economics of the plan, how to structure it to satisfy the concerns of Fortress, how to include JPMorgan, and how to deal with the SPSO claim.

The entire premise of the Melody proposal was the subordination of Mr. Ergen, a notion that was obviously consistent with Mr. Falcone's mindset. As Mr. Jaffrey put it in an e-mail, the goal was a win-win, for everyone but SPSO.

While Mr. Jaffrey not surprisingly declined to share the details of his so-called LightSquared investment thesis, it is clear that he and Melody have opportunistically entered the picture not to help, but to earn a sizable return through fees, interest on Melody's highly secure proposed second lien exit investment, and equity upside tied to LightSquared's success.

John Jacob Rasweiler, V, testified as the debtors' rebuttal expert with respect to the technical issue. Mr. Rasweiler is employed by Sublime Wireless, a professional engineering and services firm that provides communication services for operators and equipment providers such as Sprint, Samsung and AT&T. He has substantial experience in radio frequency engineering and network design.

In response to SPSO's contentions with respect to certain technical issues, Mr. Rasweiler provided credible and compelling testimony that the technical issue is unlikely to

exist at all and that even if it did exist today, technology is available today that can eliminate the problem rendering it a nonissue.

In addition, Mr. Rasweiler identified newly patented technology that, while not currently in commercial production, reflects further advances in certain devices that could be deployed to address the technical issue.

Mr. Rasweiler testimony substantially undercut the credibility of many of Mr. Hyslop's conclusions with respect to many critical aspects of the technical issue.

Mr. Philip Falcone was the final witness called to testify at the confirmation hearing. The scope of Mr. Falcone's testimony did not include matters as to which he had previously testified during the adversary proceeding.

Called by SPSO, Mr. Falcone testified about his intimate involvement in the formulation of the plan, detailing his discussions with Mr. Jaffrey of Melody, Mr. McKnight of Fortress and others. E-mail correspondence was introduced reflecting Mr. Falcone's desire to subordinate Mr. Ergen's claim and to protect the interests of Harbinger, Fortress and JPMorgan.

He detailed his views about the FCC approval process and his continuing belief that approval is forthcoming. He indicated his view that the technical issue was fabricated by DISH and is merely fluff, that the FCC will see it for what it

is and will ultimately grant LightSquared the license.

Mr. Falcone also answered a number of questions about what consideration Harbinger would receive under the plan and what Harbinger's options were to increase its proposed stake in the reorganized company.

Mr. Falcone confirmed that Harbinger could exercise call option and put in an additional 150 million dollars to increase its post-confirmation stake to thirty-six percent and that at least part of that sum would be part of the second lien and therefore would be ahead of the SPSO note.

Mr. Falcone stated that he believed he did not get everything he had asked for and that Harbinger is entitled to in connection with the plan, citing the fact that he himself has no seat on the board of directors of the reorganized company and that he is giving up his causes of action against the GPS industry.

It is fair to say that there was much correspondence introduced into evidence that at best reflects mean-spirited banter by Mr. Falcone about various aspects of these cases and worst reflects genuinely malevolent views toward various individuals. His many attempts to spin his words otherwise were unconvincing.

It is clear that Mr. Falcone more or less dictated the principal economic terms and structure of the plan.

DISCUSSION.

A) Separate classification of the pre-petition LP facility SPSO claim complies with Section 1122.

Under the plan, the pre-petition LP facility SPSO claim is placed in a separate class, Class 7-B, from the pre-petition LP facility, non-SPSO claim.

The proper justification for such separate classification claims which, on their face, are identical is not equitable subordination, but rather that the holder of the SPSO claim is a competitor of the debtors' that has various noncreditor interests and that there is, thus, a valid business reason for separately classifying the SPSO claim.

SPSO vehemently opposes separate classification of its claim. For the reasons set forth herein, the Court finds that such separate classification is permitted by the Bankruptcy Code and applicable case law.

Section 1122(a) of the Bankruptcy Code provides that a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claim or interests of such class. Although Section 1122(a) specifies that a claim or an interest may only be included in a particular class if it is substantially similar to the other claims or interests in such class, it does not require that all similar claims be placed in a single class, nor does it address when similar claims may be placed in different classes.

Stated differently, the Bankruptcy Code does not prohibit placing similar claims in separate classes as long as there is a reasonable justification for doing so.

Courts that have considered the issue, including the Court of Appeals for the Second Circuit as well as numerous courts in this district, have concluded that the separate classification of otherwise substantially similar claims in interest is appropriate so long as the plan proponent can articulate a reasonable or rational justification for separate classification. See e.g., In re Chateaugay, In re Lafayette Hotel Partnership, In re Adelphia Communications.

Where there is any "good business reason" to support a plan proponent's separate classification is a question of fact. In re: Graystone III Joint Venture, 995 F.2d 1274, cert. denied, 506 U.S. 821 (1992).

However, the separate classification of substantially similar claims must not offend one's sensibility of due process and fair play. In re: One Times Square Associates Ltd. Partnership, 159 B.R. 695 (S.D.N.Y. 1993).

One such reasonable justification for separate classification is where a claimant is a competitor of the debtor. See e.g., In re: Premier Network Services, Inc., 333 B.R. 130 (N.D. Tex. 2005).

A noncreditor interest in the reorganized debtor meets the good business reason standard and justifies separate

classification of the creditor's claim. In re: Graphics Communications, Inc. 200 B.R. 143, (E.D. Mich. 1996), holding that a rational business reason existed for classifying competitors separately from general trade creditors; In re: Texas Star Refreshments, 494 B.R. 684, (N.D. Tex.), separately classifying trade creditors from competitor creditor.

Importantly, it is not merely the creditor's status as a competitor that is dispositive so much as the noncreditor interests that the creditor competitor may pursue. In Premier Networks, for example, the separately classified creditors, noncreditor interest, was a different stake in the future viability of their reorganized company.

The parties also cite to In re: 500 Fifth Avenue Associates, 148 B.R. 1010, (S.D.N.Y. 1993), but disagree on its applicability here.

In 500 Fifth Avenue Associates, the debtor isolated the unsecured deficiency claim of a secured creditor in a separate plan class from other recourse unsecured claims arguing that such treatment was justified due to the legal distinction between nonrecourse deficiency claims and other secured claims.

The court found that separate classification was not justified because the deficiency claim of the secured lender was an allowed unsecured claim that was no different in a bankruptcy case from the obligation owed to a recourse creditor

and also found that the separate classification of the deficiency claim was based on the debtor's clear desire to gerrymander an impaired accepting class to ensure confirmation of its plan.

The court, perhaps presaging Judge Gerber's views in Adelphia observed that the fact that a creditor's secured claim may drive the manner in which it votes its unsecured deficiency claim, which may be contrary to its best interests as an unsecured creditor, is not a valid reason for separately classifying a secured creditor's deficiency claim.

SPSO, relying on Fifth Avenue Associates, argues that a secured creditor's motives and agenda cannot justify separate classification of a creditor's claims and that the Court should focus, instead, on the legal nature of the underlying claim.

The debtors and the ad hoc secured group argue that 500 Fifth Avenue Associates merely addresses the separate classification of a secured creditor's garden-variety unsecured deficiency claim and it does not address the propriety of separately classifying the claim of a competitor/creditor whose sole interest was to acquire the company by one means or another.

The court agrees.

While SPSO urges that the Court should decline to delve into an analysis of ulterior motives and poses myriad hypotheticals to demonstrate instances in which a valuation of

a classification scheme based on claim holder considerations would be "a complicated and arbitrary line drawing exercise", there is no need to go down that path here. SPSO's different stake in the future of LightSquared is manifest and does not require a searching inquiry into ulterior motives.

Although as a general matter, 500 Fifth Avenue Associates does indeed hold that when considering classification issues, the focus should be on the legal nature of the underlying claim rather than on the motives and agenda of the claim holder, here it is necessary to recognize that a claim reflects more than a dollar amount on a proof of claim. It reflects a bundle of rights and remedies that are wielded by the holder of the claim. Accordingly, both the nature of the claim and the identity of the claimant may be relevant in the context of separate classification.

While SPSO is the holder of the SPSO claim, the Court finds that under the circumstances here, SPSO, which is wholly owned by Mr. Ergen, the chairman of the board and controlling shareholder of DISH, must be considered to have interests which are aligned with those of DISH, which is a competitor of the debtors.

Notwithstanding Mr. Ergen's reluctance to admit as much, the record makes it clear that, A, both DISH and the debtors own spectrum assets; B, DISH has been and remains active in the market to acquire more spectrum assets and/or

engage in transactions with third parties that own spectrum assets; C, Mr. Ergen himself purports to have an interest in owning spectrum personally, if his testimony in the adversary proceeding is to be credited; and D, both DISH and the debtors have announced their intention to develop and operate telephonic networks that utilize spectrum assets and that would compete with each other for customers and business. The debtors and the Ergen parties, one of which is SPSO, are competitors for spectrum assets under any reasonable meaning of the word.

Given Mr. Ergen's interests as the sole beneficial owner of SPSO and as the chairman of the board of directors and controlling shareholder of DISH, it is not hard to conjure a set of facts and circumstances in which he personally would benefit more from LightSquared's failure than its success.

Stated differently, his fiduciary duties as chairman of DISH may at some point require him to take action that is contrary to the best interests of LightSquared and contrary to his interest as a creditor through SPSO of LightSquared LP.

As Mr. Ergen himself made clear in pursuing his so-called personal bid for LightSquared spectrum through his LBAC bid, preserving optionality for DISH is a hallmark of his ongoing strategy for DISH in these cases and more generally.

Optionality for DISH should not come at the expense of the interests of LightSquared's creditors who do not share Mr.

Ergen's economic interest in and lifelong commitment to DISH.

While SPSO maintains that it is not a competitor of the debtor's because, although it is affiliated with DISH and EchoStar, those companies are in the paid television business while the debtors own spectrum "but have no ability or authority to use it for commercial purposes", this position is demonstrably unsupportable and is contrary to Mr. Ergen's sworn testimony.

Mr. Ergen clearly has big ambitions for DISH. Indeed, DISH is expanding or at least has the desire to expand into the terrestrial wireless business. Mr. Ergen has specifically testified that DISH would like to compete with telecommunications companies such as AT&T and Verizon.

Doing so requires spectrum, which Mr. Ergen describes as a limited commodity. DISH's takeover of DBSD and TerreStar and its failed attempts at transactions with, among others, ClearWire, Sprint and Inmarsat demonstrate that DISH is an active market participant in the race for spectrum and a player on the ever-changing chessboard of spectrum usage. Indeed, DISH's participation in the recently concluded H-block auction has been raised many times in these cases in a variety of contexts.

The fact that the Ergen parties are competitors of LightSquared is bolstered by the fact that DISH was listed as a disqualified company under the pre-petition LP credit agreement

and as a result was prohibited from purchasing LP debt.

Mr. Ergen's testimony, as well as the testimony of SPSO's valuation expert, Mr. Reynertson, supports the conclusion that DISH and LightSquared are currently competitors and would continue to be competitors upon LightSquared's emergence from Chapter 11.

Even if the status of DISH and EchoStar as competitors of LightSquared were not imputable to Mr. Ergen and SPSO, which it is, SPSO is clearly an affiliate of such entities, and by virtue of such affiliation and the common control exercise by Mr. Ergen with respect to these entities, SPSO is properly viewed as a competitor of the debtors. SPSO's attempts to distance itself from the overwhelming evidence of its competitor status and interest must be rejected.

That being said, SPSO is quite correct in its argument that separate classification cannot be used to mistreat a creditor out of personal animosity or otherwise. The unfair discrimination against SPSO reflected in the plan will be dealt with separately herein.

For all of these reasons separate classification of the pre-petition LP facility SPSO claimed in the plan is thus necessary and appropriate. SPSO must be viewed as a competitor of the debtors with significant noncreditor interest, or in the alternative, SPSO is an affiliate of a competitor controlled by SPSO's ultimate owner, Mr. Ergen.

Under the facts and circumstances of this case, the separate classification of SPSO's claim comports with Section 1122 of the Code.

It is worth noting that while the separate classification of the SPSO claim and the pre-petition LP facility non-SPSO claims is permissible under Section 1122, that does not mean it is required. Indeed, it is possible to envision a plan of reorganization which classifies all pre-petition LP facility claims in the same class subject to being able to navigate successfully the requirements of Section 1123(a)(4).

Of course, that portion of the SPSO claim, which is equitably subordinated, could not be included in such a class, absent the consent of all affected parties.

B) SPSO's vote to reject the plan should not be designated.

Section 1126(e) of the Bankruptcy Code provides that a Bankruptcy Court may designate the vote of any entity whose acceptance or rejection of a plan was not in good faith.

The seminal decision in this circuit addressing vote designation is the Second Circuit's 2011 decision In re: DBSD North America, 634 F.3d 79 in which the court made the following observations:

The Code provides no guidance about what constitutes a bad faith vote to accept or reject the plan. Rather, Section

1126(e)'s good faith test effectively delegates to the courts the task of deciding when a party steps over the boundary. Bankruptcy courts should employ Section 1126(e) designations sparingly as the exception, not the rule.

Merely purchasing claims in bankruptcy for the purpose of securing the approval or rejection of a plan does not of itself amount to bad faith, nor will selfishness alone defeat a creditor's good faith. The Code assumes that parties will act in their own self-interest and allows them to do so.

Section 1126 comes into play when voters venture beyond mere self-interested promotion of their claims. This section was intended to imply to those who are not attempting to protect their own proper interests, but who were, instead, attempting to obtain some benefit to which they were not entitled.

A Bankruptcy Court may, therefore, designate the vote of a party who votes in the hope that someone would pay them more than the ratable equivalent of their proportionate share of the bankrupt assets, or one who votes with an ulterior motive, that is with an interest other than an interest as a creditor. DBSD at 101 to 102.

Moreover, votes cast by parties who purchase claims in a competitor's bankruptcy are viewed by courts as being particularly worthy of scrutiny. Id. at 105, Note 12. See also Allegheny International, 118 B.R. 282 (W.D.Pa. 1990).

As described with greater detail in LightSquared's motion for entry of an order designating the vote of SP special opportunities, the vote designation motion, and the ad hoc secured group's joinder to the motion, the debtors maintain that, one, Mr. Ergen's attempt to secure control of the LP debtor's assets by purchasing a blocking position is precisely the behavior the Second Circuit attempted to deter and punish in DBSD and that, two, the behavior of SPSO in these cases is even worse than the behavior of DISH in DBSD.

The debtors allege the following in support of their conclusion: one, SPSO and the Ergen parties have followed the DBSD and TerreStar playbooks to gain control of a company in distress by buying claims and then manipulating the Chapter 11 process for their own noncreditor interest, but in this case they did so with stealth; two, SPSO's purchase of the LP debt at close to par to acquire a blocking position was part of Mr. Ergen's scheme and not simply to obtain higher returns, as he testified, or to ensure that he had bankruptcy protections against cram down; three, Mr. Ergen's overall interest in these cases as an owner of LP debt through SPSO and as the majority equity owner of DISH gives him incentives to help DISH achieve as low a purchase price for the debtors' assets as possible in direct contravention of his interest as a creditor; rather than acting in his interest as a creditor -- four, rather than acting in his interest as a creditor, SPSO opposed a near-full

recovery in cash under the ad hoc secured group plan by authorizing its counsel to object to the ad hoc secured group's motion to enforce the LBAC bid and seek a declaratory judgment that the LBAC bid was terminated.

And once again, the debtors in the ad hoc secured group urge that the bad acts of all of the Ergen parties other than SPSO should be imputed to SPSO for purposes of vote designation. See ad hoc secured group statement in support pointing out that "if this were not the case, it would be easy to eviscerate the protection intended by Section 1126(e) by simply forming multiple entities and having one buy claims while the other engage in disruptive inequitable conduct, exactly as the Ergen parties did here." While there is certainly truth to such an observation, those are not the facts before the Court with respect to vote designation.

Moreover, whether or not the alleged bad acts of all the Ergen parties, including LBAC, can be imputed or attributed to SPSO, the Court finds that SPSO's vote to reject the plan cannot be designated.

What the debtors and the ad hoc secured group ignore is the fact that, as will be discussed in detail below, the third amended plan is unconfirmable for a variety of reasons, not the least of which is the unpalatable treatment it affords the SPSO claim. Where a creditor votes not to accept the plan for an admixture of reasons, some of which can be characterized

as being consistent with the interests of a creditor acting to protect its legitimate creditor interest, its vote cannot be designated.

SPSO has voted against a plan that not only deprives it of its first lien security interest, but provides it with plan consideration that is virtually indistinguishable from equity interests. It is not at all surprising that SPSO declined to accept such treatment. The other members of the ad hoc secured group would most certainly have done likewise. Indeed, Mr. Falcone could not even interest Mr. McKnight in taking that treatment on account of the LP preferred equity interest held by Fortress.

While the debtors urge that DBSD compels designation of SPSO's vote to reject the plan, to do so would materially extend the reach of DBSD in ways that Section 1126(e) does not contemplate.

The centerpiece of the Second Circuit's decision in DBSD was its observation that a competitor of DBSD, DISH, brought claims with the intent of voting against any plan that did not give it a strategic interest in the reorganized company, and it bought those claims above par and after a plan had been proposed by DBSD. So too in Alleghany in which creditor Japonica purchased its claims after balloting on a plan had already been begun.

As Judge Gerber noted in DBSD, DISH intended to use

its creditor status to provide advantages over proposing a plan as an outsider. However, both Judge Gerber and the Second Circuit were particularly focused on the timing of the debt -- of the DISH debt purchases after the plan in DBSD had been filed.

Here, SPSO made no purchases above par and acquired a significant portion, 286 million dollars, of its claim before the Chapter 11 cases were commenced when the LP debt was trading at or below sixty cents on the dollar. Moreover, SPSO acquired all of its LP debt below par and prior to the filing of any plan.

SPSO is, thus, arguably at least in part a pre-existing creditor, albeit one who has allegedly voted with strategic intentions, the type of creditor that the Second Circuit did not expressly include in the ambit of its prohibition on voting in connection with strategic claims acquisitions.

The Court declines to extend the holding of DBSD to cover votes cast with respect to claims and which were acquired before a plan had been propose by any party and where, as discussed below, there are valid economically self-interested creditor reasons for the holder of such claims to reject a proposed plan.

While courts in this district and elsewhere have held that casting a vote on a plan to gain more than one deserves is

evidence of bad faith, it takes more than evidence of simply a selfish or aggressive attempt to maximize recovery to demonstrate bad faith. See e.g. Adelphia, 359 B.R. 54 (S.D.N.Y 2006). Declining to designate votes of creditor who held claims against two different Adelphia debtors and who cast votes with respect to one set of claims with ulterior purpose of increasing its recovery on the claims it held against another debtor.

Judge Gonzalez had occasion to analyze the issue of alleged mixed motive voting post-DBSD in the case of In re: GSC, 453 B.R. 132. In GSC, there were allegations that a creditor, Black Diamond, had voted against a plan in order to pursue a sale transaction that would have given it more than its ratable share of the debtor's assets.

In analyzing whether there was evidence to this effect Judge Gonzalez observed that, even if there were such evidence, the objectors would have needed to establish Black Diamond's intent to pursue this alternative at the time of voting and that, even if the objectors could have succeeded in making such a showing, the objectors "would have had to further prove that Black Diamond's sole or primary goal in rejecting the plan was to benefit at the expense of others."

Stated differently, vote designation should not be ordered where a creditor can articulate a valid business reason for rejecting a plan, even if such rejection may also be

consistent with such creditors' noncreditor interest. See also, In re: Figter Limited, 118 F.3d 635 (9th Cir. 1997), denying vote designation where creditor acts to preserve what he reasonably perceives as his fair share of the debtor's estate; In re: Landing Associates Limited, 157 B.R. 791 (W.D. Tex.), noting that creditors act with a variety of motives in evaluating an admixture of creditor-related and noncreditor-related motives; In re: Dune Deck Owners Corp., 175 B.R. 839 (S.D.N.Y. 1995), stating that a court must decide whether the creditor opposes the plan because of how it affects his claim, or because the creditor really seeks to obtain some collateral advantage in another capacity and has voted without regard to the treatment of its claim.

Here, there is ample basis to find that, notwithstanding SPSO's alleged ulterior motives, its noncreditor competitor interests and its demonstrable inequitable conduct in acquiring at least a substantial proportion of its claim, it casts its vote to block a plan that provided it with abysmal treatment that no similarly situated creditor would have accepted.

The debtors would have this Court conflate the provisions of Section 1126(e) and Section 510(c) and hold that a finding of inequitable conduct sufficient to support equitable subordination of a creditor's claim necessarily translates into the basis for designating the bad actor's vote.

Moreover, the debtors would seek to transform vote designation into a substantive treatment provision.

The Court declines to read Section 1126 so broadly.

In the plain words of the statute, designation may be ordered with respect to "any entity whose acceptance or rejection of such plan was not in good faith."

It is vote specific and plan specific, not entity specific. It focuses on the voting conduct of the creditor holding the claim.

Simply put, had SPSO voted to reject the plan that proposed to pay it in full in cash, or a plan proposing some other treatment that was accepted by the non-SPSO holders of LP debt, SPSO's good faith in rejecting such a plan would be open to serious question.

Indeed, as SPSO itself ironically points out in drawing a distinction between this case and DBSD, "it is one thing to designate a creditor that votes against a plan that manifestly compensates the designated stakeholder's economic expectations in full," but quite another thing to designate SPSO's vote on this plan.

Here, while it is not subject to credible dispute that SPSO has noncreditor interests, its vote to reject this demonstrably unconfirmable plan cannot be designated, especially when to do so would arguably render the protections of Section 1129(b) inapplicable.

C) Because SPSO's vote cannot be designated, the cram down standard of 1129(b) is applicable to class 7-B.

Pursuant to Section 1129(b)(1) of the Bankruptcy Code, the court may confirm a plan over a dissenting impaired class of claims so long as the plan is fair and equitable and does not discriminate unfairly with respect to the dissenting class. See In re: Johns Manville, 843 F.2d 636 (2d. Cir. 1988); In re: Cantora, 439 B.R. 561 (Bankr. S.D.N.Y. 2010).

Neither requirement is satisfied by the plan.

1. The plan is not fair and equitable with respect to the secured plan of SPSO.

A plan is fair and equitable with respect to a class of secured claims if it satisfies one of the three alternatives set forth in Section 1129(b)(2)(A).

The plan must provide: one, that the holders of such claims, A, retained their liens on the same collateral to the extent of the allowed amount of such claims, and B, receive deferred cash payments of a value equal as of the effective date of the plan to the value of the secured creditor's interest and the estate's interest in such collateral; two, for the sale of any property that is subject to the lien securing such claims free and clear of such liens with such liens to attach the proceeds of such sale and the treatment of such liens to comply with Clause 1 or 3 of Section 1129(b)(2)(A), a provision which the parties is agree is not applicable here; or

three, for the realization by such holders of the indubitable equivalent of such claims.

The plan is not fair and equitable with respect to SPSO. Although the parties here disagree as to whether the plan must comply with Section 1129(b)(2)(A)(1) or Section 1129(b)(2)(A)(3) with respect to SPSO. See RadLAX Gateway Hotel v. Amalgamated Bank, 132 S.Ct. 2065 (2012). The plan fails to satisfy either subsection. On its face the plan does not comply with subsection (A)(1) inasmuch as it replaces SPSO's first lien with the third lien. Since SPSO's claim will not be subordinated in its entirety, the analysis of this speech is a fair and equitable -- of the fair and equitable treatment ends there.

Nor does the plan fare better under Section 1129(b)(2)(A)(3), which requires the realization by the creditor of the indubitable equivalent of its claims.

In In re: DBSD, 419 B.R. 179, the Bankruptcy Court held that although indubitable equivalent is not defined in the Bankruptcy Code, courts generally will find that the requirements satisfied were a plan both protects the creditor's principal and provides for the present value of the creditor's claim. Citing In re: Sparks, 171 B.R. 860 (N.D. Ill. 1994).

The court continued stating that "Courts focus on the value of the collateral relative to the secured claim and the proposed interest rate of the facility providing the

indubitable equivalent." Courts have held that the indubitable equivalent standard requires that there can be no doubt that replacement recoveries are equal to existing secured interests. See In re: Philadelphia Newspapers, 599 F.3d 298 (3rd Cir. 2010).

Thus, the indubitable equivalent under subsection (3) is the unquestionable value of a lender's secured interest in the collateral. See also, In re: Salem Suede, 219 B.R. 922 (D. Mass.), requiring that there be no reasonable doubt that the subject creditor will receive the full value of what it bargained for.

Here, the plan proposes to give SPSO the SPSO note, which, one, accrues pick interest at the rate of thirteen percent based on current LIBOR and the one percent LIBOR floor under the SPSO note; two, has a seven-year maturity, and three, is secured by a third priority lien on all of the assets of the new LightSquared entities.

SPSO argues that the SPSO note does not represent the indubitable equivalent of its claim because, among other things, A, the value of such note will be highly speculative as of the effective date; B, such note does not provide for post-petition interest accrued through the effective date; C, such note contains economic terms that are inferior to those it enjoys pursuant to the pre-petition LP facility as it provides for the payment of interest in kind rather than in cash and its

seven-year maturity is longer than the four-year maturity under the pre-petition LP facility; and D, such note will be subject to more rigorous transfer restrictions and be less liquid than SPSO's pre-petition LP facility claim while at the same time containing reduced covenant protections for SPSO.

The debtors submit that the SPSO note will provide SPSO with the indubitable equivalent of its claim by providing it with payment in full.

To determine whether the SPSO note provides for the indubitable equivalent of SPSO's claim, the debtors suggest that the Court must, one, compare the value of the collateral securing the SPSO note to the value of SPSO's claim to ensure that the principal is protected; and two, analyze the interest rate and maturity of the SPSO note to ensure that SPSO is receiving the present value of its claim. If an equity cushion can be shown, the debtors argue indubitable equivalence is established.

Pointing to the Moelis valuation, a collateral valuation with the midpoint of 7.7 billion dollars, the debtors argue that the full principal value of the SPSO claim would be more than sufficiently protected by a third lien note on the existing collateral securing the pre-petition LP facility.

Nevertheless, to erase any shadow of a doubt to the extent any such doubt existed that SPSO was not receiving fair and equitable treatment, the debtors emphasize that the plan

enhances SPSO's collateral package by providing SPSO with a third lien on existing collateral, as well as a lien on certain new collateral, including substantially all of the assets of NewCo and its direct and indirect subsidiaries.

The SPSO note, according to debtors, is thus secured by a new collateral package that is more "expansive" than that provided under the pre-petition LP facility. And the ad hoc secured group argues that this so-called additional collateral, which includes the assets of LightSquared, Inc., increases SPSO's collateral package by at least hundreds of millions of dollars.

SPSO disagrees entirely. In addition to disputing the debtor's valuation and protections, SPSO argues that the third lien it will receive under the SPSO note cannot satisfy indubitable equivalence where SPSO currently enjoys to purport a first lien.

While some courts have held that a subordinated lien can constitute the indubitable equivalent of a secured creditor's claim under Section 1129(b)(2)(A)(3), such cases are few and far between. See e.g., Woods v. Pine Mountain Limited, 80 B.R. 171 (9th Cir. BAP 1987); Affiliated National Bank, Englewood v. TMA Associates, 160 B.R. 172 (D. Colo. 1993). No cases from courts in this district have been cited to the Court in support of this contention.

Moreover, in each case cited by the ad hoc secured

group in support of its indubitable equivalence argument the Court found that the secured creditor in question was demonstrably over secured and that the creditor's equity cushion protected it from any diminution in value -- any diminution of its security interest.

In In re: Pine Mountain, for example, the Ninth Circuit BAP based its determination that the secured credit received the indubitable equivalent of its claim on the fact that the creditor's claim would still be fully secured even after obtaining a senior construction loan.

Similarly, in Affiliated National Bank of Englewood, the court based its holding on the Bankruptcy Court's determination that the property securing the creditor's 1 million dollar claim was worth between 1.8 million and 2 million dollars.

The debtors readily concede that although the plan is not conditioned on FCC approval, the debtor's valuation of the SPSO note and SPSO's proposed recovery thereunder indeed relies on opinions offered at the confirmation hearing that the FCC will approve LightSquared's pending license modification application and the later use of its lower downlink spectrum.

Thus, the value of the collateral securing the SPSO note depends almost entirely on whether or not such approvals occur.

Accordingly, it appears that the parties are in

agreement that the valuation of LightSquared and its assets, including its spectrum assets, is ultimately dispositive on the question of indubitable equivalence.

There is enormous disagreement on valuation, however. Not surprisingly, the debtors and the plan sponsors on the one hand with the vocal support of the ad hoc secured group and SPSO on the other hand have drastically different views on valuation.

Mr. Ergen himself prepared a valuation of the debtor's spectrum assets, as did Perella Weinberg when it issued a fairness opinion for the DISH special committee in connection with the now terminated LBAC bid.

Of course, the assumptions underlying each of these valuations are radically different from one another with respect to variables, such as the appropriate price per megahertz POP metric, the impact of FCC approval on the license modification application, the proposed use of each block of spectrum, and the question of whether or not there is a so-called technical issue with respect to portions of the spectrum.

The Court will enter detailed findings of fact with respect to valuation issues as soon as is practicable, and the following summary is offered for the sake of expedience in order to provide context herein.

First, the Moelis valuation. As the debtors readily

concede, the value of LightSquared's assets is central to the determination of the feasibility of the plan and the appropriateness of the treatment of the SPSO claim.

Under the direction of Mr. Hootnick, Moelis prepared a valuation analysis of LightSquared's assets that reflects a range of value from 6.2 billion at the low end to 9.1 billion at the high end.

The methodology employed by Moelis is industry accepted and indeed does not differ in any material respect from the methodology used by SPSO's valuation expert, or from the methodology used in the valuations performed by Perella Weinberg for the DISH special committee, or by Mr. Ergen himself.

The methodology employs market comparables based on price per megahertz POP, which reflects, among other things, the market price as a function of the size of the band of spectrum and the number of people it covers.

Spectrum characteristics are also taken into account, including, for example, the propagation characteristics of the spectrum.

Moelis relied on the opinions of Mr. Smith, Mr. McDowell and Mr. Jeffrey Carlisle, LightSquared's EVP for regulatory affairs, that the FCC will grant LightSquared's license modification application by the end of 2015 and will approve the use of the lower downlink in seven years.

Mr. Hootnick's qualifications as an expert are stellar. Moelis' experience in valuing complex assets in the telecommunications space is broad and deep and the methodology employed in the Moelis valuation is clearly consistent with industry standards.

But because the Moelis valuation rests almost entirely on unsupportable assumptions about the timing of FCC approvals, the Court is unable to afford it weight sufficient to support the valuation premise of the plan.

Next, the Reynertson GLC valuation. The Reynertson GLC valuation suffered from many infirmities and inconsistencies. On the one hand, Mr. Reynertson purported to have relied on the opinions of Mr. Hyslop for his determination of how much of LightSquared's spectrum should be included in his valuation analysis and how much might be sidelined due to the alleged technical issue.

He appears to have relied in part on a Hyslop opinion that was first revealed at trial. This undermines the integrity of Mr. Reynertson's opinion and, more generally, raises questions about his credibility.

Moreover, notwithstanding his reliance on others for regulatory and technical assumptions, he appears to have used his own judgment to risk adjust his valuation analysis.

Simply put, his methodology is all over the place. Paid 1.25 million dollars for his work, Mr. Reynertson

delivered a superficial analysis that was not even performed by a review of the valuations prepared by Mr. Ergen and Perella Weinberg. The court affords it little weight.

Next, the July 2013 Ergen valuation. In connection with the consideration of the LBAC bid by the DISH board and the DISH special committee, Mr. Ergen prepared a six-page presentation dated July 3rd, 2013 entitled Strategic Investment Opportunity L-Band Acquisition.

The presentation reflects Mr. Ergen's analysis of the aggregate value of LightSquared's assets to DISH comprised of, A, the value of twenty megahertz of LightSquared spectrum and satellites themselves; and B, the incremental value that would be realized by DISH due to the substantial additional value that LightSquared spectrum would bring to DISH's existing AWS-4 spectrum.

The range of value for the former, per Mr. Ergen, is 3.3 billion to 5.2 billion. The range of value of the latter, i.e., inclusive of DISH supplemental asset value, is 5.1 billion to 8.9 billion. The Ergen valuation includes a higher range of price per dollars per megahertz POP than the Moelis valuation, sixty-five cents to ninety-five cents versus sixty cents to ninety cents.

SPSO has attempted to retreat from the numbers reflected in the Ergen valuation on the grounds that it does not reflect the negative effect of the alleged technical issue.

As the Court repeatedly observed during the confirmation hearing, however, no attempt was ever made by DISH to solve, let alone quantify, the technical issue, which allegedly stood in the way of the realization by DISH of billions of dollars of supplemental asset value. It is indeed a curious thing.

The Ergen valuation, while offering strong support for the proposition that LightSquared's assets have tremendous value in the hands of DISH, does not provide sufficient support for the valuation on which the plan and the treatment of the SPSO claim are premised.

Finally, the Perella Weinberg valuation. In addition to the Ergen valuation, a valuation was prepared by Perella Weinberg. A valuation prepared by Perella Weinberg was considered by the DISH special committee. Perella Weinberg was retained by the DISH special committee to issue a fairness opinion with respect to the 2.2 billion dollar LBAC bid in July of 2013. In connection with its assignment, Perella Weinberg performed an extensive valuation analysis of LightSquared assets and concluded that the cumulative value is estimated to be 4.4 billion to 13.3 billion. This valuation range includes the standalone value of LightSquared spectrum and an estimate of the magnitude of the ways in which the LightSquared spectrum would enhance the value of DISH's existing and planned business.

In order to demonstrate the existence of an equity cushion, the debtors point not only to the Moelis valuation, but also to the Ergen valuation, which yields an approximately twenty-three percent equity cushion, not including value attributable to the lower downlink; and 2, the valuation prepared by Perella Weinberg, which yields an approximately fifteen percent equity cushion, both of which are higher than the ten percent equity cushion, which has found to be sufficient by courts in this district.

SPSO, not surprisingly, argues that these various equity cushion calculations should be given little credence because of the technical issue that was allegedly discovered after preparation of the Ergen and Perella Weinberg valuations and as such, these valuations are no longer indicative of current value.

The debtors contend that the Ergen and Perella Weinberg valuations, which are consistent with the Moelis valuation, are illustrative and persuasive evidence of the value of LightSquared's assets and that the purported technical issue is a red herring manufactured by SPSO that likely does not materially alter such valuations.

The Court is inclined to agree, but this issue was not explored or fully developed during the evidentiary hearing.

Based on all of the valuation evidence in the record, it is clear that LightSquared is indeed the owner of valuable

spectrum assets, unbuilt beachfront property that has yet to be put to its highest and best use. But as long as the regulatory hurdles that exist remain unresolved, it is impossible to conclude by a preponderance of the evidence that debtors' valuation and projections are sufficiently reliable to support indubitably the valuation on which SPSO's treatment under the plan is premised.

As the Court found, the Moelis valuation is premised on unsupportable assumptions about the timing of FCC approvals and no party has the ability to predict when and if such approvals will be obtained. Moreover, the fact that certain of the planned support parties appear to be investing what the debtors characterize as hundreds of millions of dollars junior to the SPSO note does not persuade the Court otherwise.

Indeed as graphically demonstrated in SPSO's post-confirmation trial brief, the plan is in large part a sophisticated shell game that moves debt and cash up and down the capital structure in ways that are less than obvious, but nonetheless real. A substantial amount of the purportedly junior investment by Melody is being offset by substantial fees paid to Melody by Harbinger in connection with the defunct Harbinger plan. Moreover, certain of the plan support parties who are holders of existing LP preferred equity interest, including Fortress, would receive 223 million dollars in cash and additional pick preferred interest under the plan.

As the January 2014 correspondence among the plan support parties makes very clear, the plan was constructed to bootstrap these preferred interests into the second lien position ahead of Mr. Ergen. When Mr. McKnight balked at being third to Mr. Ergen's second, Mr. Falcone simply moved him up ahead of Charlie. Breathtakingly simple, but entirely unsupportable.

Because the debtor's asset valuation does not support the valuation on which the plan and the treatment of the SPSO claim are premised, the Court cannot conclude that under the plan SPSO will realize the indubitable equivalent of its existing pre-petition LP facility claim such that the plan is fair and equitable with respect to Class 7-B.

Even if the Court were to find the valuation that undergirds the plan is sufficient to protect SPSO's principal, however, the Court determines that the SPSO note would still not constitute the indubitable equivalent of the SPSO claim because of other features of the SPSO note, including the alteration of the type of interest received under the SPSO note, as opposed to the pre-petition LP facility, pick versus cash, the longer maturity of SPSO note as compared to the pre-petition LP facility, seven years versus four years, and the fact that the note, instead of providing SPSO with the first lien, provides for a far riskier third lien treatment subordinated behind at least 2.2 billion dollars of senior

debt.

2. The plan unfairly discriminates against Class 7-B.

Contrary to the requirement of Section 1129(b)(1) of the Code, the plan unfairly discriminates against Class 7-B. While the currency with which the pre-petition LP facility SPSO claim has paid the SPSO note, does not have to be exactly the same as that provided to the pre-petition LP facility non-SPSO claims, there must nonetheless be a determination that the treatment afforded SPSO does not discriminate unfairly against SPSO.

The purpose of the requirement is to ensure that a dissenting class will receive relative value equal to the value given to all other similarly situated classes. In re: Johns Manville, 68 B.R. 618 (Bankr. S.D.N.Y. 1987). See also, In re: Sea Trail (E.D.N.C., October 23rd, 2012); In re: Hawaiian Telcom Communications, 430 B.R. 564 (Bankr. D. Haw. 2009); In re: Great Bay Hotel and Casino, Inc., 251 B.R. 213 (Bankr. D.N.J. 2000).

To determine whether a plan discriminates unfairly, this Court has held that courts consider whether, one, there is a reasonable basis for discriminating; two, the debtor cannot consummate the plan without the discrimination; three, the discrimination is proposed in good faith; and four, the degree of discrimination is in direct proportion to its rationale. In re: Worldcom, 2003, Bankr. LEXIS 1401 (S.D.N.Y. 2003).

The debtors argue that each of these elements has been satisfied because, one, SPSO impermissibly acquired LP debt intending to facilitate the acquisition of LightSquared's assets by DISH, a competitor, thus providing a rational basis for the treatment; two, the treatment of the SPSO claim is necessary because the plan represents "the best and only path for LightSquared to emerge"; three, the plan has been proposed in good faith; and four, there is nothing unfair about the fact that the plan satisfies SPSO's claim in full.

SPSO vehemently disputes such assertions arguing that the disparate treatment is not supported by any reasonable basis and, far from providing payment in full, the SPSO note is at best a highly distressed debt instrument and is at worst entirely worthless.

At a minimum, the treatment afforded in the plan clearly does not pass muster on prongs one and four of the Worldcom test and likely falls short on the good faith prong as well.

Simply put, it is difficult to imagine discrimination that could be much more unfair than that contemplate by the plan. Close to full payment in cash on confirmation, not the effective date, for Class A, versus an equity-like deeply subordinate seven-year third lien pick interest note for Class 7-B, treatment that, even if possibly yielding payment of the value of the SPSO claim seven years down the road, for all

intents and purposes puts SPSO at the mercy of the rest of the proposed post-confirmation capital structure, including the equity holders below it.

While some discrimination in this case may be necessary to address the noncreditor competitor interests of SPSO, the plan's treatment of Class 7-B is not designed to achieve that goal. The legitimate business reasons for separately classifying the SPSO claim hardly entitle the debtors to discriminate in SPSO in ways that far exceed those that are necessary to address the legitimate concerns attending to SPSO's creditor status and connections to DISH; e.g., through appropriate covenants and other noneconomic protective measures.

Moreover, the fact that, as Mr. Smith testified, SPSO is getting a promissory note because "there's not enough cash for everybody to receive cash," does not provide a legitimate basis for the plan's discriminatory treatment of Class 7-B, nor is it a justification for such discrimination to point to the fact that, as some have observed, the ad hoc secured group "requires" early payment in full in cash." See Mr. Hootnick. "And the plan satisfies the requirement of certain constituents, particularly the non-SPSO lenders who have been promised an early payout by the LBAC approach and who have required throughout that they be paid off quickly."

There are many creative ways to attempt to address the

limited availability of cash. See, e.g. In re: Central European Distribution Corporation, et al., case number 13-10738, Bankruptcy District of Delaware, employing a reverse Dutch auction procedure in which note holders could elect to bid for cash treatment, but unfair discrimination is not one of them.

Thus, separate and apart from its failure to satisfy the fair and equitable requirement of Section 1129(b)(2), the plan fails to pass muster on unfair discrimination grounds as well and thus, cannot be confirmed.

We're almost there. Hang in there.

D) The claim of SPSO may be subordinated to the extent of harm caused to innocent creditors.

As set forth in detail in the Court's decision in the adversary proceeding, the Court has concluded that SPSO has engaged in inequitable conduct in connection with its acquisition of its now nearly one billion dollar LP debt claim.

Although confirmation hearing did not encompass a retrial of those issues that were presented and have now been adjudicated in connection with the adversary proceeding, there are additional allegations of inequitable conduct that were raised in connection with confirmation.

In essence, the ad hoc secured group maintains that they were the victims of an elaborate bait-and-switch strategy perpetrated by Mr. Ergen through SPSO, LBAC and DISH. The

strategy was allegedly hatched in a presentation prepared by Mr. Ergen's counsel in late April 2013 and presented by Mr. Ergen to the DISH board in May 2013, which stated, among other things, that Mr. Ergen wanted to "see the results of the marketing process and if the process is unsuccessful, revert with a different bid later."

There, says the ad hoc secured group, it is made crystal clear that the Ergen-led strategy is to make a bid, wait and see if anyone else is interested in the LightSquared assets at that price, and if not, pull the bid and come back with a lower bid. Had they only known, say the members of the ad hoc secured group, they would never have gone down that path.

But now, pointing again and again to the DBSD and TerreStar playbooks as evidence of Mr. Ergen's modus operandi for acquiring distressed assets, the ad hoc secured group complains that it was deceived into signing up for a deal that Mr. Ergen never intended to close. The fly now regrets having accepted the invitation of the spider to enter its parlor.

Not surprisingly, there is no documentary evidence reflecting the alleged bait-and-switch strategy. The May 2nd DISH board presentation on which the ad hoc secured group principally relies cannot be fairly read as the ad hoc secured group suggests it should be read. The DISH board minutes in the December 2013 time frame contain carefully constructed

high-level summaries of the status of the LBAC bid and, not surprisingly, contain no hint of any such strategy.

Consistent with the allegations of the ad hoc secured group that the so-called technical issue was fabricated as a pretext for LBAC's termination of its bid, there are, however, DISH internal documents that suggest that the so-called technical issue was not being approached as something to be resolved in order to keep the proposed transaction on track, but rather was being viewed as something DISH was hoping would turn out to be real. In addition to the unsettling content and tenor of some of these documents, Mr. Ergen's testimony on this issue is quite evasive.

Moreover, the words and behavior of Mr. Ergen in connection with the December 11th auction are not exactly what one would expect to hear and see from a stalking horse bidder who had snagged assets that were worth, in DISH's hands, billions of dollars of net incremental value. Why would Mr. Ergen fly to New York to personally attend the auction with a sizable team of DISH personnel and the DISH board on standby, but on that very day have his counsel tell Mr. Zelin that she hoped another bidder would appear or it would be bad for the ad hoc secured group? Why in December did the DISH board waive its forty-eight-hour meeting notice requirement until January 9th, 2014, the exact day on which the LBAC bid termination became effective? There are no good answers to these and many

other questions about the conduct of LBAC and SPSO.

Nonetheless, the fact remains that the LBAC transaction was tied to the achievement of certain milestones, and LBAC, as this Court has ruled, was free to terminate the PSA and then terminates its bid for any reason once any of those milestones was missed. The milestones were aggressive from the outset and were soon missed.

Moreover, the bid procedures order only required LBAC to remain in place as a backup bidder until mid-February 2013 only if another party had outbid it at the auction, and that did not occur.

Whether LBAC terminated its bid because it believed there was a technical issue, even though the record does not support a finding that there was or is such an issue, or because it wanted to make a lower conditional bid, or because Mr. Ergen decided to direct DISH and its capital elsewhere, or because of negative implications for DISH in connection with the Nevada shareholder litigation remains unclear.

What is indisputable, however, is that the actions of Mr. Ergen in this regard defy logical explanation. Mr. Ergen was particularly evasive when asked at the confirmation hearing about his reasons for coming to the December 11th auction fully prepared to proceed and then terminating his bid shortly thereafter.

Notwithstanding, the record of a confirmation does not

provide compelling additional support for the equitable subordination of the SPSO claim, even assuming that the conduct of LBAC and DISH in terminating the LBAC bid were attributable to SPSO.

E) Additional objections to the plan.

SPSO has raised numerous additional objections to confirmation of the plan, including the failure to satisfy the best interests test under Section 1129(a)(7) of the Code; the failure of the plan to contain projections that extend beyond the first quarter of 2016, the impermissibility of the plan's proposed nondebtor releases, the effect of the plan when SPSO's intercreditor rights under the pre-petition LP credit agreement, certain infirmities with respect to the new proposed DIP facility, including the lack of adequate protection, the alleged artificial impairment of certain accepting classes, the debtor's failure to demonstrate that the plan is feasible, and the debtor's alleged lack of good faith in soliciting acceptances of the plan under Section 1125(e). While there may be merit to several of these additional objections, the Court need to the address them now in light of the other bases on which the Court has denied confirmation of the plan.

One final observation is in order. This Court has previously ruled in this case that the Bankruptcy Code does not contemplate or permit equitable disallowance of a creditor's claim. Against the backdrop of allegations and findings that

SPSO and Mr. Ergen indeed orchestrated an end run around restrictions on the pre-petition LP credit agreement, it is remarkable that the debtors and those parties who support the plan have constructed a plan of reorganization that is a gerrymandered end run around their inability to disallow the SPSO claim.

The latest such attempt is the invocation of unjust enrichment by the ad hoc secured group. And the trial record leaves no doubt that subordinating the SPSO claim with or without a finding of equitable subordination was the sine qua non of the Harbinger-driven plan process. This was a plan that was orchestrated by Mr. Falcone and those he sought to protect. It provides the ad hoc secured group with the quick cash payout it had hoped to obtain from LBAC's purchase of the LP assets, and it assumes a result in the adversary proceeding that is not to be.

As these cases approach their two-year anniversary in this court, the time is long overdue for the parties to adjust their expectations, tone down their animosity and work constructively to maximize the value of LightSquared's valuable spectrum assets.

CONCLUSION.

For all of the foregoing reasons, one, confirmation of the third amended joint plan is denied.

Two, SPSO's motion to strike portions of the testimony

of Mr. McDowell and Mr. Hootnick is denied.

Three, the debtors' motion to strike portions of the testimony of Mr. Hyslop and Mr. Reynertson is granted as to Mr. Hyslop and denied as to Mr. Reynertson.

Debtor's motion to designate SPSO vote is denied.

Five, the motion to approve the DIP facility and for related relief, including the request to approve the plan support party breakup fee, is denied as moot.

Six, SPSO's motion to admit SPSO confirmation Exhibit 2 is denied.

And seven, the request for equitable subordination of the claim of SPSO is granted for the reasons set forth in the Court's separate decision in the adversary proceeding with the extent of such subordination to be determined in further proceedings to be held in this court.

The Court's finding and conclusions remain subject in all respects to a complete decision to be filed in these cases as soon as practicable.

Okay. That ends the rulings. That ends the two bench decisions, but I'd like to take a few minutes further to talk to you.

MR. DUGAN: Your Honor, just a clarification on the record, just to be clear, the adversary proceeding ruling is not final; is that correct?

THE COURT: Okay, I thought I had explained the ground

rules at the beginning. So I'm not going to re-explain them.

MR. DUGAN: Okay.

THE COURT: You can read the transcript of what I said in the beginning.

If what you're immediately asking me, Mr. Dugan, is how you all are going to start trying to appeal, I'm not interesting in having that discussion right now.

MR. DUGAN: We just don't want to --

THE COURT: So --

MR. DUGAN: Yeah. We just wanted to make sure we weren't missing anything. That's all. Thank you, Judge.

THE COURT: There is a transcript and it will say exactly what it says.

MR. DUGAN: Okay.

THE COURT: These decisions are bench decisions. They're not open for discussion. They're not tentative rulings. They will be superseded in their entirety by full decisions that will be filed when I recover enough strength to finish dotting all I's and crossing the T's.

The reason that this was done in this manner was for the sake of all of you. Rather than you spend the next thirty days waiting for me to do what I need to do and for Mr. Montagner to see 1.5 million dollars go out the door every day, I'm going to do what I'm going to do while you're going to do what you have to do. Okay?

And I would strongly suggest that figuring out how to appeal right now is not the best thing. Your appeal rights are what they are.

At the end of these decisions there are not the words "it is so ordered." Okay?

MR. DUGAN: Okay, thank you.

THE COURT: I am not so ordering these records.

MR. MUNDIYA: Thank you, Your Honor.

THE COURT: Okay. Now, I know that I took you all by surprised today, probably in more ways than one, by issues these decisions on the timing that I did, but I felt that this was the best thing to do, rather than send you away and come back in many weeks so that you could productively make use of this time.

It may be overreaching, but I feel that it's necessary for me to attempt to guide you in a constructive direction at this point because I care deeply about this case.

You have two weeks. You have two weeks to come up with a deal. You all know the facts. You know all the moving parts. You know what people are willing to do. You've now been given a lot of guidance about what's going to fly with me, what's not going to fly with me.

Two weeks. If you don't do it in two weeks, which takes us to Memorial Day weekend, which you can have off, on Tuesday, May 27th, Judge Drain will assume his role as a plan

mediator. You have two weeks to avoid that.

If you come up with a deal globally, both with respect to the amount of equitable subordination and on a plan, no Judge Drain. If you don't, Judge Drain. He has agreed, gracious as always, notwithstanding his enormous workload, to serve free of charge as a plan mediator in this case. There could be no one better. He is sophisticated, he is smart and he is really nice.

So that's what we're going to do. That's what you're going to do for the next two weeks. For the next two weeks we're going to keep working. I can't make you promises about when I will be ready to file these decisions on the docket, because as I've said, there is a lot of work that goes into the footnotes and the dotting of the I's and crossing of the T's, and because there may well eventually be appeals consistent with all of your rights, they have to be perfect by my standards. But I think what you've heard today is sufficiently detailed for you to know more than enough about the bottom line.

So that's going to be plan. I will wait until May 27th to enter an order appointing Judge Drain as plan mediator, but he is standing by and is ready. And that gives us a healthy three weeks or so before what I believe now is the current June 15th point with respect to liquidity and I fully admit I don't know details about the current liquidity

position.

So again, I apologize for taking you by surprise if you thought you were going to have the next couple of weeks off, but there you go.

Questions, comments, anything other than you really would like to get out of here on stopping listening to me talk?

MR. MUNDIYA: I just want to say thank you, Your Honor, for all the work you did.

THE COURT: Sure.

MR. BARR: Same. Just thank you, Your Honor. We understand. Thank you.

THE COURT: Thank you, folks.

(Whereupon these proceedings were concluded at 5:22 PM)

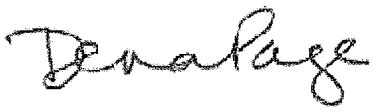
I N D E X

RULINGS

Request for equitable subordination of the claim of SPSO is granted	154	11	

C E R T I F I C A T I O N

I, Dena Page, certify that the foregoing transcript is a true and accurate record of the proceedings.



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