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 23 of 44**

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company interest" to acquire LightSquared's assets for $2 to $2.1 billion.[73] Specifically, the Ergen Presentation informed each board that Mr. Ergen's blocking position in the LP Debt could help facilitate any bid for LightSquared's assets:

> Mr. 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.[74]

Mr. Ergen understood the critical nature of the timing of any bid, and he testified at Trial that, given the July 15 termination of the Debtors' exclusive periods, it was likely that LightSquared would "begin exploring strategic alternatives in early June if no restructuring or sale strategy emerges."[75] His understanding was that "anyone could come to the Court to make an offer for LightSquared, that that might be a corporate opportunity for DISH and for EchoStar."[76] Because Mr. Ergen recognized, however, that the DISH Board was at the time focusing on the potential Sprint and Clearwire transactions, had performed no analysis of LightSquared, and did not authorize a bid for LightSquared at that time, Mr. Ergen planned to make a bid "personally" to preserve "optionality" for DISH and/or EchoStar to bid on LightSquared assets.[77] He did not, however, seek approval from either board to make a bid personally.

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73 The Ergen Presentation states that the proposed acquisition vehicle would be "NewCo," which would be "formed by any combination of Mr. Ergen, EchoStar, and/or DISH based on company interest." (PX0867 at SPSO-00011825).

74 Ergen Presentation, PX0867 at SPSO-00011824.

75 Ergen Presentation, PX0867 at SPSO-00011828.

76 Jan. 13 Tr. (Ergen) 77:10-17.

77 Mr. Ergen's testimony that he pursued LightSquared as an alternative for DISH if the Sprint and Clearwire acquisitions fell through – as they ultimately did – is clear on this point. (*See* 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").)

3. Mr. Ergen Makes a Bid Himself, Keeping Options Open for DISH

Two weeks later, on May 15, 2013, Mr. Ergen, by his counsel, submitted an unsolicited cash bid for LightSquared's spectrum for $2 billion[78] on behalf of LBAC, which had not yet been formed.[79] The wording of the LBAC Bid provided optionality for DISH to be the ultimate purchaser, stating that the newly-formed buyer would be "owned by one or more of Charles Ergen, affiliated companies and/or other third parties."[80] Non-binding and expiring on May 31, 2013, the bid emphasized LBAC's "willingness to fund the Purchase Prices, *on a non-refundable basis*, prior to receipt of FCC and Industry Canada approvals and authorizations . . .",[81] and it explicitly stated that the cash purchase price of $2 billion could be used to pay off the LP Debt. With its lack of conditionality and offer of cash consideration sufficient to pay off the LP Debt in full, the LBAC Bid accomplished the objective, set forth in the Ergen Presentation given to the DISH Board less than two weeks earlier, of proposing a bid that would "be highly attractive to stakeholders and put pressure on L2 fiduciaries to consider [the] proposal."[82]

The existence of the LBAC Bid quickly hit the press. Upon learning of the bid, no member of the Boards of Directors or management of DISH or EchoStar formally objected to Mr. Ergen having made a personal bid for LightSquared's assets. Mr. Cullen, a top DISH executive, stated that he learned of the LBAC Bid through news reports but did not ask Mr. Ergen if he was usurping a corporate opportunity, despite not being aware at that time that Mr.

[78] PX0504.

[79] LBAC was formed approximately two weeks later, on May 28, 2013.

[80] PX0504 at GH_L2_00450.

[81] PX504 (emphasis in original).

[82] PX0867 at SPSO-00011826.

Ergen had presented the DISH Board with the option to make a bid.[83] The Court can infer from the inaction of DISH's Board and management upon learning of Mr. Ergen's personal bid that they either (i) understood that the LBAC Bid and the strategy behind it were ultimately for the benefit of DISH, even if the bid was made by Mr. Ergen personally at that time or (ii) did not wish to impede Mr. Ergen's forward movement on his own bid, notwithstanding their fiduciary obligations.

4. "You are way ahead of your skis here"

On May 8, 2013 (one week *prior* to the LBAC Bid), the DISH Board had formed a special committee consisting of two directors independent of Mr. Ergen – Mr. Goodbarn and Mr. Howard. Pursuant to board resolutions, the Special Committee was vested with the power and authority to: (i) review and evaluate (including any potential conflicts of interest arising out of Mr. Ergen's proposal to the DISH board regarding LightSquared and his personal interest in LightSquared) a potential bid for LightSquared and whether such a bid was in the best interests of DISH and its shareholders, and to discuss and/or negotiate such a transaction; (ii) negotiate definitive agreements with the parties concerning the terms and conditions of the potential transaction; and (iii) determine whether such terms and conditions were fair to DISH.[84] 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 remains viable.[85] As it turned out, such resolutions were not worth the paper they were written on.

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83 Jan. 17 Tr. (Cullen) 143:25-145:19.

84 PX0768 (Howard Nevada Affidavit) ¶ 9; PX0491 at DISH_NY000000002-4.

85 PX0491 at DISH_NY0000000005.

The evidence reveals that these board resolutions were quickly and flagrantly disregarded. Despite being in existence for three months, the Special Committee was forced to work under a compressed timetable because of Mr. Ergen's interference with its ability to begin its task. Upon learning on May 22, 2013 of the Special Committee's recent engagement of independent counsel, Mr. Ergen pushed its members to hold off, asking why Special Committee counsel was needed and cautioning that "[y]ou are way ahead of your skis here."[86] Similarly, 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.[87] 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.[88]

The existence and amount of the LBAC Bid created a significant challenge to the Special Committee's task of evaluating a potential DISH bid and determining what terms and conditions were fair to DISH. Upon learning of the LBAC Bid from news alerts on May 20 and 21, 2013,[89] Mr. Howard stated that he was surprised, as it "was [his] expectation that Mr. Ergen would not

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[86] DX0188, *see also* PX0767 (Goodbarn Nevada Dep.) at 102:2-103:15 ("[Ergen] felt we were moving too fast as a committee" given that the Special Committee was trying to seek trading information from him, he had unsettled trades, and he was tied up with Sprint and Clearwire at the time).

[87] PX0768 at ¶ 25. 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 at ¶ 33.

[88] PX0768 at ¶ 34.

[89] 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 the updated Charles Schwab news alert on May 21, 2013. *See* PX0768 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 also articulated his concern 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.

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."[90]

When asked whether the Special Committee considered proposing that DISH make a bid for LightSquared's spectrum below the amount 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."[91] 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 investment and "that does not make a very happy chairman."[92] These statements by an independent board member demonstrate that Mr. Ergen, as chairman of the Board and majority owner of DISH, exercised significant control. The Special Committee did not determine to bid at a lower price, as Mr. Ergen had already staked out the territory with a bid that would ensure that he, as a substantial holder of LP Debt, would be paid in full, and no one was interested in making him unhappy by altering that.

Furthermore, although the role of the Special Committee included evaluating any potential conflicts of interest, the repeated requests of the Special Committee to Mr. Ergen for information regarding his LP Debt trades were ignored, and Mr. Ergen never provided the Special Committee with the requested schedule of his trades. The Special Committee's stated reasons for seeking such information were significant – "to assess Mr. Ergen's conflict, to

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90 *Id.*

91 PX0767 (Goodbarn Nevada Dep.) at 100:7-21.

92 PX0767 (Goodbarn Nevada Dep.) at 100:22-101:5.

determine the potential profit that Mr. Ergen would make if DISH made a successful bid . . . , and to assess whether DISH should have been entitled to pursue the corporate opportunity of buying LightSquared debt before permitting Mr. Ergen to do so for his personal account."[93] Mr. Howard stated that he did not recall ever hearing from Mr. Ergen or his counsel that the Committee's requests for information were improper or that Mr. Ergen had no obligation under DISH's charter to bring potential corporate opportunities to the attention of the DISH Board,[94] yet, Mr. Ergen provided no reason for leaving the Special Committee in the dark on this key inquiry.[95]

On July 3, 2013, Mr. Ergen sent to the Special Committee and David Moskowitz, an in-house attorney and a Senior Vice President for DISH and EchoStar, via email, a presentation for the Special Committee and the DISH Board.[96] In the email, Mr. Ergen stated, "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."[97] The presentation, dated July 8, 2013, was entitled "Strategic Investment Opportunity – L-Band Acquisition, LLC.[98] It was delivered to the DISH Board of Directors by Mr. Ergen at a special meeting on July 8, 2013. The Ergen July 8 Presentation provided, for discussion purposes in the context of considering

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93 PX0768 (Howard Nevada Affidavit) at ¶ 16.

94 PX0768 (Howard Nevada Affidavit) at ¶ 18.

95 PX0767 (Goodbarn Nevada Dep.) 92:10-93:15; 128:35-130:5); *see also* DX0224 (July 6, 2013 email from Howard to DISH board in which Mr. Howard writes "[f]or reasons better articulated by Charlie, the special committee has no further insight into the bond purchases made by Charlie's entity."), PX0768 (Howard Nevada Affidavit) at ¶ 17 ("Despite repeated requests and discussions, Mr. Ergen never provided the Special Committee with the requested documentation regarding his investment in and ownership of LightSquared debt or preferred stock.")

96 PX0927.

97 *Id.* at DISH_PLAN000003150.

98 PX0928.

whether DISH would participate in the LBAC Bid, certain valuation information relating to LightSquared's spectrum as of that date.

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. 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."[99] 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. 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 was estimated by Mr. Ergen to be between $5.174 billion and $8.996 billion, with a midpoint of $7.085 billion.

On July 21, 2013, the Special Committee presented its conclusions to the DISH Board,[100] recommending that DISH pursue the LBAC Bid for $2.2 billion, subject to five express

[99] *Id.* at 5.

[100] At this meeting, PWP provided a nine-page presentation entitled "Project Discus Summary Conclusions" to the DISH Board. (PX0929 at 2.) In a section captioned "Illustrative Value of DISH's Use Cases Related to

(continued...)

conditions, four of which implicated further review and decision making by the Special Committee:

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

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

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

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

(x) 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.[101]

Even though the DISH board resolutions permitted disbandment of the Special Committee only upon the Committee's own decision so long as a bid for LightSquared remained viable, the DISH Board abruptly disbanded the Special Committee without advance notice immediately after the Special Committee delivered its conditional approval of the LBAC Bid. Other than Messrs. Howard and Goodbarn, who abstained, the DISH Board's vote was unanimous.[102] On July 22, 2013, DISH agreed to buy LBAC from Mr. Ergen for one dollar

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).)

[101] (PX0716 at GH_L2_000973-74.); PX0768 at ¶ 47. According to Mr. Howard, because the Special Committee had not yet received the requested information on Mr. Ergen's purchases of LP Debt, the Special Committee "informed the Board that it had been unable to completed its evaluation of potential conflicts of interest associated with the LightSquared acquisition, but made clear that it would continue to evaluate those potential conflicts and take appropriate action once its evaluation was completed." *Id.* at ¶ 49.

[102] PX0768 (Howard Nevada Affidavit) ¶¶ 49-50; DX400. Mr. Howard testified that, at the time the vote was taken, he "did not believe that the Special Committee had completed all of its work and therefore did not believe that it should be disbanded at that time." PX0768 at ¶ 50. On July 24, 2013, Mr. Goodbarn and Mr. Howard sent a letter to the DISH Board in which they reiterated their conditional recommendation in favor of a potential LightSquared acquisition and stated that they did not recommend or endorse the disbandment of the Special Committee. *Id.* at ¶ 52. No response to that letter was introduced into evidence.

without the Special Committee ever reviewing the terms of the acquisition agreement.[103] On July 23, 2013, DISH announced its intention to bid through LBAC for LightSquared's spectrum.[104]

The Special Committee had been disbanded despite the fact that its conditions remained unsatisfied; in particular, the Committee had neither negotiated nor approved the draft plan support agreement or the draft asset purchase agreement, which were filed with the Court together with the Ad Hoc Secured Group Plan on July 23, 2013[105] and which explicitly stated that they were subject to further negotiations and approval by DISH.[106] One notable feature of the APA, incorporated by reference into the PSA, was its broad release of all claims against Mr. Ergen, DISH, EchoStar, and SPSO and contemplation of the full allowance of the SPSO Claim.[107] The proposal of such a release belies the assertions made by SPSO and DISH that they have no ties to one another and supports the inference that Mr. Ergen and SPSO were acting for DISH in creating a path for DISH, through LBAC, to take over as purchaser, while still

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[103] Howard Dep. 315:10-316:3; Jan. 13 Tr. (Ergen) 195:6-8.

[104] 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 board, an action taken so suddenly that DISH risked delisting from the NASDAQ. PX0746; *see also* PX0741; DX313.

[105] The joint chapter 11 plan of reorganization filed on July 23, 2013 was proposed by the Ad Hoc Group of Secured Lenders, of which SPSO was a member at that time. *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].

[106] Mr. Howard testified that the first time he heard that Mr. Ergen was negotiating a proposed joint chapter 11 plan with the Ad Hoc Secured Group was during a July 18, 2013 board meeting. The Special Committee and its advisors were not invited to participate in these negotiations with the Ad Hoc Secured Group. *See* PX0768 at ¶ 42. At a meeting of the Special Committee on July 21, 2013, counsel for the committee discussed a draft asset purchase agreement with the committee that had been provided to counsel by Mr. Ergen's counsel. Mr. Howard stated that neither the committee nor its counsel had been involved in negotiating this agreement. *Id.* at ¶ 46. Mr. Howard further testified that he learned of the existence of the PSA after a draft of it was annexed to a Form 8-K filed by DISH, and the Special Committee was neither involved in negotiating this agreement nor had they recommended that DISH enter into it. *Id.* at ¶ 51.

[107] *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.

protecting Mr. Ergen from any downside on his substantial investment. Despite many attempts to characterize it otherwise, the proposal of such a release reveals the strong linkage between SPSO's debt and DISH's bid and the inability to disguise such linkage with so-called "separate hats."

While it is not the Court's role to pass judgment on the corporate governance practices of DISH, the Court nonetheless concludes that the facts surrounding the Special Committee process show that, notwithstanding the existence of the Special Committee, Mr. Ergen himself was the driving force behind each step DISH took on the path toward the DISH/LBAC Bid, including the actions taken in connection with Mr. Ergen's evolving acquisition strategy in the spring and summer of 2013. Although the Special Committee was created to be independent, the blatant disregard of the conditions set forth in its recommendation for DISH's participation in a LightSquared acquisition, its abrupt dissolution by the DISH Board, and its lack of involvement in the negotiations of the LBAC transactional documents as they evolved in the late summer and into the fall of 2013, despite the explicit board resolutions to the contrary, indicate that the Special Committee was little more than window dressing.[108]

5. Mr. Ergen was Not Acting Solely on His Own Behalf in Making a "Personal" Bid or in Purchasing LP Debt

Even after acknowledging his change of strategy in April 2013 and his interest in making a bid for LightSquared,[109] and faced with allegations that his debt purchases and the LBAC Bid were made in contemplation of a potential DISH acquisition of LightSquared spectrum, Mr.

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108 While not part of the record of the Adversary Proceeding, the Court notes that, on the evening of January 7, 2014, DISH, by counsel, terminated the DISH/LBAC Bid. Additional grounds for equitable subordination in connection with the termination have been alleged by the Debtors and the Ad Hoc Secured Group, and such matters are part of the record on confirmation of the Debtors' Third Amended Joint Plan of Reorganization Pursuant to Chapter 11 of Bankruptcy Code.

109 Jan. 13 Tr. (Ergen) 65:4-66:15.

Ergen has continued to deny that he acted other than for his own personal benefit. Specifically, Mr. Ergen steadfastly maintains that he had an interest in purchasing and owning LightSquared's spectrum assets *personally* and was prepared to own and operate a spectrum business himself. In response to the Court's questioning, Mr. Ergen testified that he believes he could operate a spectrum business without creating a conflict with DISH.[110] At the time of the May 15 LBAC Bid, however, 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; a draft term sheet was only received by Mr. Ergen on July 18, 2013,[111] and its draft form indicated that no deal had been reached. Mr. Ergen also stated that, at the time of the LBAC Bid, he had made no decisions about headquarters, employees, or management of his personal spectrum company.[112] Taken as a whole, Mr. Ergen's statements that he was prepared to run a spectrum business personally (and in competition with DISH) are farfetched, to say the least. Rather, they cause the Court to conclude that, at the time of the April 2013 LP Debt purchases and the LBAC Bid, the intended strategic investor was not Mr. Ergen, but rather, DISH.[113]

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

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[110] Jan. 13 Tr. (Ergen) 245:17-247:20 (suggesting possible uses for spectrum that did not conflict with DISH, such as "ground-to-air communications" and "machine-to-machine").

[111] The LBAC Bid stated that its proposal expired on May 31, 2013 if not accepted by LightSquared prior to that time. *See* PX0504. It was subsequently extended beyond that date.

[112] Jan. 13 Tr. (Ergen) 244:16-245:12 ("I had seen where LightSquared headquarters were; I know something about LightSquared and their business. And I would have plenty of time to – I wouldn't be able to manage the company until the FCC approved it. So I would have plenty of time to make all those decisions.")

[113] Notably, Mr. Ergen confirmed at Trial that, had DISH won its bid for Sprint, he would have withdrawn his personal bid for LightSquared. (Jan. 13 Tr. (Ergen) 188:11-190:15.) While his stated reason for such action was that, under those circumstances, he would not have had the personal time to go through the two or three-year process with the FCC to "clean up" LightSquared, an inference can be drawn that the true reason for withdrawal of the LBAC Bid would be that DISH, Mr. Ergen's intended buyer for LightSquared's assets, would not have the capital necessary to complete both transactions.

of LightSquared spectrum. The Ergen July 8 Presentation and the valuation contained therein demonstrate the significant benefit to DISH from acquiring LightSquared's spectrum, with the "Implied Net Supplemental Asset Value" to DISH (which had a midpoint of $2.308 billion) alone coming in above the LBAC Bid amount of $2.2 billion, without even looking at the total aggregate value of the spectrum to DISH, which Mr. Ergen estimated at a value of between $5.174 billion and $8.996 billion. Such an enormous value could not have simply occurred to Mr. Ergen in an epiphany in the days or weeks before making such a detailed presentation to the DISH Board; rather, Mr. Ergen must have perceived the synergistic value reflected in this presentation much earlier, as he monitored the actions of the FCC and the movement of the pieces on the wireless spectrum chessboard, some of which he himself was moving.

In their post-trial brief, SPSO and Mr. Ergen also argue that the evidence does not establish that SPSO's LP Debt purchases were for the benefit of DISH because, as an initial matter, purchasing even one-third of the outstanding debt of the company did not confer on SPSO any rights to acquire the company.[114] As Mr. Ergen himself stated in the Ergen Presentation, however, his "substantial interests in L2 debt and preferred stock compliment [*sic*] any acquisition strategy and could have significant influence in L2's chapter 11 cases."[115] A competitor who obtains a substantial position in the debt of a distressed company and then bids for the assets often has a significant advantage, which dissuades other bidders from participating in any sale process. While Mr. Ergen's substantial near-par purchases of LP Debt in April 2013 are consistent with a plan to obtain a blocking position in order to acquire the underlying company, they are somewhat inconsistent with a personal investment by a typical creditor

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[114] *See* Post-Trial Brief of Defendants SP Special Opportunities, LLC and Charles W. Ergen [Adv. Docket No. 142], p. 34.

[115] PX0867.

seeking to make a profit on distressed debt by buying low and selling high. Indeed, Mr. Ergen's final purchase of LP Debt on April 26, 2013 was made just one week prior to his presentation to the DISH Board on May 2, 2013,[116] and less than three weeks before he made the LBAC Bid. While Mr. Ergen's substantial investment in LP Debt reflects (he says) his confidence in the intrinsic value of LightSquared's spectrum assets, it also reflects his certainty, that, in his capacity as DISH's controlling shareholder and chairman of its board of directors, he could cause DISH to do what he wanted to effect the acquisition of the assets at a price that would return his investment, and possibly make a profit, while also benefiting DISH with valuable spectrum. And the Ergen July 8 Presentation makes clear just how valuable LightSquared spectrum could be for DISH, permitting unusable and impaired uplink AWS-4 spectrum owned by DISH to be converted to downlink and yielding a supplemental value to DISH of $1.833 billion to $3.783 billion. Given the control Mr. Ergen exercised over the DISH Board (as evidenced in particular by his bullying of the Special Committee), it is clear that Mr. Ergen believed that, after making the LBAC Bid, he could and would get DISH to step in as purchaser.[117]

Finally, Mr. Ergen's substantial LP Debt purchases are wholly inconsistent with his investing history. The evidence demonstrates that, before his investment in LightSquared, Mr. Ergen had a history of diversified investing in conservative, low-risk, liquid assets, rather than investing a substantial sum in the distressed debt of a single company. In fact, the evidence reveals that Mr. Ergen had never made a personal investment in distressed debt of anything close

[116] The Court notes the importance of the specific dates on which events occurred in this matter. In his pleadings and at oral argument, Mr. Ergen's broad-brush approach to dates (for example, stating "Spring 2013" instead of "April 26, 2013") clearly is a device to deflect focus on the specific timeline of Mr. Ergen's conduct.

[117] As discussed *supra*, the stated unwillingness of the Special Committee to propose a DISH bid for LightSquared's assets in an amount lower than the LBAC Bid (which bid provided Mr. Ergen with payment in full on his LP Debt) confirms that even the independent members of the DISH Board believed they could not propose a bid lower than Mr. Ergen's.

to the magnitude of his eventual $844 million investment in LightSquared, nor had he ever made a significant personal investment (i) in a competitor of DISH or EchoStar, (ii) in a company considered a strategic investment for either one, or (iii) in any company owning spectrum assets. According to Mr. Ergen, he did not even discuss the almost $1 billion investment with his wife, who was also the co-trustee of the trust that funded the purchases. Mr. Ergen, who testified that, as the chairman of DISH, he focuses "on strategic direction of the company,"[118] was clearly planning for DISH, and the inconsistency of his LightSquared investment with his prior investing history only lends further support to the inference that SPSO's debt purchases were made to pave the way for DISH to acquire control of LightSquared's assets.

C. Breach of the Implied Covenant of Good Faith and Fair Dealing

Based on the foregoing, the Court concludes that the conduct of Mr. Ergen and SPSO, undertaken on behalf of or for the benefit of DISH, was an end-run around the Eligible Assignee provisions of the Credit Agreement that breached the implied covenant of good faith and fair dealing arising under the Credit Agreement.[119] *See Standard Chartered Bank v. AWB (USA) Ltd.*, No. 05 Civ. 2013 (AKH), 2010 WL 532515, at *14 (S.D.N.Y. Feb. 16, 2010). Simply put, that which a corporation is contractually unable to accomplish itself in its own name cannot be accomplished by interposing a shell company. As the court stated in *Standard Chartered*, "[i]t is not a matter of piercing corporate veils. . . . It is a matter of requiring a party to . . . honor the

[118] Jan. 13 Tr. (Ergen) 95:6-9.

[119] While a party is precluded from recovering on both a claim for breach of the implied covenant of good faith and fair dealing and a claim for breach of contract at the same time (*see, e.g., Hard Rock Cafe Int'l, (USA), Inc. v. Hard Rock Hotel Holdings, LLC*, 808 F. Supp. 2d 552, 567 (S.D.N.Y. 2007)), where the meaning of a contact is in doubt, a party may plead breach of the implied covenant of good faith and fair dealing as an alternative theory to its breach of contract claim. *Id.*; *see also Fantozzi v. Axsys Techs., Inc.*, 2008 U.S. Dist. LEXIS 94040 (S.D.N.Y. Nov. 6, 2008) at *21-22. Here, LightSquared has asserted a single claim for recovery in the form of a breach of contract claim, presenting its equitable theory of breach of the implied covenant of good faith and fair dealing in the alternative, which the Court finds permissible.

contract and its covenants and not attempt to defeat assigned rights by interjecting an affiliated company." *Id*.

Under New York law, every contract contains an implied covenant of good faith and fair dealing in the course of performance. *See Empresas Cablevision, S.A.B. de C.V. v. JPMorgan Chase Bank, N.A.*, 680 F. Supp. 2d 625, 631 (S.D.N.Y. 2010), *aff'd in relevant part*, 381 F. App'x 117 (2d Cir. 2010) ("*Empresas*"). That implied covenant is, in spirit "a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" *Id.* (citing *Dalton v. Educational Testing Serv.*, 87 N.Y.2d 384, 389 (1995) (citation omitted)).[120] In *Empresas*, a case in this District, District Judge Rakoff found that conduct technically permissible under a credit agreement may nevertheless give rise to a breach of the implied covenant of good faith and fair dealing if it is intended to achieve a result that is prohibited by the agreement and which would do away with the "fruits" of the contract. *Id.* at 632.

The facts of *Empresas* are straightforward. Empresas Cablevisión ("Cablevisión") borrowed $225 million from JPMorgan Chase ("JPMorgan"). The governing credit agreement restricted JPMorgan's ability to assign the loan to another party without Cablevisión's prior written consent. *Id.* at 627. The credit agreement did allow JPMorgan to sell "participations" in the loan (which it could do without Cablevisión's consent), but only if the relationship between JPMorgan and Cablevisión, as well as JPMorgan's rights and obligations under the credit agreement, remained unchanged. *Id*. In his decision, Judge Rakoff noted that Cablevisión negotiated for and obtained a veto right over assignments in order to protect against the

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120 *See also* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (1981) ("Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified . . . [where the actor evades] the spirit of the bargain . . . ."); *InterDigital Commc'ns Corp. v. Nokia Corp.*, 407 F. Supp. 2d 522, 536 (S.D.N.Y. 2005) (quoting Restatement).

possibility of an "unsuitable party" being given the rights to enforce restrictive covenants or to receive information under the loan. *Id*. at 631.

Subsequently, JPMorgan agreed to assign 90 percent of the loan to Banco Inbursa, S.A. ("Inbursa"), a bank under common ownership with a competitor of Cablevisión.[121] *Id.* at 629. After JPMorgan sought Cablevisión's consent, Cablevisión's counsel replied by letter stating that it would not consent to the proposed assignment because

> . . . it would be inappropriate, and could cause serious harm to our business and our competitive position if one of our major competitors is allowed to gain access to confidential and competitively sensitive information about us, or to exert any control over our business affairs and hinder the development of our business.

The letter also stated that JPMorgan's sale of a participation of 90 percent of the loan to Inbursa (instead of an assignment) would similarly be unacceptable and would violate the "duty of good faith" owed by JPMorgan under the credit agreement. Notwithstanding, JPMorgan proceeded ahead with negotiating a sale of a 90 percent participation in the loan to Inbursa and did not disclose the participation to Cablevisión even after the participation agreement was signed.[122] By selling a participation rather than assigning the loan, JPMorgan avoided the transfer restrictions in the credit agreement that necessitated borrower consent.

When Cablevisión learned of the agreement between JPMorgan and Inbursa, it promptly sought a preliminary injunction preventing JPMorgan from effectuating the transfer. It argued

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[121] Inbursa is a Mexican bank controlled by Carlos Slim Helú and his family, who also held a controlling interest in Telmex, a Mexican communications conglomerate that owned over 80 percent of telephone land lines in Mexico and was seeking to expand into other telecommunications markets at the time of the *Empresas* decision. *Id*. at 627.

[122] The participation agreement also contained numerous non-standard terms, including permitting Inbursa to request and receive nearly unlimited information from Cablevisión and providing that in the event of default by Cablevisión, "the Participation Agreement 'shall be terminated and replaced by an assignment agreement . . . whereupon the Participant shall become a Lender.'" *Id.* at 630. Inbursa also obtained a provision that would have allowed it to declare an event of default and trigger the outright assignment in the event that Cablevisión refused to provide the confidential information requested. *Id*. at 632.

that the participation agreement was, for all relevant purposes, "a disguised but unconsented-to assignment" that breached the credit agreement or that "so subverts the purposes underlying Cablevisión's right to veto assignments of the loan as to breach the covenant of good faith and fair dealing implied by law in the Credit Agreement." *Id.* at 631.

Judge Rakoff enjoined the transfer, finding that JPMorgan violated the implied covenant of good faith and fair dealing by attempting, through the "guise" of a purported participation, to effectuate a prohibited assignment that it could not have implemented directly. *Id.* at 631. While the court observed that JPMorgan's argument that the participation agreement was "technically consistent" with the credit agreement "[s]uperficially . . . may be correct," its actions were nevertheless impermissible because they "effectuated what is in substance a forbidden assignment" that the transfer restrictions were designed to prevent, thus undermining Cablevisión's veto rights under the credit agreement. *Id.* at 631, 633. Had the transfer been allowed, the participation agreement would have given Inbursa the potential to access extensive confidential information about the business, affairs, and financial condition of Cablevisión, all of which Cablevisión desired to keep its competitors from obtaining. *Id*. at 630-631. Thus, the Court granted Cablevisión's request for a preliminary injunction, concluding that "JPMorgan violated, at a minimum, the covenant of good faith and fair dealing automatically implied by law in the credit agreement" and that "[s]uch an end-run, if not a downright sham" was not permissible as it did away with the "fruits" of the contract.[123] *Id*. at 632.

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[123] At closing argument in the Adversary Proceeding, counsel for DISH informed the Court that, on appeal, the Second Circuit subsequently reversed Judge Rakoff's *Empresas* order. (Mar. 17 Tr. (Giuffra) 300:23-303:3 ("The Second Circuit, in a summary order, reversed the injunction, insofar as the participation was not allowed. . .").) This interpretation of the Second Circuit's order is incorrect. As counsel for the Debtors correctly pointed out, the Second Circuit affirmed Judge Rakoff's *Empresas* decision. Because Inbursa and JPMorgan had already completed the transfer of a 90 percent participation interest in the loan, however, the Second Circuit, after affirming Judge Rakoff's order, simply ordered the District Court to review and modify the injunction to require JPMorgan to comply with the implied covenant of good faith and fair dealing by prohibiting, pending a trial to determine whether

(continued...)

Here, as in *Empresas*, in which consent to sell a participation was technically not required by the credit agreement, the Court's finding that SPSO is technically an Eligible Assignee under the Credit Agreement might end the analysis. But, as in *Empresas*, contractual language must be read in context.[124] The context here requires reading the Eligible Assignee provision and the rest of the Credit Agreement in the context of the intent, on the part of LightSquared, to prevent competitors from gaining access to its capital structure. This intent was readily apparent from the face of the Credit Agreement and is overtly evidenced by (i) the language utilized in the definitions of Eligible Assignee and of "Disqualified Company" (which refers to direct competitors of LightSquared) designed to limit ownership of the LP Debt[125] and

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or not damages were owed, the exercise of any right under the participation agreement that might give Inbursa or its affiliates a competitive advantage over Cablevisión. *See* 381 Fed. Appx. 117 (2d Cir. 2010); Mar. 17 Tr. (Leblanc) 350:25-351:20.

124 In this Adversary Proceeding, DISH, LBAC, and SPSO have argued that the Court should look only to the literal terms of the document, without regard to context, when adjudicating the asserted claim for breach of the Credit Agreement. Notably, however, these parties have made the contrary argument in the Debtors' main cases when seeking a declaration that both the PSA and the DISH/LBAC Bid were terminated in their entirety. In arguing that the DISH/LBAC Bid did not remain irrevocable until the earlier of sixty days after entry of the Confirmation Order and February 15, 2014, DISH and LBAC sought to avoid the application of the literal terms of the bid procedures order entered in the Debtors' cases [Bankr. Docket No. 892], which so stated, by relying on context and the parties' intent. *See* Objection of LBAC to the January 13, 2014 Statement of the Ad Hoc Secured Group and Notice of Intent to Proceed with Confirmation of the First Amended Joint Chapter 11 Plan and Motion for Declaratory Relief [Bankr. Docket No. 1232] at 14 ("Examined in its full context . . . , the plain language of the pertinent provision which was added at the Court's request, paragraph (j) of the Bid Procedures [Order], makes clear that this was the extent of LBAC's commitment"), 14-17 (citing to numerous hearing transcripts to demonstrate that "the statements of . . . parties . . . subsequent to the September 30 hearing further clarify all parties' understanding that LBAC's commitment to move forward with the LBAC Bid was governed by the PSA, not the Bid Procedures Order").

125 *See, e.g.*, *Meridian Sunrise Village, LLC v. NB Distressed Debt Investment Fund Limited (In re Meridian Sunrise Village LLC)*, 2014 WL 909219 (holding that, while courts will first look to the face of the document and the plain language of the agreement to determine its meaning, a court may rely on extrinsic evidence even in the absence of ambiguity, and finding that the parties had intentionally limited the term "Eligible Assignees" in the loan agreement at issue in order to exclude assignment to "distressed asset hedge funds who candidly admit they seek to 'obtain outright control' of assets").

(ii) LightSquared's May 9 and May 12, 2012 amendments to the Credit Agreement to add additional LightSquared competitors, including DISH, to the list of Disqualified Companies.[126]

As set forth in detail in paragraphs 32-34, *supra*, pursuant to the Credit Agreement, Eligible Assignees 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[127] and also receive a right to vote on certain material matters, including waivers, exercises of remedies, and other similar matters. The Debtors have appropriately pointed out that one could reasonably expect a competitor to vote differently than a non-competitor lender on material matters concerning LightSquared, and, more significantly, a competitor given access to material non-public information about LightSquared may use it to LightSquared's detriment, given that a competitor may possess a desire to see LightSquared fail. As a result, LightSquared has a legitimate basis for its desire to prohibit competitors from becoming holders of its LP Debt.

The problem is that the Credit Agreement was not crafted sharply enough to achieve that intent. Moreover, the problem was exacerbated by the lack of action by LightSquared in the face

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[126] As Mr. Smith testified at Trial, LightSquared amended the Disqualified Company (pre-bankruptcy) list "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.

[127] *See*, *e.g.*, Credit Agreement § 3.04 (requiring LightSquared to provide several years of financial statements and projections), § 3.05 (listing all real property owned or leased), § 3.06 (listing all intellectual property owned or licensed), § 3.09 (all material agreements relating to LightSquared's business), § 5.01(a) and § 5.01(b) (requiring annual and quarterly updates containing information that would be included on SEC Forms 10-K and 10-Q), § 5.01(h) (annual and quarterly budgets), and § 5.01(j) (a general catchall for information reasonably requested by a Lender). In addition, under Section 5.07 (a), each Lender also has the right to inspect LightSquared's properties and "discuss the affairs, finances accounts and condition" of LightSquared with its officers, employees, accountants and advisors.

of rampant public speculation about the debt purchases.[128] Mr. Ergen found a loophole in the express terms of the Credit Agreement and exploited it. That is not wrong in and of itself. The wrong arises from Mr. Ergen's purchases of the LP Debt, beginning in the spring of 2013, when he intended his "substantial interests" in the debt to complement any acquisition strategy and have "significant influence" in the bankruptcy cases;[129] he intended and preferred that it be DISH that acquired LightSquared debt (and ultimately its spectrum), and he pursued such purchases to preserve valuable options for the benefit of DISH. These purchases violate the spirit of the Credit Agreement, as the harm that LightSquared sought to avoid – a competitor entering its capital structure and acting against its interests – has now come to pass. Mr. Ergen's use of SPSO to evade the terms of the Credit Agreement that prevented him and DISH from buying the LP Debt thus deprived LightSquared of the fruits of the Credit Agreement's restrictions.

While technically permitted to buy LP Debt, SPSO was essentially a front used by Mr. Ergen to implement his strategy for the benefit of DISH**,** a forbidden Lender under the Credit Agreement. That SPSO's acquisition strategy was formulated specifically to achieve an end-run around the restrictions in the Credit Agreement is amply supported by the record. The Court thus concludes that, at least as of mid-April 2013, during the period in which SPSO acquired an additional $320 million of LP Debt, Mr. Ergen, through SPSO, was not acting on his own behalf to acquire LP Debt as a personal investment; rather, he was acting to acquire a strategic advantage which he knew he would have to tender to the DISH Board to give DISH the option of

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[128] SPSO focuses on the notable distinction between the facts of *Empresas* and the Adversary Proceeding on this point. In *Empresas*, Cablevisión actively opposed Inbursa's use of a participation structure to circumvent the assignment restrictions. *See Empresas*, 680 F. Supp. 2d at 628. Here, the evidence demonstrates that Plaintiffs were aware as early as May 2012 that there was at least some possibility that Mr. Ergen was behind SPSO's debt purchases. Yet, as SPSO continued to acquire additional LP Debt, Plaintiffs did not act in any way to seek to prohibit SPSO from making such purchases. As will be discussed more fully *infra*, for this reason, the Court declines to award damages to Plaintiffs.

[129] *See* PX0867 (Ergen Presentation).

making a bid LightSquared's spectrum assets, assets which were clearly attractive to DISH, whether or not DISH consummated a transaction with Sprint.[130]

The record also supports the conclusion that Mr. Ergen's strategy was deployed on behalf of DISH as early as October 2012, when he told Mr. Kiser, "[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." Simply put, had he then been advised that DISH was permitted to buy the LP Debt, Mr. Ergen's words reflect his preference that DISH (not SPSO) buy the debt. But having identified a roadblock in the Credit Agreement, Mr. Ergen simply created a special purpose vehicle, drove around the roadblock, and took an alternate route to his destination.

Nor can it be seriously maintained that Mr. Ergen did not personally direct and indeed control virtually every aspect of the process leading to the formulation of the LBAC Bid and its ultimate pursuit by DISH. From his stunning lack of candor with the DISH Board and management to the stonewalling and disbanding of the Special Committee, the message is loud and clear: no one crosses or even questions the actions of the Chairman. Charles Ergen is, in every sense, the controlling shareholder of DISH and wields that control as he sees fit. His acquisition through SPSO of the LP Debt violated the covenant of good faith and fair dealing automatically implied by law in the Credit Agreement.[131]

Indeed, the extent to which DISH itself believed an end-run around the terms of the Credit Agreement was perfectly acceptable was made crystal clear during closing arguments.

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130 *See* Ergen Presentation (stating that Mr. 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."); *see also* Ergen July 8 Presentation.

131 Because the Court has declined to hold any of the Defendants liable for breach of the express terms of the Credit Agreement, it is not necessary to address the parties' myriad arguments regarding the applicability of the doctrines of agency, imputation, ratification, and alter ego.

When asked by the Court if an affiliate of DISH could have purchased LP Debt without running afoul of the Credit Agreement, counsel for DISH agreed, "based on the words of the contract."[132] After a further hypothetical situation was posed to counsel – if SPSO hypothetically had a side agreement with DISH that DISH would guarantee the return of Mr. Ergen's capital on his investment of LP Debt – counsel responded that he still believed that SPSO would not have breached the Credit Agreement under such a scenario, even if SPSO was hedged with a Disqualified Company such as DISH.[133] DISH's view, in other words, is that if the Credit Agreement does not explicitly prohibit a particular transfer by its express terms, any contrivance or subterfuge to avoid running afoul of those express terms is a-ok. This cannot be correct.

Finally, Defendants' attempts to distinguish *Empresas* are unavailing. They argue that *Empresas* is entirely different from this case because, in *Empresas*, JPMorgan *colluded* with Inbursa to alter fundamentally the agreement between Cablevisión and JPMorgan, and Inbursa actively bargained for non-standard provisions in the participation agreement with JPMorgan, both facts which are not present here.[134] Regardless of whether collusion occurred here or not (and there have been no allegations that Mr. Ergen in fact colluded with any Lenders from whom he purchased LP Debt), and notwithstanding the fact that SPSO's LP Debt purchases were made under standard terms, the violation of the spirit of the Credit Agreement in each case remains the same. Having been informed more than once that DISH and EchoStar could not purchase the LP

[132] Mar. 17 Tr. (Giuffra) 293:14-21. Counsel further added that "there is a definition of affiliate in this contract, which does what they want it to do, which would have picked up SPSO, which would have picked up Mr. Ergen. And that's not what it says in the transfer provision." *Id.* at 300:8-11.

[133] *See* Mar. 17 Tr. (Giuffra) 313:17-315:1 ("Your Honor, it's because the contract wasn't drafted with a broad transfer restriction. . . . I think we still win.").

[134] Defendants also argue that the legal analysis in *Empresas* is distinguishable based on the procedural posture of the case. This argument lacks merit because the legal analysis concerning the parties' good faith and fair dealing or lack thereof remains unchanged, whether evaluated in the context of a preliminary injunction or, as here, in the liability phase.

Debt under the express terms of the Credit Agreement, Mr. Ergen sought to do indirectly what he knew was not permitted directly. As in *Empresas*, although the LP Debt purchases by SPSO may have appeared "superficially" permissible, those purchases (which, by April 2013, were made essentially for DISH in contemplation of a potential DISH acquisition) were intended to circumvent the Credit Agreement's restrictions on transfers to DISH. Contrary to Defendants' assertions, the restrictions on competitors becoming Lenders were bargained for by LightSquared in the same way that Cablevisión bargained for the right to veto assignees but neglected to include in such provision the right to veto parties purchasing participations.

SPSO must be held accountable for its conduct, in context. Mr. Ergen's multiple hats – personal, SPSO, LBAC, DISH – cannot be selectively deployed to disguise SPSO or insulate SPSO from responsibility for its actions in using a "guise" to achieve an "end run" around the substance of the Eligible Assignee restrictions in the Credit Agreement and undercut what Mr. Ergen certainly knew the restrictions were designed to prevent. *See Empresas*, 680 F. Supp. 2d 625.

IV. The SPSO Claim Shall Not Be Disallowed

A. The SPSO Claim is Not Void or Voidable Even Though the Court Finds an Implied Breach and Even if the Court Were to Have Found an Express Breach

Section 502 of the Bankruptcy Code provides that a properly filed proof of claim is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a). Various other subsections of section 502 set forth the grounds for disallowing a claim, including section 502(b)(1), which authorizes disallowance because the claim is unenforceable under any agreement or applicable law. Section 502(b) provides: "[T]he court . . . shall allow such claim in such amount, except to the extent that (1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law . . . ." 11 U.S.C. § 502(b).

SPSO maintains that, even if it was not an Eligible Assignee, the SPSO Claim would *still* be enforceable against the LightSquared LP estate, as nothing in the Credit Agreement treats transfers as void or voidable even if they are made in violation of the transfer restrictions. The Court concludes that SPSO is correct on this point. Even if the Court had found that SPSO breached the express terms of the Credit Agreement and was not an Eligible Assignee, the plain language of the Credit Agreement does not support disallowance of the SPSO Claim.

Plaintiffs argue that the Credit Agreement provides that a transferee who is not an Eligible Assignee acquires no rights under the Credit Agreement, and, therefore, such transferee cannot assert a claim against the company with respect to any purchase of LP Debt. Accordingly, they argue, any claim of SPSO based on the Credit Agreement must be disallowed. In support of this argument, Plaintiffs rely on Section 10.04(a) of the Credit Agreement, which provides that

> Nothing in this Agreement, express 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 Indemnities) any legal or equitable right, remedy or claim under or by reason of this Agreement.

Credit Agreement § 10.04(a).

As Mr. Ergen and SPSO point out, however, Plaintiffs fail to mention other relevant provisions of the Credit Agreement which provide that any breach by any Lender or participant[135] of the transfer restrictions under the Credit Agreement does not excuse

[135] Section 10.04(b) of the Credit Agreement provides that "[a]ny assignment or transfer by a Lender of rights or obligations under [the Credit] Agreement that does not comply with this paragraph 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)." Credit Agreement § 10.04(b). Thus, even if an assignment by a Lender is invalid, it would be treated as a sale of a participation, and, pursuant to Section 10.04(d), a breach by a participant still does not excuse performance by LightSquared.

performance by LightSquared. Specifically, Section 10.04(d) of the Credit Agreement provides, in pertinent part, 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.

Credit Agreement § 10.04(d). Contrary to Plaintiffs' argument, Section 10.04(d) of the Agreement makes clear that neither a breach of the express terms of the Credit Agreement nor a breach of the implied covenant of good faith and fair dealing renders wrongfully transferred debt claims unenforceable against LightSquared and therefore disallowable. SPSO also points out that similar language has been found insufficient to invalidate transfers. *See LCE Lux HoldCo S.a.r.l. v. Entretenimiento GM de Mexico S.A. de C.V.*, 287 F.R.D. 230, 235 (S.D.N.Y. 2012).[136]

Under any circumstances, even in the case of an express breach, in order for a claim to be disallowable, the contract must expressly provide that any breach of the contract, such as an assignment in violation of the agreement, shall render the assignment wholly void or invalid. *See In re 785 Partners LLC*, 2012 WL 401497 at *3 (Bankr. S.D.N.Y. Feb. 7, 2012) (citing *Pravin Banker Assocs., Ltd. V. Banco Popular Del Peru*, 109 F.3d 850, 856 (2d Cir. 1997)) (assignment of a loan is valid, rendering the assignee "a secured creditor and party in interest" in

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[136] In *LCE Lux HoldCo S.a.r.l. v. Entretenimiento GM de Mexico S.A. de C.V.*, the agreement at issue contained a provision prohibiting assignment without consent, specifically stating that "[n]either party may assign any of its right under the Agreement without the prior written consent of the other parties, which will not be unreasonably withheld." The agreement went on to provide that "[s]ubject to the preceding sentence, this Agreement will apply . . . to give any Person other than the parties to this Agreement any legal or equitable right, remedy, or claim under or with respect to this Agreement or any provision of this Agreement." 287 F.R.D. at 235. The defendant argued that the only way to give meaning to the phrase "subject to the preceding sentence" was to read the second sentence to mean that the benefits of the agreement inured only to permitted assigns, thus rendering an assignment in violation of the agreement void. The court found that the agreement did "not contain the typical 'talismanic' language that renders an assignment void," and that, given the ambiguities in the phrasing of the agreement on this point, was unwilling to void the assignment at issue. *Id.* at 235-36 (stating that "assignments made in contravention of a prohibition clause in a contract are void if the contract contains clear, definite, and appropriate language declaring the invalidity of such assignments") (citation omitted).

the bankruptcy, even if the assignee did not meet the definition of an Eligible Lender, where the contract lacked language invalidating an improper assignment)); *see also See Purchase Partners, LLC v. Carver Fed. Sav. Bank*, 914 F. Supp. 2d 480, 505 (S.D.N.Y. 2012) (contractual provisions prohibiting assignments are not enforceable except where "the relevant provision of the contract contains 'clear, definite, and appropriate' language declaring an assignment invalid") (quoting *Sullivan v. Int'l Fid. Ins. Co.*, 96 A.D.2d 555, 556 (2d Dep't 1983)); *In re Britton*, 288 B.R. 170, 173 (Bankr. N.D.N.Y. 2002) (quoting *Pravin Banker Assocs. Ltd. v. Banco Popular Del Peru*, 109 F.3d at 856) (finding that under New York law, "to preclude the power to assign, or cause an assignment violative of contractual provisions to be wholly void, [a contractual] clause must contain express provisions that any assignment shall be void or invalid if not made in a certain specified way").

Here, the Credit Agreement does not contain clear language voiding an assignment to a party that is not an Eligible Assignee or invalidating a claim by such party relating to the Credit Agreement; thus, even if the Court had found that SPSO is not an Eligible Assignee under the express terms of the Credit Agreement, the SPSO Claim would not be void or voidable.

B. The Inaction and Delay of LightSquared and Harbinger Preclude the Award of Affirmative Damages

Beginning in May 2012, LightSquared and Harbinger knew or had strong reason to believe that Mr. Ergen was purchasing LP Debt. Substantial documentary evidence in the record reflects that, at a minimum, beginning with the sale of Carl Icahn's $247 million LP Debt position to a Sound Point client on May 4, 2012, which was reported in the press,[137] the Debtors and Mr. Falcone harbored serious suspicions that Mr. Ergen had entered LightSquared's capital

137 *See*, *e.g.*, DX396 (May 10, 2012, *Wall Street Journal* blog, "Deal Journal," entry titled "Ergen Builds Cash Pile Amid LightSquared Restructuring Talks").

structure. For example, on May 5, 2012, Mr. Falcone responded to an email from a LightSquared creditor, writing "[m]aybe we shouldn't file if [Ergen] is circling the wagons. Though I think [it] is a positive. May bring in another strategic." (DX035 (Falcone to Ara Cohen of Knighthead); *see also* DX040 (May 7, 2012, Marc Montagner of LightSquared to Stan Holtz of Moelis: "Ketchum, with his 175MM fund, bought 350 of the debt on Friday. He is probably a front for Charlie Ergen."); DX382 (May 8, 2012, Falcone to Ara Cohen: "I can understand why u guys balked; Charlie will definitely give u guys 25% and an independent board and your full claim.").) Sarcasm aside, Mr. Falcone's surmise that the buyer of LP Debt was Mr. Ergen was also set forth in a number of emails he sent to members of the press. *See* DX037 (May 6, 2012, Falcone to Matthew Goldstein of *Reuters*: "Ergen. Will prompt more strategics to step in."); DX386 (May 16, 2012, Falcone to Greg Bensinger of *The Wall Street Journal*: "Carlos Slim apparently [is] involved with Ergen" as purchasers of LP Debt, and, after questions from Mr. Bensinger, adding that "He clearly wants the spectrum and the satellites. Let me know before I tell someone else if u are going to write anything.").) After sending these emails, Mr. Falcone testified, he understood that *The Wall Street Journal* may write an article based on the information provided.[138]

LightSquared and Harbinger attempt to explain such email correspondence as either idle banter, or, with respect to the media, as a "fishing expedition" to prod for information on the identity of the buyer. When asked at Trial about his emails to Mr. Bensinger of *The Wall Street Journal* about Mr. Ergen and Carlos Slim, Mr. Falcone explained that he was "trying to get [Bensinger] to get information for me to confirm, because, before he does anything, he's got to

[138] *See* Jan. 16 Tr. (Falcone) 54:15-22, 108:25-109:4.

go out and corroborate."[139] Other emails touting Mr. Ergen as a purchaser were, according to Mr. Falcone, sent either (i) to fish for information or (ii) in the hope that Mr. Ergen's presence would get other competitors interested in LightSquared as strategic investors. For example, on October 4, 2012, Mr. Falcone emailed Omar Jaffrey, a banker,[140] telling him "[y]ou may want to circle up w[ith] your contact at AT&T and let him know Ergen continues to buy bonds." (DX0388.) At Trial, Mr. Falcone explained that, in sending this email, he was fishing for information to "corroborate what [he] believed," and he was also hoping Mr. Jaffrey could "get AT&T involved" because LightSquared was looking for strategic investors at the time.[141] As Mr. Falcone testified, 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."[142]

None of these emails reflects alarm on the part of Mr. Falcone or LightSquared that a competitor who might act against LightSquared's interests had likely entered its capital structure or that the uncertain identity of such party was troubling to them. Quite the contrary, the correspondence in evidence reveals that Mr. Falcone conveniently used his suspicions of Mr. Ergen's trading in LP Debt as an item to publicize in order to drum up possible interest in

[139] Jan. 16 Tr. (Falcone) 109:6-8. When asked at Trial about why he exchanged emails with reporters, Mr. Falcone testified that "[s]ometimes they have good information," as he was trying to find out who was buying LightSquared debt. *Id.* at 36:9-16.

[140] Mr. Jaffrey is now a principal of Melody Capital Partners, one of the sponsors of the Debtors' Third Amended Joint Plan of Reorganization.

[141] Jan. 16 Tr. (Falcone) 56:17-57:5. On May 8, 2012, Mr. Falcone had sent a similar email to Gil Ha, a banker at Greenhill & Co., who had a relationship with AT&T, stating "Ergen now involved in LS." DX043. Mr. Falcone testified that he sent this email to both (i) fish for intelligence as to who had purchased Mr. Icahn's position and (ii) see if AT&T, after viewing Mr. Ergen's investment as validation, would possibly be interested in investing in LightSquared. *Id.* at 41:17-42:9; 118:21-119:14.

[142] Jan. 16 Tr. (Falcone) 35:3-10. Other emails admitted into evidence show that Mr. Falcone had also contacted DISH directly in what appears to have been an attempt to goad them into corroborating that Mr. Ergen was purchasing LP Debt. *See* DX0378 (May 7, 2012, Falcone to Thomas Cullen of DISH, "Good purchase."); DX097 (December 18, 2012, Falcone to Thomas Cullen of DISH: "Tom, we should talk. I know you guys are buying the bonds through Sound Point. One of his guys has been talking.").

LightSquared from strategic investors, some of whom were themselves LightSquared competitors. And, as the trading price of LP Debt increased from 48 cents on the dollar in April 2012 to 96 cents on the dollar in April 2013, Mr. Falcone seemed even less inclined to complain about the allegedly harmful presence of a competitor in the capital structure. Even as late as March 28, 2013, Mr. Falcone and Drew McKnight of Fortress both expressed in an email exchange their views that it was beneficial that a potential strategic investor, Mr. Ergen, was also buying LP Preferred Interests in addition to LP Debt.[143] Mr. Falcone explained at Trial that he considered this a validation of spectrum value, and, in addition, as stated in the email exchange, he felt that Mr. Ergen's LP Debt acquisition could help to "blow up" the Ad Hoc Secured Group unless Mr. Ergen joined them.[144] While, at Trial, he denied that he knew the details of the Exclusivity Stipulation (which required the Debtors to start preparatory work on a sale process on June 3, 2013 and to commence a formal sale process on July 15, 2013 upon the termination of exclusivity, if the Ad Hoc Secured Group still remained the largest group of holders of LP Debt and no consensual deal between the parties had been achieved), Mr. Falcone admitted that he understood that such requirement would fall away if Mr. Ergen became the largest holder of LP Debt.

At Trial, Mr. Falcone maintained that, depending on the day and the information he received, his belief changed as to who was behind Sound Point's purchases. For example, when asked if, on May 9, 2012, he still believed that it was Mr. Ergen buying the LP Debt, he answered that "I don't know if it was the Carlos Slim and Charlie Ergen day, but it could have

143 DX0395 (McKnight to Falcone: ". . . at end of day really need a strategic involved here to maximize value and I think you're getting it. Pretty huge for them to pay up on preferred. Think it's a positive all around." Falcone reply: "I do too.")

144 Jan. 16 Tr. (Falcone) 141:11-143:17.

been one or the other." (Jan. 16 Tr. (Falcone) 115:4-5; *see also id.* at 58:4-11 ("I just didn't know. You know, depending on – at this point in time what minute of the day it was, I had believed, on one hand, it could be AT&T, and then six minutes later I changed my mind, I think it's Ergen.").) The contention that Mr. Falcone and LightSquared were unsure whether the purchaser of the LP Debt was related to DISH, rather than Carlos Slim (the owner of one of the largest telecommunications empires in the world) or Cablevision (one of the largest cable providers in the United States and a Disqualified Company) – all competitors of LightSquared – suggests that LightSquared was not overly concerned about the presence of any these parties in its capital structure. In fact, the addition of DISH to the Credit Agreement's list of Disqualified Companies on May 9, 2012, appears to have been pursued by Mr. Falcone at least partially in spite in order to trap Mr. Ergen in a minority position in the LP Debt after he had acquired Mr. Icahn's position. On May 6, 2012, after learning of the purchase of Mr. Icahn's $247 million position in the LP Debt, Mr. Falcone wrote to Ara Cohen of Knighthead, "Well I'm working on giving [Ergen] a nice surprise" by adding DISH to the list of Disqualified Companies. (DX038).

Despite the significant amount of documentary evidence indicating that they knew or should have known, LightSquared and Harbinger maintain that it was not until May 21, 2013 that they first received confirmation that Mr. Ergen was the party behind SPSO's purchases of LP Debt.[145] They argue that, prior to being informed by SPSO's counsel on May 21, 2013, public information provided them with no certainty as to who was behind SPSO's purchases. They emphasize the widespread speculation in the media and that news reports, blogs, and

[145] As support for this assertion, LightSquared and Harbinger point to emails exchanged between Mr. Falcone and representatives and advisors for Harbinger and LightSquared on May 21, 2013, when they purportedly did not yet know the identity of Sound Point's client. In those emails, Falcone stated 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 the email from counsel confirming Ergen was in fact the ultimate buyer of Sound Point's LP Debt purchases, Falcone responded "[f]ortunately, I'm not a betting man." (Jan. 16 Tr. (Falcone) 73:19-74:9; PX0537.)

rumors at various times pointed to Carlos Slim, the Dolan Family, or Mr. Ergen as the purchaser.[146] Moreover, LightSquared and Harbinger maintain that they made diligent efforts to determine who was behind Sound Point's purchases of LP Debt, pointing to, among other things, voicemails left by Mr. Montagner for Mr. Ketchum; efforts by Moelis to obtain information from Mr. Ketchum and from Willkie Farr;[147] their attempts through UBS; and Mr. Falcone's efforts to reach out to "people on the street" such as reporters, Mr. Cullen, and representatives of AT&T and Sprint.[148]

Notwithstanding the fact that, beginning in May 2012, there was a long history of speculation in the press but no definitive confirmation that Mr. Ergen was the purchaser,[149] it is clear from the totality of the evidence that, for nearly a year, LightSquared knew or had reason to believe that Mr. Ergen was behind SPSO. Despite LightSquared's protestations that it attempted to ascertain the identity of the purchaser (and the efforts to which it points), the fact remains that

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[146] *See, e.g.*, PX0095 (May 4, 2012, trader at Harbinger to Falcone: "[Ketchum] is the guy running South Point. An old article, but looks like the guy has close ties with the Dolan family."); PX149 (May 10, 2012, email from Harbinger employee to 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."); PX0304 (July 9, 2012, *Forbes* article noting that "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."); DX045 (May 9, 2012, *LCD News* story headlined "LightSquared [Term Loan] trades north of 70 as Ergen enters the picture.").

[147] Mr. Hootnick testified at Trial that Moelis called "Mr. Ketchum regularly and [met] with him regularly, and . . . continu[ed] 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 its investors or intentions. (Jan. 17 Tr. (Hootnick) 23:13-24; Jan. 15 Tr. (Ketchum) 88:22-89:22; PX0443.) 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. Mr. Hootnick also reached out to Rachel Strickland of Willkie Farr, who had represented 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, Mr. Ergen's counsel would not confirm whether he was involved. (Jan. 17 Tr. (Hootnick) 20:22-21:3.)

[148] Jan. 16 Tr. (Falcone) 22:1-11.

[149] Indeed, 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.)

LightSquared, a chapter 11 debtor, did nothing to seek to obtain that information through the many tools available to it, including Bankruptcy Rule 2004, or to seek any relief from this Court with respect to the debt purchases by SPSO, which 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 (i) in its search for strategic investors and (ii) in terms of the implication of Mr. Ergen's holdings on the requirements set forth in the Exclusivity Stipulation. Regardless of LightSquared's ultimate view, what is clear that 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: (i) conduct giving rise to the situation complained of, (ii) delay by the plaintiff in asserting a claim despite the opportunity to do so, (iii) lack of knowledge on the defendant's part that a claim would be asserted, and (iv) injury or prejudice to the defendant if relief is granted to the plaintiff. *Caldor Corp. v. S Plaza Assocs. (In re Caldor Inc.)*, 217 B.R. 121, 134 (Bankr. S.D.N.Y. 1998) (citations omitted). To equitably estop a plaintiff from asserting its claims, a defendant must demonstrate that the plaintiff (i) made a false representation or concealed material facts, (ii) intended that such conduct would be acted upon by the defendant, and (iii) had knowledge of the true facts. *Id.* (citations omitted). In their answer to the LightSquared Complaint,[150] SPSO and Mr. Ergen raise each of these equitable doctrines (and others) as defenses barring any recovery against them.

150 Adv. Docket No. 102.

The Court finds that, while all of the elements of the doctrines of laches or equitable estoppel may not have been met, sufficient elements of each doctrine have been satisfied to preclude 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 LP Debt and, once confirmed, they failed to take any action to prevent Mr. Ergen from closing trade after trade, instead delaying in filing suit until after Mr. Ergen had acquired $844 million in LP Debt and had made a bid for LightSquared's assets. Meanwhile, for over one year, SPSO had purchased its LP Debt and, other than in connection with the bundled March 28, 2013 trade, never heard a peep of protest from LightSquared. As far as SPSO could reasonably conclude, the Debtors appeared to have no concern about SPSO's status as a 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.[151]

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[151] The conduct of LightSquared and Harbinger upon learning of SPSO's LP Debt purchases, however, has no effect on whether or not the conduct of Mr. Ergen and SPSO in acquiring the LP Debt satisfies the first and seond prongs of the *Mobile Steel* test for equitable subordination of SPSO's claim – whether SPSO and Mr. Ergen engaged in "inequitable conduct" and whether such conduct harmed innocent creditors. Subject to limited exceptions, "[c]ourts generally have not applied common law equitable defenses to causes of action created under Chapter 5 of the Bankruptcy Code." *In re Auto. Professionals, Inc.*, 398 B.R. 256, 262 (Bankr. N.D. Ill. 2008). With respect to "equitable subordination, [the test] focuses only on the actions of guilty creditors and the resulting impact on innocent creditors." *Id.* at 260. "Inequitable conduct by the debtor is noticeably absent from the list of relevant considerations." *Id.* Thus, consideration of the debtor's conduct, as opposed to the guilty creditor, and allowing the unclean hands defense "would be inconsistent with the traditional test for equitable subordination, the substantial case law allowing subordination despite debtors' participation in wrongdoing, and the purpose of equitable subordination. *Id.*; *accord In re Applied Theory Corp.*, 345 B.R. 56, 59 (S.D.N.Y. 2006) ("The purpose of equitable subordination is to undo wrongdoing by an individual creditor in the interest of the other creditors."), *aff'd*, 493 F.3d 82 (2d Cir. 2007).

V. SPSO's Claim Shall 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 claim 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 the SPSO 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 broad equitable powers and have the ability to invoke equitable principles to achieve fairness and justice in the reorganization process. *See Momentum Mfg. Corp. v. Employee Creditors Comm. (In re Momentum Mfg. Corp.)*, 25 F.3d 1132, 1136 (2d Cir. 1994); 11 U.S.C. § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title"); *see also Law v. Siegel*, 134 S. Ct. 1188, 1195 (2014) (a bankruptcy court has statutory authority to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code (quoting 11 U.S.C. § 105(a)), but the bankruptcy court's equitable powers, including the power to impose sanctions, must be "exercised within the confines of the Bankruptcy Code" (internal quotations and citations omitted)). The doctrine of equitable subordination, codified in section 510(c) of the Bankruptcy Code, is one such equitable power that a 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 a 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 Corp.*, 277 B.R. 520, 563 (S.D.N.Y. 2002) (Gerber, J.) ("*Adler*") (citing *80 Nassau Assocs. v. Crossland Fed. Sav. Bank (In re 80 Nassau Assocs.)*, 169 B.R. 837 (Bankr. S.D.N.Y. 1994) (Bernstein, C.J.) ("*80 Nassau Assocs.*")); *In re Enron Corp.*, 333 B.R. 205, 221 (Bankr. S.D.N.Y. 2005) (Gonzalez, J.) ("*In re Enron*") ("a bankruptcy court can subordinate any claim held by a creditor found to have engaged in inequitable conduct to achieve a 'just' result for the debtor's estate"). First articulated in the seminal case of *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 Mobile Steel Corp.)*, 563 F. 2d 692 (5th Cir. 1977) ("*Mobile Steel*"), and has since been adopted by Courts in the Southern District of New York. *See 80 Nassau Assocs.*, 277 B.R. at 563; *Adler*, 277 B.R. at 564; *In re Enron*, 333 B.R. at 217; *ABF Capital Mgmt. v. Kidder, Peabody & Co. (In re Granite Partners)*, 210 B.R. 508, 514 (Bankr. S.D.N.Y. 1997) (Bernstein, C.J.) ("*Granite Partners*"). As such, in order for this Court to exercise its power of equitable subordination, three conditions must be satisfied: (i) "[t]he claimant must have engaged in some type of inequitable conduct;" (ii) "[t]he misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant;" and (iii) "[e]quitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Act." *Mobile Steel*, 563 F.2d at 700; *80 Nassau Assocs.*, 277 B.R. at 563; *Granite Partners*, 210 B.R. at 514.[152]

In determining whether these three conditions are satisfied, *Mobile Steel* instructs the Court to be mindful of three principles. First, inequitable conduct directed against the debtor or its creditors may be sufficient to warrant subordination of a claim irrespective of whether it was related to the acquisition or assertion of that claim.[153] *Mobile Steel*, 563 B.R. at 700-01; *see also Citicorp Venture Capital Ltd. v. Comm. of Creditors Holding Unsecured Claims*, 323 F.3d 228, 234 (3d Cir. 2003), *cert. denied*, 540 U.S. 825 (2003). ("*Papercraft*")[154] ("The inequitable conduct may arise out of any unfair act by the creditor as long as the conduct affects the bankruptcy results of other creditors"). Second, a claim or claims 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. *Id*. And third, an objection resting on equitable grounds must contain some substantial factual basis to support its allegation of impropriety. *Id*.

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[152] Although the second prong of the *Mobile Steel* test is stated in the disjunctive, the better view (and the one followed by courts in this District) is that injury must be shown; and "unfair" advantage to the claimant, in the absence of injury to creditors, is not sufficient. *See Nisselson v. Softbank AM Corp. (In re MarketXT Holdings Corp.)*, 361 B.R. 369, 388 (Bankr. S.D.N.Y. 2007) (Gropper, J.); *see also In re Mr. R's Prepared Foods, Inc.* 251 B.R. 24, 29 (Bankr. D. Ct. 2000) ("In the [Second Circuit], the second requirement for equitable subordination involves a conjunctive test, requiring a showing of both unfair advantage to one creditor and harm to the debtor or its other creditors." (citing *Cosoff v. Rodman (In re W.T. Grant Co.)*, 699 F.2d 599, 611 (2d Cir. 1983) (grammatical changes in original)); *In re Vermont Electric Generation & Transmission Cooperative, Inc. v. Rural Utility Serv., U.S. Dep't of Agric.*, 240 B.R. 476, 485 (Bankr. D. Vt. 1999).

[153] This Decision reflects a disposition of the Complaints asserted by the Debtors and Harbinger in the Adversary Proceeding; SPSO's conduct in these cases which is unrelated to claim acquisition is the subject of objections asserted in connection with the Debtors' Third Amended Joint Plan of Reorganization.

[154] For ease of comprehension and unless otherwise noted, all references to *Papercraft* are to the Third Circuit's opinion, 323 F.3d 228 (3d Cir. 2003), *cert. denied*, 540 U.S. 825 (2003).

1. Mobile Steel Prong I: Inequitable Conduct

Prong I of the *Mobile Steel* tests 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 Assocs.*, inequitable conduct means, among other things,

> a secret or open fraud, lack of faith or guardianship by a fiduciary; an unjust enrichment, not enrichment by bon 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."

169 B.R. at 837 (quoting *In re Tampa Chain Co.*, 53 B.R. 772, 779 (Bankr. S.D.N.Y. 1985)) (other citations omitted); *In re Lois/USA, Inc.*, 264 B.R. 69, 134 (Bankr. S.D.N.Y. 2001) (Gerber, J.) ("*Lois/USA*"); *Adler*, 277 B.R. at 663-564. 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 "non-insiders," though the circumstances warranting equitable subordination of a non-insider's claim arise less frequently because the opportunities for abuses triggering equitable subordination tend to be more readily available to insiders. *See Lois/USA*, 264 B.R. at 134 (citing *80 Nassau Assocs.*, 169 B.R. at 838) (other citations omitted).

In order to identify the precise type of conduct supporting equitable subordination of a non-insider's claim, some courts have applied a heightened standard of wrongdoing, the majority requiring conduct that is "gross and egregious." *80 Nassau Assocs.*, 169 B.R. at 838 (citing *Waslow v. MNC Commercial Corp. (In re M. Paolella & Sons, Inc.)*, 161 B.R. 107, 119 (E.D. Pa. 1993)); *Bank of New Richmond v. Production Credit Ass'n (In re Osborne)*, 42 B.R. 988, 997 (W.D. Wisc. 1984). However, courts in this District have held that there is no different or heightened standard by which to judge a non-insider's conduct, though there may be fewer traditional grounds available because neither undercapitalization nor breach of fiduciary duty applies to the conduct of a non-insider. *See 80 Nassau Assocs.*, 169 B.R. at 839. Unless the non-insider has dominated or controlled the debtor to gain an unfair advantage, the type of inequitable conduct that justifies subordination of a non-insider's claim is "breach of an existing, legally recognized duty arising under contract, tort or other area of the law." *Id.* at 838; *accord Lois/USA*, 264 B.R. at 136; *In re Monahan Ford Corp. of Flushing*, 340 B.R. 1, 44 (Bankr. E.D.N.Y. 2006).

In commercial cases, the proponent of equitable subordination must demonstrate, for example, "a substantial breach of contract and advantage-taking by the creditor." *80 Nassau Assocs.*, 169 B.R. at 838 (citations omitted); *accord Lois/USA*, 264 B.R. at 136. Where a proponent is able to establish inequitable conduct in connection with contractual obligations, courts have granted equitable subordination. *See Developmental Specialists, Inc. v. Hamilton Bank, N.A. (In re Model Imperial, Inc.*), 250 B.R. 776, 804-05 (Bankr. S.D. Fl. 2000) (holding that 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 Assocs.*, 169 B.R. at 838 (citations omitted); *accord Lois/USA*, 264 B.R. at 136. A violation of the implied covenant of good faith and fair dealing may provide grounds for equitable subordination. *See Lois/USA*, 264 B.R. at 136 & n.167 (declining to make a substantive determination with respect to the extent to which a claim for violation of the implied 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 In re Enron*, 333 B.R. at 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 sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate") (quoting *Pepper v. Litton*, 308 U.S. at 305) (grammatical changes in original)). Accordingly, creditor misconduct in connection with the chapter 11 process itself – irrespective of applicable non-bankruptcy law – provides an appropriate predicate for equitable subordination of such creditor's claim.

2. Mobile Steel Prong II: 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. *Mobile Steel*, 563 F.2d at 700-01; *In re Vargas Enterprises, Inc.* 440 B.R. 224, 240 (S.D.N.Y. 2010) (Sullivan, J.). For a creditor to have achieved an unfair advantage as required under the *Mobile 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 the claim. *See 9281 Shore Road Owners Corp. v. Seminole Realty Co.*, 187 B.R. 837, 853-854 (E.D.N.Y. 1995); *see also Nisselson v. Softbank AM Corp. (In re MarketXT Holdings Corp.)*, 361 B.R. 369, 388 (Bankr. S.D.N.Y. 2007) (Gropper, J.) (denying non-insider creditor's motion to dismiss, finding that the complaint raised core equitable subordination issues that were sufficient to state a claim under the *Mobile Steel* test that the creditor "engaged in (x) some type of inequitable conduct that (y) resulted in injury to other creditors *and* an unfair advantage to itself" (emphasis added)).

Equitable subordination requires that a party prove unfair advantage and injury to creditors because subordination is a remedial measure designed to offset the harm resulting from the inequitable conduct; it is not penal in nature. *See Mobile Steel*, 563 F.2d at 700 ("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 the 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 a 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 Corp. v. Citicorp Venture Capital, Ltd.*, Civil Action No. 00-2180, 2002 WL 34702177 at *3 (W.D. Pa. Feb. 20, 2002). While the harm and amount of injury should be based upon the supportive evidence of the record, *id*., the remedy of equitable subordination should remain flexible to deal with the inequitable conduct at issue. As the court noted in *In re Teltronics Servs., 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, 172 (Bankr. 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. The purpose of equitable subordination is to protect creditors against unfairness and to restore creditors to the position that they would have been in if the misconduct did not occur.[155] As such, there is no justification for linking equitable subordination of a 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 and other creditors is greater, the equitable subordination should be greater. Conversely, if the injury to creditors is less than 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 at the amount it paid for the claim is inconsistent with the notion that equitable subordination is remedial in nature.[156] Rather, a 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.

To that end, *Papercraft* identifies three categories of economic harm that provide a useful template for determining the extent of equitable subordination: (1) quantifiable monetary harm that results from delay; (2) harm that results from uncertainty; and (3) harm that results from

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[155] As this Court made clear in its Decision on the Motions to Dismiss, section 510(c) of the Bankruptcy Code does not provide for the subordination of a claim to an equity interest. *See, e.g., Shearer v. Tepsic (In re Emergency Monitoring Techs., Inc.)*, 366 B.R. 476, 504 (Bankr. W.D. Pa. 2007) (Section 510(c) only "authorizes the subordination of *claims to other claims or interests to other interests* but its language does not extend to treatment of interests vis-à-vis claims") (citations omitted) (emphasis in original); *Town & Country Corp. v. Hare & Co. (In re Town & Country Corp.)*, 2000 Bankr. LEXIS 1755 at *16-17 (1st Cir. B.A.P. 2000) (Section 510(c) is designed to "deal with equitable subordination of claims to other claims or interest to other interests . . . . The Panel will not import some other interpretation to § 510(c) when its language is clear and unambiguous on its face."); *80 Nassau Assocs. v. Crossland Fed. Sav. Bank (In re 80 Nassau Assocs.)*, 169 B.R. 832, 836-837 (Bankr. S.D.N.Y. 1994) (Section 510(c) "empowers the Bankruptcy Court, under 'principles of equitable subordination,' to subordinate, for purposes of distribution, claims to other claims, and interests to other interests...."); 4 COLLIER ON BANKRUPTCY ¶ 510.05 at 510-17 (16th ed. 2013) ("Under subsection (c)(1), claims may be subordinated to claims, and interests may be subordinated to interests, but claims may not be subordinated to interests."). This is so because equitable subordination of debt to equity would constitute a penalty, not a remedy, as there is nothing equitable about allowing a debtor to evade a valid obligation enforceable under applicable law.

[156] Linking equitable subordination (or other bankruptcy rights and remedies) to the amount paid for a claim in the secondary market opens a Pandora's Box of sizable proportions.

delay that can be measured by professional fees and administrative expenses incurred by the estate as a result of the litigation. *Papercraft*, 323 F.3d at 232.

The facts of *Papercraft* (a ten-year litigation saga that resulted in a suite of eight decisions) are instructive. Citicorp Venture Capital ("CVC"), an insider and fiduciary of the debtor, Papercraft, attempted to take control of Papercraft's assets and obtain a significant profit at 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 CVC. *Id.* at 231-232 (citing *In re Papercraft Corp. v. Citicorp Venture Capital, Ltd.*, 165 B.R. 980 (Bankr. W.D. Pa. 1994)). Papercraft's unsecured creditors' committee filed a motion for summary judgment seeking to limit the allowance of claims held by CVC. *Id*. 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 that debtor filed its plan of reorganization and the time it filed its disclosure statement, and therefore, CVC's purchases at a discount, without disclosure, while an insider, constituted breaches of CVC's fiduciary duty to Papercraft. *Id.* at 231 (citing *In re Papercraft Corp. v. Citicorp Venture Capital, Ltd.*, 187 B.R. 486, at 498-99 (Bankr. W.D. Pa. 1995)). Accordingly, the bankruptcy court limited CVC's allowed claim and distribution in the plan of reorganization to the purchase price of the claim. *Id*.

After a subsequent trial on the issue of equitable subordination of CVC's claim, the court withdrew and vacated its prior decision, finding that CVC breached its fiduciary duty to debtor as an insider for failing to disclose its identity in purchasing the claims and, as an equitable subordination remedy, limiting CVC's claim to the purchase price of the claim. *Id.* at 231; *In re Papercraft Corp. v. Citicorp Venture Capital, Ltd.*, 187 B.R. 486. But the bankruptcy court declined to equitably subordinate CVC's claim, holding that further subordination of CVC's thus-limited claim pursuant to the principles of equitable subordination was not appropriate because the bankruptcy court was already limiting CVC's allowed claim to the amount it paid for such claim. *Papercraft*, 323 F.3d at 231 (citing *In re Papercraft Corp. v. Citicorp Venture Capital, Ltd.*, 187 B.R. at 501-502).

The parties then cross-appealed, and, on appeal, the district court affirmed the bankruptcy court's factual findings that CVC acted inequitably and caused injury to Papercraft and its creditors and agreed with the bankruptcy court's finding that CVC's claim should be limited to the amount it paid for such claim so as to eliminate any potential profit. *Papercraft*, 323 F.3d at 232 (citing *In re Papercraft Corp. v. Comm. of Creditors Holding Unsecured Claims*, 211 B.R. 813, 827 (W.D. Pa. 1997)). The district court reversed the bankruptcy court on the issue of further subordination and held that any subordination beyond the limitation of CVC's recovery to the amount paid for such claims should be supported by factual findings and reconciled with principles of equity. Accordingly, the district court remanded the case to the bankruptcy court for a further finding on the extent to which CVC's limited allowed claim should be equitably subordinated. *Papercraft*, 323 F.3d at 232 (citing *In re Papercraft Corp. v. Comm. of Creditors Holding Unsecured Claims*, 211 B.R. at 827).

On remand, the bankruptcy court found that CVC's recovery would be further subordinated for (i) additional administrative expenses incurred during the delay caused by CVC, (ii) interest and dividends lost by creditors during the delay, and (iii) professional fees and expenses incurred and/or paid by the estate. *Papercraft*, 323 F.3d at 232 (citing *In re Papercraft Corp. v. Citicorp Venture Capital, Ltd.*, 247 B.R. 625, 628 (Bankr. W.D. Pa. 2002)).

Additional appeals ensued, and the district court affirmed the bankruptcy court's decision, but the court reduced the lost interest component of the subordinated claim. *In re Papercraft Corp. v. Citicorp Venture Capital, Ltd.*, Civil Action No. 00-2180, 2002 WL 34702177 (W.D. Pa. Feb. 20, 2002). Ultimately, the Third Circuit upheld the additional subordination of CVC's claim for attorneys' fees, reasoning that the bankruptcy court did not award a monetary judgment for attorneys' fees to penalize CVC, but rather, to return other creditors to the position they would have been in had CVC not acted inequitably, and affirmed the district court's reduction of the lost interest component of CVC's subordinated claim. *Papercraft*, 323 F.3d at 234.

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 redound to the benefit of the wrongdoer. *In re Papercraft Corp. v. Citicorp Venture Capital, Ltd.*, Civil Action No. 00-2180, 2002 WL 34702177 at *9-10 (citing *In re Papercraft Corp.*, 247 B.R. at 630).

3. Mobile Steel Prong III: Consistency with the Bankruptcy Code

The third prong of the *Mobile 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, its power to subordinate an allowed claim is not boundless and courts cannot use equitable principles to disregard unambiguous statutory language of the Bankruptcy Code. *In re Enron*, 333 B.R. at 218-19 (citing *United States v. Noland*, 517 U.S. 535, 543 (1996) (citations omitted)); *Law v. Siegel*, 134 S. Ct. 1188, 1195 (2014).

The application of the third prong of the *Mobile 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." *In re Enron*, 333 B.R. at 219. 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. *80 Nassau Assocs.*, 169 B.R. at 841. By virtue of the codification of the doctrine in section 510(c) of the Code, the third prong of the *Mobile Steel* doctrine warrants little attention.

B. Mobile Steel Prong I: 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 LP Debt through SPSO violated the spirit and purpose of the Credit Agreement 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. *See Lois/USA*, 264 B.R. at 136, n.167 (declining to make a substantive determination with respect to the extent to which a claim for violation of the implied 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). Although many aspects of SPSO's conduct are, as has been suggested, "perfectly lawful"[157] – including making purchases anonymously, acquiring a blocking position, and making an unsolicited cash bid for distressed assets – its purchase 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 equitable subordination of the SPSO Claim.

[157] *See* Post-Trial Brief of Defendants SP Special Opportunities, LLC and Charles W. Ergen [Adv. Docket No. 142], pp. 7-8.

2. SPSO, Through the Conduct of Messrs. 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-sanctioned termination of exclusivity on July 15, 2013, all while SPSO, Mr. Ergen, and, eventually LBAC/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.[158] Even though Sound Point knew that SPSO was funded with an insufficient amount of initial capital to buy a significant amount of LP Debt, Sound Point nevertheless traded for SPSO because Mr. Ketchum understood that SPSO was backstopped by Mr. Ergen.[159] 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, and tell Bear Creek how much money was needed to close the trade, after which Mr. Ergen would then authorize the wire transfer and

[158] 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").

[159] Jan. 15 Tr. (Ketchum) 18:8-21, 20:4-13; PX0023; PX0024; PX0046; PX0048; PX0052; PX0056; PX0058; PX0059; PX0074.

Bear Creek would liquidate investments to fund the transfer.[160] 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.[161]

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.[162] 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.[163]

Mr. Kiser explained the delays as stemming from the fact that he and Mr. Ergen were not in any rush to close the trades of LP Debt; in their view, the trades "didn't need to be closed until you absolutely had to," as "there wasn't an economic benefit to doing it."[164] 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."[165] The documentary evidence on this point is to the contrary, as account statements produced by Bear Creek indicate that Mr. Ergen earned a relatively low rate of

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[160] Mr. Ergen was the only person who could authorize the transfer of funds from his account at Bear Creek to Bal Harbour or SPSO for settlement of the LightSquared trades. Jan. 10 Tr. (Kiser) 21:23-22:13, 58:7-12.

[161] Jan. 10 Tr. (Kiser) (Q: Well, in fact, you didn't want to pay unless—you didn't want to pay until you absolutely had to, right? A: That's right. We were in no rush to close. Q: You wanted to wait until the last possible minute? A: Well, as I said before, there was no economic benefit.)

[162] PX0859.

[163] PX0859.

[164] Jan. 10 Tr. (Kiser) 64:17-25 (stating that Mr. Ergen had his capital invested elsewhere and was making a return on money that would have been liquidated).

[165] Jan. 10 Tr. (Kiser) 98:3-6.

interest on the funds in his trust accounts.[166] In addition, there were economic penalties imposed on SPSO for leaving LP Debt trades open for an extended period of time, including having to forgo adequate protection payments;[167] 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 (i) when to close unsettled trades or (ii) which of Mr. Ergen's assets to liquidate to pay for SPSO's LP Debt trades, despite the fact that Messrs. Ergen and Kiser had been made aware of how the adequate protection payments worked.[168] 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 possibly 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.[169] 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.

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[166] PX0796-818.

[167] If SPSO failed to close certain LP Debt trades within 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 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, 2014 (Ketchum) 81:1-82:3; PX0493; 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.)

[168] PX0258; PX0256; PX0259 (emails discussing adequate protection payments).

[169] Roddy Dep. 86:5-87:3. Bear Creek 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; Jan. 13 Tr. (Ergen) 168:4-14.)

Liquidity concerns were another purported reason for the delayed closing of the LP Debt trades, according to Mr. Kiser.[170] At Trial, Mr. Kiser initially denied that liquidity reasons caused any delays, until he was reminded that he had testified otherwise at his deposition and then recalled giving that as an explanation.[171] 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 "immediate funds available, [yes], that occurred."[172] Mr. Kiser equivocated, however, when pressed as to whether he could identify any investments that Mr. Ergen would have needed to exit which would take longer than three days, saying that "it depended. . . . [Mr. Ergen] had things that were all over the gamut of types of investments. . . . [some] were a lot less liquid."[173] 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 issues, stating that "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."[174] 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.[175] Mr. Ergen's account statements reflect 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

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[170] Mr. Ketchum testified that it was his "understanding from [Mr]. Kiser that things had to be sold, cash had to be raised to settle those trades." Jan. 15 Tr. (Ketchum) 84:13-14. When asked about the lengthy delays between the trade and settlement dates and whether all of these delays were because the money was not coming from the Ergen family office, Mr. Ketchum responded, "Correct." *Id.* 86:1-3.

[171] Jan. 10 Tr. (Kiser) 128:24-129:13; 129:23-130:1.

[172] Jan. 10 Tr. (Kiser) 129:23-130:6.

[173] *Id.* 130:7-131:23.

[174] Jan. 13 Tr. (Ergen) 159:13-19.

[175] Roddy Dep. 66:12-67:14. Around that time, Bear Creek managed between $626 million and likely $750 million dollars for Mr. Ergen. (Roddy Dep. 71:11-18.)

account for several weeks before it was used to fund a trade.[176] The evidence further shows that, in at least one case, liquid funds were readily available, but Mr. Kiser instructed Bear Creek to hold off on wiring funds.[177] 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[178] and asked no further questions.

Mr. Kiser and Mr. Ergen also blamed the delays in closing the SPSO LP Debt 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 an 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."[179] 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."[180] None of this testimony was credible.

[176] 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.)

[177] *See* PX0530 (Mr. Kiser instructing 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."). By that time, at least $207 million in assets which had been liquidated by Bear Creek in order to fund trades remained in the Trust account. (PX0812.)

[178] Jan. 15 Tr. (Ketchum) 74:12-20 (testifying as to his understanding that trades that had been delayed for over a month or more could not be closed by Sound Point because the funds had not been sent by Mr. Ergen's family office, and Mr. Ketchum had been told that such trades could not close because the funds were "not available.").

[179] Jan. 13 Tr. (Ergen) 62:17-63:6.

[180] Jan. 10 Tr. (Kiser) 63:13-25.

The volume of emails 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, e.g.*, PX0319 (Sound Point e-mail 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 seeking to close a 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).) In particular, Jefferies, the executing broker for the majority of the LP Debt trades, was pushed aside for months by Sound Point, which provided excuse after excuse for the failure to close numerous open trades. In February 2013, Jefferies sent ongoing email and telephone requests to Sound Point to close multiple trades, with trade dates dating back as early as October 23, 2012.[181] At that time, an employee of Mr. Ketchum's reminded him that "[w]e have been pushing Jefferies off for nearly 3 weeks."[182] On April 23, 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 15" in connection with over $289 million in LP Debt trades that had not settled.[183] After Jefferies followed up with Sound Point on April 25, 2013, seeking to close $88 million of open trades,[184] Mr. Ketchum inquired internally whether he could plausibly blame SPSO's delay on the "upstreams," but he was told by Sound Point personnel that the work had already been completed.[185] Mr. Ketchum then emailed back and forth with a colleague about

181 PX0347; PX0859.

182 PX0347.

183 PX0458; PX0441; PX0859.

184 PX0466.

185 PX0466; Jan. 15 Tr. (Ketchum) 76:9-77:8.

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 exiting 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 (head of sales) [at Jefferies] about this."[186] 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, Jefferies needed to be "put off" for a period of time.[187]

As of May 9, 2013, SPSO had seven open trades with Jefferies, totaling approximately $588 million in LP Debt trades dating back as far as January 2013. Jefferies was imploring Sound Point to close the trades.[188] Mr. Sander of 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 5pm 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."[189] None of the open trades closed for another several weeks.[190]

As he knew Mr. Ergen did not like to hold up funds which could be invested elsewhere,[191] Mr. Kiser testified that he instructed Mr. Ketchum to prepare a schedule for him

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186 PX0466; *see also* Jan. 15 Tr. (Ketchum) 76:20-78:7; 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.

187 *Id.* 78:18-79:15.

188 PX0498.

189 PX0498.

190 PX0859.

191 *See*, *e.g.*, PX041 (March 26, 2012 email from Ketchum to Kiser in which Ketchum suggests setting up a prime brokerage account at BNP to fund the trades and wiring $500,000 to open the account, to which Kiser replies

(continued...)

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.[192] This testimony was not credible. Mr. Ketchum also testified that proposed settlement dates for the unsettled trades were requested by Jefferies, and he tried to act as an intermediary between SPSO and Jeffries "an anxious counterparty who was trying to get trades settled."[193] Mr. Ketchum stated that the "proposed settlement dates" in the schedule he emailed to Mr. Kiser on May 8, 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.[194] While it is not clear whether such proposed dates were actually sent to Jefferies, Mr. Ketchum's testimony on this point was not credible. The proposed settlement dates contained in the schedule emailed from Mr. Ketchum to Mr. Kiser on May 8, 2013 reflect not a prediction for liquidity planning purposes of when trades would be ready to close, but rather a gameplan for delaying the closing of the open trades for 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 (69 days) and

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"[i]t'll be a lot easier if we don't have to fund $$ until we have a trade to settle. . . [Ergen] won't be a big fan of just putting $$ out for opening an account.")

[192] 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"); PX0495.

[193] Jan. 15 Tr. (Ketchum) 123:14-124:17.

[194] *Id.*, *see also id.* 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.")

the average days after the industry-norm "contractual settlement date" of "T+20," or twenty days after the trade date (38 days).[195] There is no 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+20 contractual settlement date.[196]

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 him to delay the closing. *See* Jan. 15 Tr. (Ketchum) 69:3-6 (Q: "Did you ever have a discussion with Mr. Kiser in which you and Mr. Kiser agreed that you should delay the closing of the trade?" A: "Yes."); *see also* 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?"). Mr. Kiser admitted that even when directly informed that counterparties were ready to close, he sought to defer settlement as long as possible.[197] This goal was evident in much of the documentary evidence submitted. (*See, e.g.*, PX0495 (Mr. Ketchum to Mr. Kiser "We need to close our March 25 trade before month end, for example May 25 or so, to stave off Jefferies"); PX0466).

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195 PX0493.

196 On March 17, 2014, during closing arguments in the Adversary Proceeding, counsel for SPSO and Mr. Ergen argued, for the first time, that the delay in closing SPSO's LP Debt trades during the period between March and June 2013 was caused by a "moratorium" imposed by Jefferies as the trade intermediary. Counsel represented that this "moratorium" was reflected in a document in the existing record. After the hearing, counsel filed a letter to the Court which attached emails reflecting the purported "moratorium," none of which had been previously produced or were otherwise in the record. On March 21, 2014, counsel for the Plaintiffs filed a supplement to their previously-filed motion for sanctions, seeking additional sanctions in connection with, among other "discovery misconduct," SPSO's failure to have produced the "moratorium" document. [Adv. Docket No. 148]. The sanctions motions remain *sub judice*.

197 Jan. 10 Tr. (Kiser) 64:5-25, 97:23-98:6.

The time period in which the foregoing delays occurred was a crucial time in the Debtors' chapter 11 cases. The Exclusivity Stipulation, approved by this Court in February 2013, extended the Debtors' exclusive periods to file a plan of reorganization to July 15, 2013. If the parties did not reach a deal for a consensual plan by June 3, 2013, preparatory work for a sale process for all or substantially all of the Debtors' assets was required to begin, with the formal sale process commencing on July 15, 2013.[198] 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 a consensual plan of reorganization.[199] Beginning in late May 2013 and continuing thereafter, Moelis also contacted over 90 parties to discuss a joint venture or strategic partnership.[200] 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,[201] after which a "road show" 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 would be able to carry a

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[198] PX0852 at Ex. A.

[199] On April 4, 2013, the Ad Hoc Secured Group submitted a proposed plan term sheet to LightSquared and indicated their 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.) Also, on May 15, 2013—the same day that LBAC submitted its bid for LightSquared's assets—the parties exchanged a revised term sheet for a consensual plan of negotiation. (PX0505; DX335; DX174.) The revised term sheet provided for an infusion of new capital to be obtained by Harbinger and/or LightSquared, and reorganization, such that a sale of LightSquared's assets would be avoided. (PX0505 at HARBAP00005107-13.) 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.)

[200] Jan. 17 Tr. (Hootnick) 28:6-16.

[201] Bankr. Docket No. 667.

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 or longer, Mr. Ergen arrogated to himself the power to control the forward motion or lack thereof of the bankruptcy cases 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 13, 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.[202] 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.[203] SPSO's decision to join the Ad Hoc Secured Group was undoubtedly made for the strategic purpose of controlling the sale process for the Debtors' 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,[204] and enabling the stipulation to remain in place until then furthered his interest of keeping the status

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[202] PX0858 (Stipulation by SP Special Opportunities, LLC in Aid of Discovery in Connection with Emergency Motion of the Ad Hoc Secured Group of LightSquared LP Lenders to Enforce This Court's Order Pursuant to 11 U.S.C. § 1121(d) Further Extending LightSquared's Exclusive Periods to File a Plan of Reorganization and to Solicit Acceptances Thereof, dated July 3, 2013) at ¶ 13. 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. (Strickland) 189:12-191:4 ("[SPSO] was very much focused on those lender protections, and that's why it joined the group."))

[203] PX0649 at L2AP0008732; PX0625; PX0859.

[204] 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.

quo until the DISH Board had authorized DISH to step into the shoes of LBAC and pursue the LBAC Bid. While a creditor who is not an insider is not a fiduciary, a creditor nevertheless 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 voluntarily 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 assets of a debtor. Nothing in the 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. Nevertheless, 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 timeframe 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's conduct 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 LP Debt during that time period, the parties may have made substantial progress on a plan, and it is possible that the Debtors' exclusive periods could have been extended, which would have been a "game changer" in the course of the Debtors' cases.

C. Mobile Steel Prong II: SPSO's Conduct Harmed LightSquared's Creditors

Having acquired a controlling position in the LP Debt by the use of a 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 then seized control of the case itself, rendering meaningless the heavily negotiated and Court-ordered process leading to the termination of exclusivity on July 15, 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.[205]

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[205] The third prong of the test for equitable subordination set forth in *Mobile Steel* test states that equitable subordination cannot be used to alter the statutory scheme imposed by bankruptcy law. As equitable subordination has since been codified in section 510(c) of the Bankruptcy Code, the Court need not address the third prong of the *Mobile Steel* separately in this Decision.

CONCLUSION

SPSO has gone to great lengths to identify the many things it did that are "perfectly lawful" 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 estates and cases. As Mr. Ergen so colorfully explained during Trial, "[y]ou 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."[206] 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 Debtors, the constituents, and even the Court to conduct the case. Determining the amount of 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.

For all of the foregoing reasons, the Court finds that the SPSO Claim shall be equitably subordinated in an amount to be determined after further proceedings before this Court.

IT IS SO ORDERED.

Dated: June 10, 2014
New York, New York

/s/ Shelley C. Chapman
UNITED STATES BANKRUPTCY JUDGE

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[206] Jan. 13 Tr. (Ergen) 199:23-200:4 (video played at Trial).

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
LIGHTSQUARED INC., *et al.*,	)	Case No. 12-12080 (SCC)
Debtors.	)	Jointly Administered

DECISION DENYING CONFIRMATION OF DEBTORS' THIRD AMENDED JOINT PLAN PURSUANT TO CHAPTER 11 OF BANKRUPTCY CODE

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SHELLEY C. CHAPMAN
UNITED STATES BANKRUPTCY JUDGE

Before the Court is the *Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of Bankruptcy Code* [Docket No. 1308] (as amended, supplemented, or modified in accordance with the terms thereof, the "Third Amended Plan" or the "Plan"). 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 face amount of the outstanding LightSquared LP prepetition secured debt. The facts and circumstances surrounding SPSO's acquisition of its claim (the "SPSO Claim"), and the conduct of Mr. Ergen and certain of his 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 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 Bankruptcy Code, to designate SPSO's vote. Pointing to SPSO's connection to Mr. Ergen and DISH, the Debtors, Harbinger, and the Ad Hoc Group of LightSquared LP Lenders have constructed a Plan that purports to follow the blueprint laid out by the decisions in DBSD,[1] 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 SPSO's vote and disregard the class (7B) 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

[1] In re DBSD North America, Inc., 421 B.R. 133 (Bankr. S.D.N.Y. 2009); In re DBSD North America, Inc., 634 F.3d 79 (2d Cir. 2011) (together, "DBSD").

the other holders of LightSquared LP prepetition 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[2] was to be closed. This Decision[3] will address confirmation of the Plan and all pending motions related to the confirmation hearing.

I. BACKGROUND[4]

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

2 Harbinger Capital Partners LLC v. Ergen (In re LightSquared Inc.), Adv. Pro. 13-1390-scc (Bankr. S.D.N.Y.) (the "Adversary Proceeding").

3 This Decision supersedes this Court's Bench Decision read into the record on May 8, 2014.

4 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.

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

On May 14, 2012 (the "Petition Date"), LightSquared filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code (the "Chapter 11 Cases"). Pursuant to Bankruptcy Rule 1015 and the *Order Directing Joint Administration of Related Chapter 11 Cases* [Docket No. 33], the Court directed the joint administration of the Chapter 11 Cases for procedural purposes only. LightSquared continues to operate its businesses and manage its properties as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No official committee has been appointed in the Chapter 11 Cases. No trustee or examiner has been appointed in the Chapter 11 Cases.

On August 6, 2013, Harbinger Capital Partners LLC, HGW US Holding Company LP, Blue Line DZM Corp., and Harbinger Capital Partners SP, Inc. (collectively, "Harbinger") commenced the Adversary Proceeding against Charles Ergen, DISH Network Corporation ("DISH"), EchoStar Corporation ("EchoStar"), L-Band Acquisition, LLC ("LBAC"), SP Special Opportunities LLC ("SPSO"), Special Opportunities Holdings LLC, Sound Point Capital Management LP, and 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. After the Court granted motions to dismiss Harbinger's complaint,[5] LightSquared filed a Complaint-in-Intervention against SPSO, DISH, EchoStar, and Mr. Ergen,[6]

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[5] See Memorandum Decision Granting Motions to Dismiss Complaint [Adv. Docket No. 68], 504 B.R. 321 (Bankr. S.D.N.Y. 2013).

[6] SPSO, DISH, EchoStar, Mr. Ergen, and LBAC will be referred to collectively herein as the "Ergen Parties."

and Harbinger filed a second amended complaint. A trial in the Adversary Proceeding was held between January 9 and 17, 2014, with closing arguments held on March 17, 2014. This Court issued a bench decision on May 8, 2014, which was superseded by its Post-Trial Findings of Fact and Conclusions of Law, dated June 10, 2014 (the "Adversary Proceeding Decision").[7]

On August 29, 2013, LightSquared filed the *General Disclosure Statement* [Docket No. 815] and, on October 7, 2013, filed the *First Amended General Disclosure Statement* [Docket No. 918] (the "General Disclosure Statement"). On October 10, 2013, the Court entered an order approving, among other things, the General Disclosure Statement and certain solicitation, notice, balloting, and confirmation procedures in the Chapter 11 Cases.[8] On December 31, 2013, LightSquared filed the *Debtors' Revised Second Amended Joint Plan Pursuant to Chapter 11 of Bankruptcy Code* [Docket No. 1166] (the "Second Amended Plan").

On February 14, 2014, LightSquared filed the Plan[9] and the corresponding *Specific Disclosure Statement for Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of Bankruptcy Code* [Docket No. 1308] (as amended, supplemented, or modified, the "Specific Disclosure Statement"). On February 24, 2014, the Court entered the *Order Approving (A) LightSquared's Third Amended Specific Disclosure Statement and (B) Shortened Time To Object to Confirmation of LightSquared's Third Amended Plan and Streamlined Resolicitation Thereof* [Docket No. 1343] (the "Revised Disclosure Statement Order"), approving, among other things, (a) the Specific Disclosure Statement, (b) the streamlined solicitation of votes on the Plan, and (c) certain amended dates and deadlines with respect thereto. The Revised Disclosure Statement Order established, among other things, (i) March 3, 2014 at 4:00 p.m. (prevailing

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[7] Post-Trial Findings of Fact and Conclusions of Law, [Adv. Docket No. 165], 2014 Bankr. LEXIS 2528 (Bankr. S.D.N.Y. June 10, 2014). Additional background on the Chapter 11 Cases and Adversary Proceeding can be found in the Adversary Proceeding Decision.

[8] Docket No. 936.

[9] The Plan was subsequently modified several times. See Docket Nos. 1336, 1422, and 1482.

Pacific time) as the Plan voting deadline and (ii) March 11, 2014 at 12:00 p.m. (prevailing Eastern time) as the Plan objection deadline, which was subsequently extended for SPSO until March 15, 2014 at 12:00 p.m. (prevailing Eastern Time). SPSO's Objection to Approval of the Specific Disclosure Statement [Docket No. 1325] was overruled.

A. The Third Amended Plan

Article III of the Third Amended Plan provides for separate classification of claims and equity interests into the following sixteen distinct classes:[10]

Class 1:	Inc. Other Priority Claims
Class 2:	LP Other Priority Claims
Class 3:	Inc. Other Secured Claims
Class 4:	LP Other Secured Claims
Class 5:	Prepetition Inc. Facility Non-Subordinated Claims
Class 6:	Prepetition Inc. Facility Subordinated Claims
Class 7A:	Prepetition LP Facility Non-SPSO Claims
Class 7B:	Prepetition LP Facility SPSO Claims
Class 8:	Inc. General Unsecured Claims
Class 9:	LP General Unsecured Claims
Class 10:	Existing LP Preferred Units Equity Interests
Class 11A:	Existing Inc. Series A Preferred Stock Equity Interests
Class 11B:	Existing Inc. Series B Preferred Stock Equity Interests
Class 12:	Existing Inc. Common Stock Equity Interests
Class 13:	Intercompany Claims
Class 14:	Intercompany Interests

(See Plan, Art. III.)

Each class of Claims and Equity Interests under the Plan contains only Claims or Equity Interests that are substantially similar to the other Claims or Equity Interests within that class. Pursuant to the Plan, holders of Prepetition LP Facility Claims[11] are divided into two classes, Class 7A and Class 7B. While holders of Prepetition LP Facility Non-SPSO Claims in Class 7A

[10] In accordance with section 1123(a)(1) of the Bankruptcy Code, Administrative Claims, DIP Inc. Facility Claims, DIP LP Claims, New DIP Claims, U.S. Trustee Fees, and Priority Tax Claims are not classified in the Plan.

[11] "Prepetition LP Facility Claims" refers to claims held by the Prepetition LP Agent or the Prepetition LP Lenders arising under, or related to, the $1,500,000,000 term loan credit facility provided in connection with the Prepetition LP Credit Agreement, dated as of October 1, 2010, by and among LightSquared LP and certain of its affiliates and the Prepetition LP Lenders thereunder. "LP Debt" refers to the secured debt of LightSquared LP issued pursuant to the Prepetition LP Credit Agreement.

will receive Plan consideration in the form of cash payment equal to the amount of their allowed claims,[12] SPSO, the sole claimant in Class 7B (Prepetition LP Facility SPSO Claims) will receive Plan consideration in the form of the SPSO Note.[13] Pursuant to the Plan, the SPSO Note, which shall have a seven-year maturity and bear interest at LIBOR plus twelve percent, payable in kind, will be secured or unsecured as determined by this Court, provided, however, that if this Court determines that the SPSO Note shall be secured, the liens securing such note will be silent, third priority liens junior to the liens securing the two exit facilities created in connection with the Plan. Because SPSO is not being paid in cash, the Plan requires almost $1 billion less in financing than the Second Amended Plan. (Plan § IV.A.; Mar. 6, 2014 Dep. Tr. (Montagner) 197:9-21.)

The Plan contemplates, among other things: (a) first lien exit financing, including a facility of not less than $1.0 billion; (b) the issuance of new debt and equity instruments; (c) the payment of all allowed claims and equity interests with cash and other consideration, as applicable; (d) the assumption of certain liabilities; (e) the provision of a $1.65 billion new debtor in possession facility by the Plan Support Parties (as defined below) shortly following confirmation of the Plan but prior to the Effective Date (the "New DIP Facility") (approximately (i) $930 million of which will be converted into second lien exit financing, (ii) $300 million of which will be converted into the Reorganized LightSquared Inc. Loan, and (iii) approximately $115 million of which will be converted into new equity,[14] in each case, subject to adjustments as set forth in the Plan), which New DIP Facility will be used to fund operations pending

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12 Pursuant to the Plan, such claimants may also elect to receive Plan consideration in the form of New DIP Tranche B Claims (for Converted Prepetition LP Facility Non-SPSO Claims).

13 The Plan provides that Class 7B will receive the "SPSO Option A Treatment" or the "SPSO Option B Treatment," depending on whether SPSO votes to accept the Plan. Given that SPSO has voted to reject the Plan, it would receive the SPSO Option B Treatment, discussed herein.

14 Pursuant to the Plan, this $115 million will be converted into equity junior to the proposed SPSO Note. (See Conf. Hr'g Tr. Mar. 24, 2014 (Hootnick) at 55:1-12.)

consummation of the Plan and to make distributions to certain creditors; and (f) the preservation of LightSquared's litigation claims.[15]

The Plan has the affirmative support of (a) Fortress Investment Group, on behalf of its affiliates' funds and/or managed accounts ("Fortress"), (b) Melody Capital Advisors, LLC and/or Melody NewCo, LLC, each of behalf of itself and its funds ("Melody"), (c) Harbinger, (d) JP Morgan Chase & Co. or its designated affiliates ("JPMorgan," and, collectively with Fortress, Melody, and Harbinger, the "Plan Support Parties"), (e) U.S. Bank National Association ("U.S. Bank") and MAST Capital Management, LLC ("MAST"), and (f) the Ad Hoc Secured Group of Prepetition LightSquared LP Lenders (the "Ad Hoc Secured Group").

The tabulation reports filed in connection with the Plan reflect the following voting results:

Class	**Amount Accepted**	**Number Accepted**
6 (Prepetition Inc. Facility Subordinated Claims)	100%	100%
7A (Prepetition LP Facility Non-SPSO Claims)	100%	100%
7B (Prepetition LP Facility SPSO Claims)	0%	0%
8 (Inc. General Unsecured Claims)	100%	100%
9 (LP General Unsecured Claims)	100%	100%
10 (Existing LP Preferred Units Equity Interests)	100%	100%

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[15] The Specific Disclosure Statement contained form agreements and/or related documents with respect to various Plan Supplement documents, including the First Lien Exit Credit Agreement, Reorganized LightSquared Inc. Loan, and New LightSquared Entities Corporate Governance Documents [Docket No. 1308]. This filing also contained copies of the SPSO Note Documents, the Schedule of Assumed Agreements, and the Schedule of Retained Causes of Action. On February 17, 2014, LightSquared filed a *Notice of Filing of Plan Supplement Documents for Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of Bankruptcy Code* [Docket No. 1312], attaching copies of the Second Lien Exit Credit Agreement and NewCo Interest Holders Agreement.

On March 18, 2014, LightSquared filed a *Notice of Filing of (A) Modified Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of Bankruptcy Code and (B) Accompanying Confirmation Order* [Docket No. 1422]. On March 21, 2014, LightSquared filed a *Notice of Filing Relating to Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of Bankruptcy Code* [Docket No. 1433], attaching (a) Highly Confident Letters from J.P. Morgan Securities LLC and Credit Suisse Securities (USA), LLC Relating to First Lien Exit Credit Agreement, (b) the Pro Forma Ownership Summary for NewCo, and (c) a list of officers for the New LightSquared Entities (indicating that the identities of the directors of the New LightSquared Entities would be disclosed in a further supplement to the Plan). On March 31, 2014, LightSquared filed a *Notice of Filing Relating to Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of Bankruptcy Code* [Docket No. 1456], attaching the Initial List of Directors for the New LightSquared Entities, subject to further supplement prior to the close of the Confirmation Hearing.

11A (Existing Inc. Series A Preferred Stock Equity Interests)	100%	100%
11B (Existing Inc. Series B Preferred Stock Equity Interests)	100%	100%
12 (Existing Inc. Common Stock Equity Interests)	100%	100%

(See *Certification of Gil Hopenstand with Respect to Tabulation of Votes on Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of Bankruptcy Code*, sworn to March 7, 2014 [Docket No. 1380], Exs. A-B.) SPSO, the sole member of Class 7B (Prepetition LP Facility SPSO Claims), voted to reject the Plan. (See id.)

Under the Plan, Holders of Claims or Equity Interests in Classes 1 (Inc. Other Priority Claims), 2 (LP Other Priority Claims), 3 (Inc. Other Secured Claims), 4 (LP Other Secured Claims), 5 (Prepetition Inc. Non-Subordinated Facility Claims), 13 (Intercompany Claims), and 14 (Intercompany Interests) are Unimpaired and, pursuant to section 1126(f) of the Bankruptcy Code, are deemed to have voted to accept the Plan. (See Plan, Art. III.)

B. Motions Filed in Connection with Confirmation

In addition to confirmation of the Plan, there are numerous confirmation-related motions pending before the Court, and the various objections and responses thereto. They are:

- LightSquared's *Motion for Entry of Order Designating Vote of SP Special Opportunities, LLC* [Docket No. 1371] (the "Vote Designation Motion"). The Vote Designation Motion seeks to designate the vote of SPSO pursuant to section 1126(e) of the Bankruptcy Code.

- LightSquared's *Confirmation-Related Motion for Order (A) Approving Postpetition Financing, (B) Authorizing Use of Cash Collateral, If Any, (C) Granting Liens and Providing Superpriority Administrative Expense Status, (D) Granting Adequate Protection, and (E) Modifying Automatic Stay* [Docket No. 1311] (the "New DIP Motion"), seeking an order (a) approving postpetition financing for the period between post-confirmation and the Effective Date, (b) authorizing the use of cash collateral, if any, (c) granting liens and providing superpriority administrative expense status, (d) granting adequate protection, and (e) modifying the automatic stay.

- LightSquared's *Supplement to Motion for Entry of Order Authorizing LightSquared To Modify and Extend Existing Key Employee Incentive Plan* [Docket No. 1390] ("the KEIP Supplement"). The KEIP Supplement seeks an order authorizing LightSquared to modify its existing Key Employee Incentive Plan.[16]

- LightSquared's *Motion to Strike Certain Portions of Expert Testimony of Douglas Hyslop and J. Soren Reynerston* [Docket No. 1458] (the "Motion to Strike Hyslop and Reynertson")

- SPSO's *Motion to Strike Certain of the Testimony of Robert McDowell and Mark Hootnick* [Docket No. 1460] (the "Motion to Strike McDowell and Hootnick")

- SPSO's *Motion to Admit SPSO Confirmation Exhibit 2* [Docket No. 1505] (the "Exhibit 2 Motion")[17]

C. Pleadings Filed in Connection with the Plan and Confirmation-Related Motions

SPSO filed objections to the Plan, the Vote Designation Motion, the New DIP Motion, the KEIP Supplement, and the Motion to Strike Hyslop and Reynertson.

On March 18, 2014, LightSquared filed its *(A) Memorandum of Law in Support of Confirmation of Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of the Bankruptcy Code and (B) Omnibus Response to Objections to (i) Confirmation of Plan, (ii) Motion to Designate Vote of SP Special Opportunities, LLC, and (iii) Motion Seeking Approval of New DIP Facility* [Docket No. 1413], accompanied by the Declaration of Matthew S. Barr and the Declaration of Douglas Smith. Statements and/or pleadings in support of the Plan were filed by (a) Fortress, (b) Melody, (c) Harbinger, (d) JPMorgan, (e) U.S. Bank and MAST, (f) the Ad Hoc Secured Group, and (g) the Special Committee.[18]

D. The Confirmation Hearing

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[16] This Decision does not address the KEIP Supplement, which remains *sub judice*.

[17] Exhibit 2 (SPX002), produced by a non-party, has not been properly authenticated, contains multiple layers of hearsay, and does not fall under any exception to the prohibition on hearsay. Morever, the Exhibit 2 Motion, dated April 30, 2014, was filed well after the close of the evidentiary record on confirmation, rendering it procedurally improper. For these reasons, the Exhibit 2 Motion is denied and Exhibit 2 is excluded from the record.

[18] In September 2013, the Court ordered the appointment of the Special Committee of the Boards of Directors of LightSquared Inc. and LightSquared GP Inc. (the "Special Committee") to direct many of LightSquared's significant actions with respect to these Chapter 11 Cases. (See Docket No. 866; PX0755; PX0789.)

On March 19, 2014, the Court commenced a hearing on the Plan, the Vote Designation Motion, and the New DIP Motion; the evidentiary hearing was conducted over the course of eight days (the "Confirmation Hearing"). The Court heard live testimony from the following witnesses and rebuttal witnesses called by the Debtors, the Ad Hoc Secured Group, and SPSO: (i) Mr. Christopher Rogers, a member of the Special Committee; (ii) Mr. Robert McDowell, offered by the Debtors as an expert on FCC-related matters; (iii) Mr. Douglas Smith, the Debtors' Chief Executive Officer; (iv) Mr. Mark Hootnick, a Managing Director of Moelis & Company ("Moelis"), the Debtors' financial advisor; (v) Mr. John Jacob Rasweiler V, a principal of Sublime Wireless, offered by the Debtors as an expert with respect to the "technical issue;"[19] (vi) 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; (vii) Mr. Philip Falcone, the controlling member of Harbinger Capital Partners, one of the Plan Support Parties and the principal shareholder of LightSquared; (viii) Mr. Douglas Hyslop of Wireless Strategy LLC and SmartSky Networks LLC, offered by SPSO as an expert with respect to the "technical issue;" (ix) Mr. Omar Jaffrey, a principal of Melody, a private investment firm which is one of the Plan Support Parties; (x) Mr. J. Soren Reynertson, a Managing Director of GLC Advisors & Co. ("GLC"), offered by SPSO as an expert on valuation issues; and (xi) Mr. Steven Zelin, a Managing Director of The Blackstone Group ("Blackstone"), the financial advisor to the Ad Hoc Secured Group. The testimony of Mr. Marc Montagner, the Debtors' Chief Financial Officer,

[19] In late 2013, SPSO, DISH, and LBAC raised what has been referred to as a "technical issue" with LightSquared's spectrum which would allegedly be an impediment to the use of certain LightSquared uplink spectrum. The Debtors submitted both documentary evidence and the live testimony of Mr. Rasweiler at trial in support of their position that that the "technical issue" poses no impediment to the use of LightSquared's spectrum and does not impact the value of LightSquared's assets. All pleadings and proceedings relating to the "technical issue" are confidential and have been filed under seal. Accordingly, the Court's findings with respect to the "technical issue" are reflected in Appendix A, which has been separately filed under seal and which is attached hereto in redacted form.

was presented via videotape and deposition transcript designations. Several volumes of documentary exhibits have also been admitted into evidence.

Detailed proposed findings of fact 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. The Court heard closing arguments concerning the Plan, the Vote Designation Motion, and the New DIP Motion on May 5 and 6, 2014.

E. LightSquared's Pending License Modification Application

The Plan valuation is premised on LightSquared's ownership and/or use of four spectrum blocks within the L-Band: (a) a 10 MHz downlink at 1526 to 1536 MHz ("Lower Downlink"); (b) a 10 MHz uplink at 1627.5 to 1637.5 MHz ("Uplink 1" or "Lower Uplink"); (c) a 10 MHz uplink at 1646.7 to 1656.7 MHz ("Uplink 2" or "Upper Uplink"); and (d) a spectrum block located at 1670 to 1680 MHz (the "New Downlink"), which is comprised of 5 MHz currently used by the National Oceanic and Atmospheric Administration ("NOAA") and 5 MHz currently leased by LightSquared.

On September 28, 2012, LightSquared filed with the FCC a series of applications seeking to modify various of its licenses (collectively, the "License Modification Application") to, among other things:

- authorize LightSquared to use the 1675-1680 MHz spectrum band (the "NOAA Spectrum") on a shared basis with certain government users, including NOAA;
- permit LightSquared to conduct terrestrial operations "pairing" the 1670-1680 MHz New Downlink with two 10 MHz L-Band uplink channels in which LightSquared currently is authorized to operate (Uplink 1 and Uplink 2); and
- permanently relinquish LightSquared's right to use its upper 10 MHz of L-Band downlink spectrum (a 10 MHz band at 1545.2 to 1555.2 MHz) for terrestrial purposes (that portion of the spectrum closest to the band designated for GPS devices).

In conjunction with submitting the License Modification Application, LightSquared also asked that the FCC open a proceeding via a petition for rulemaking, filed on November 2, 2012, to make an administrative change amending the U.S. Table of Frequency Allocations to add a primary allocation permitting non-federal terrestrial mobile use of the NOAA Spectrum. Thus, LightSquared has been pursuing a solution through the License Modification Application that would provide it with 30 MHz of spectrum – an amount, LightSquared states, that is sufficient to implement its business plan.[20] SPSO argues that one of the many reasons that the Plan is not feasible is that the NOAA Spectrum, which is needed for LightSquared to have a full 10 MHz of New Downlink, may be auctioned off by the FCC rather than assigned to LightSquared. LightSquared has conceded that it cannot predict with certainty whether the NOAA Spectrum will be assigned to LightSquared or put up for auction but maintains that this uncertainty does not preclude a finding of feasibility.

LightSquared has also requested that the FCC open an additional proceeding via a petition for rulemaking to examine the conditions and operational parameters under which its Lower Downlink could be used sometime in the future for terrestrial service. LightSquared asserts that it will have authorization to use the Lower Downlink within the next three to seven years. (See Conf. Hr'g Tr. Mar. 20, 2014 (Smith) 131:22-25 (three to five years); Mr. McDowell testified that "the lower 10 will be granted within approximately seven years." (See Conf. Hr'g Tr. Mar. 19, 2014 (McDowell) 73:17-19.) None of SPSO's witnesses testified regarding the timing or likelihood of FCC approval for the Lower Downlink.[21]

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[20] See General Disclosure Statement [Docket No. 918] at 39-40.

[21] SPSO's valuation expert, Mr. Reynertson, testified that "[t]he lower downlink block is still subject to controversy, and as highlighted by Mr. Smith's presentation, and so ultimately, we felt that there was a range of outcomes here." (Conf. Hr'g Tr. Mar. 27, 2014 (Reynertson) at 158:1-3.)

While effectiveness of the Plan is not conditioned on FCC approval of LightSquared's pending License Modification Application, LightSquared's Plan valuation relies on opinions offered at the Confirmation Hearing that the FCC will approve the pending License Modification Application and the later use of its Lower Downlink within the timeframes upon which the valuation is based.

II. CONFIRMATION TESTIMONY

A. Mr. Robert McDowell

Mr. Robert McDowell, a former FCC Commissioner, was retained by the Special Committee in November 2013 to advise it with respect to FCC issues and was presented as an expert witness at the Confirmation Hearing. (See Conf. Hr'g Tr. Mar. 19, 2014 (McDowell) at 73:22-24.) Mr. McDowell left the FCC in May 2013, having served as one of five FCC Commissioners for a period of almost seven years. (See Conf. Hr'g Tr. Mar. 19, 2014 (McDowell) at 70:22-25; PX1078.)[22]

During the Confirmation Hearing, Mr. McDowell offered his opinion that he agreed with LightSquared's forecast that it would receive FCC approval of the License Modification Application by December 31, 2015, including the premise that a portion of the New Downlink spectrum would be made available from the NOAA Spectrum. (See Conf. Hr'g Tr. Mar. 19, 2014 (McDowell) at Tr.75:1-7, 15-25.) In addition, Mr. McDowell testified that he believed it was very likely that the FCC would approve LightSquared's use of its 10 MHz of Lower Downlink (1526MHz to 1536MHz) for terrestrial use within the seven years contemplated by the Plan. (Id. at 75:8-9.)

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[22] As an FCC Commissioner, Mr. McDowell's duties included consideration of, and decisions regarding, spectrum issues involving satellite, media, and wireless companies. (See PX1078 at 2.)

Mr. McDowell did not pick these dates; rather, he was simply given the dates reflected in the Plan. Although he testified that he had participated in and had knowledge of matters relating 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. (Id. at 87:1-2.) Nonetheless, he offered his opinions "based on his thirty years of experience" that the FCC will grant the License Modification Application before the end of 2015; will not require an auction of the NOAA Spectrum; and will approve use of the Lower Downlink spectrum by the end of seven years.

Although Mr. McDowell admitted that the FCC could commence a rule-making 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,"[23] he nonetheless offered his opinions on the critical timing issues on which the Plan is premised. He testified that he examined, and ultimately discounted, a number of factors that could theoretically present issues for LightSquared's regulatory approval process, including (i) potential GPS interference issues raised by members of the GPS community during a meeting with the FCC in December 2013 (see id. at 80:10-81:2); (ii) potential handset interference issues raised by SPSO with respect to the use of LightSquared's uplink spectrum, which have not been raised by any party in a formal

[23] See *Statement Regarding the FCC Exit Condition in Debtors' Revised Second Amended Joint Plan Pursuant to Chapter 11 of the Bankruptcy Code*, dated January 17, 2014 [Docket No. 1235] (the "FCC Statement"). Mr. McDowell concluded that the FCC Statement did not change his opinion for two key reasons. First, he opined that the FCC Statement in this case is a "fairly routine filing for the Commission to preserve all of its legal options and [the statement] doesn't reach any conclusions." (Conf. Hr'g Tr. Mar. 19, 2014 (McDowell) at 81:22-82:4.) Second, Mr. McDowell noted that the FCC Statement "speaks to the second amended plan . . . which had a contingency of resolution at the FCC or grants by the end of this calendar year, 2014. And the third amended plan does not have such a contingency." (Id. at 82:5-10.)

objection (see id. at 82:11-83:4); and (iii) the possibility that the FCC could auction the NOAA Spectrum instead of agreeing to swap it for LightSquared's 10 MHz of downlink spectrum closest to the GPS band. With respect to NOAA, he pointed out that the FCC has granted license modification applications in the past that involved spectrum swaps without holding an auction. (See id. at 83:5-84:7.)

Mr. McDowell concluded that, whether or not the FCC decides to hold an auction for the NOAA Spectrum, LightSquared's "license modification will be granted by the end of calendar year 2015." (Id. at 84:8-14.) Important to his conclusion in this regard were the following facts: (a) there is "more than ample time to resolve these issues" given that LightSquared's License Modification Application has already been pending for a year and a half and there are almost two years until the end of 2015; (b) precedent transactions, including the Sprint 800 MHz rebanding and the H-block auction that resulted in DISH as the winning bidder, illustrate that the FCC can issue orders resolving very complex issues within a relatively short timeframe; and (c) resolution of the bankruptcy is imminent, which will cause the FCC to "act with alacrity." (Id. at 84:15-85:25.) The only other support that Mr. McDowell offered for his opinions was the fact that no so-called "petitions to deny" or formal objections had been filed with respect to the License Modification Application.[24] Mr. McDowell pointed to no evidence indicating that the FCC will proceed along the timeline suggested, offered no evidence that he had any knowledge of how or when the National Telecommunications and Information Administration or any coordinate agency intends to act with respect to LightSquared's application, and could not credibly estimate

[24] At the Confirmation Hearing, Mr. McDowell noted that the window for lodging such formal objections to the License Modification Application had closed over a year ago. (Conf. Hr'g Tr. Mar. 19, 2014 (McDowell) at 78:1-11; 78:25-80:9.)

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.

B. Mr. Christopher Rogers

Mr. Christopher 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, and JPMorgan (see SPX78), Mr. Rogers testified to his personal involvement in the plan formulation and negotiation process and that of the Special Committee. (Conf. Hr'g Tr. Mar. 19, 2014 (Rogers) 12:10-67:2.) He estimated that he had spent around 500 hours working on the Plan and related issues,[25] 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 the 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 in those negotiations. Because the Special Committee has asserted a broad common interest privilege with respect to communications among it, the Plan Support Parties, and the Ad Hoc Secured Group, there are no documents that were produced in discovery or are in evidence that reflect any communications

[25] Mr. Rogers testified that he personally spent more than five hundred hours on the work of the Special Committee, including meetings with stakeholders, regulators, and prospective purchasers. (See Conf. Hr'g Tr. Mar. 19, 2014 (Rogers) at 19:18-20:20.)

on this point during the relevant timeframe.

C. Mr. Douglas Smith

Mr. Douglas Smith, the Debtors' Chief Executive Officer, 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 in plan negotiations. (Conf. Hr'g Tr. Mar. 20, 2014 (Smith).) He also testified about a host of issues relating to the FCC process and certain technical issues relating to LightSquared's spectrum assets. Mr. Smith has been involved in the implementation of LightSquared's strategy for the long-term deployment of its spectrum assets since LightSquared filed such a plan with the FCC in September 2012. (See Conf. Hr'g Tr. Mar. 20, 2014 (Smith) at 32:19-35:7.)

During his testimony, Mr. Smith explained the basis of his belief that approval of the License Modification Application by December 31, 2015 and the seven-year Lower Downlink approval process timeline were achievable. (Conf. Hr'g Tr. Mar. 20, 2014 (Smith) at 32:15-18; 131:22-25.) In support of his opinion, Mr. Smith highlighted four specific points: (i) the completion of two comment cycles with respect to use of the two upper 10MHz of uplink spectrum (id. at 33:10-12); (ii) the fact that "great progress" has been made with NOAA (id. at 40:5-7); (iii) the observation that the latest U.S. budget reflects NOAA-related costs that are not inconsistent with LightSquared's projections and objectives (id. at 46:6-25); and (iv) the fact that a petition for rulemaking with respect to the lower 10MHz of downlink has already been filed with the FCC and could be complete in three to five years (id. at 129:13-18; 131:22-25). In addition to testifying about the FCC approval process, Mr. 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.

D. Mr. Marc Montagner

Mr. Marc Montagner, the Debtors' Chief Financial Officer, gave deposition testimony regarding numerous issues, and certain portions of his videotaped deposition were designated by the parties, placed into the record, and viewed by the Court on videotape. (Mar. 6, 2014 Dep Tr. (Montagner).) Mr. Montagner testified, among other things, about (i) his participation in the plan process – which he described as "mostly being on the receiving end" (id. at 8:16-18); (ii) his preparation of financial forecasts for use in connection with the Plan (id. at 9:5-10:2); (iii) his views with respect to FCC matters; and (iv) 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 cases.

E. Mr. Steven Zelin

The Ad Hoc Secured Group called its financial advisor, Mr. Steven Zelin, of Blackstone, to testify. (Conf. Hr'g Tr. Mar. 27, 2014 (Zelin) 6:13-118:13.) Mr. Zelin detailed the various plan alternatives he had explored with the Ad Hoc Secured Group in 2013 and earlier, and he described his participation in the negotiations leading to the execution of the Plan Support Agreement in connection with the DISH/LBAC Bid.[26] He described in some detail his reaction to what he viewed as "strange" conduct and comments by DISH, SPSO, and their counsel in

[26] As described more fully in the Adversary Proceeding Decision, on May 15, 2013, Mr. Ergen, through his wholly-owned entity LBAC, submitted an unsolicited bid for LightSquared LP's spectrum assets for $2 billion. On July 22, 2013, DISH purchased LBAC for a dollar, and, the next day, DISH announced its intention to bid through LBAC for LightSquared LP's spectrum assets for $2.22 billion (the "DISH/LBAC Bid"). On that date, DISH also executed a Plan Support Agreement with the Ad Hoc Secured Group, pursuant to which LBAC would act as the stalking horse bidder for the Ad Hoc Secured Group's plan. A joint chapter 11 plan of reorganization proposed by the Ad Hoc Secured Group (of which SPSO was a member at that time) was filed on July 23, 2013. See *First Amended Joint Chapter 11 Plan for LightSquared LP, et al., Proposed by the Ad Hoc Secured Group of LightSquared LP Lenders* [Docket No. 970].

connection with the "technical issue" and in connection with the pursuit of the DISH/LBAC Bid in the time period leading up to and subsequent to the scheduled December 11, 2013 LightSquared auction.[27] He also 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.

F. Mr. Charles Ergen

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 ten in the morning, and stepping down at approximately 7:45 in the evening. (Conf. Hr'g Tr. Mar. 26, 2014 (Ergen).) 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 holdings in the LP Debt.[28] His testimony focused on, among other things: (i) the valuation analysis he prepared and presented to the DISH

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[27] Conf. Hr'g Tr. Mar. 27, 2014 (Zelin) at 21:13-23:1 ("My reaction was that a bidder in a process demanding that information that they uncover that they think are issues that other bidders should know is quite strange. I've never experienced that before.") The Debtors and the Special Committee canceled the December 11, 2013 Court-scheduled auction for LightSquared's assets (or any grouping or subset thereof), and they did not deem any bid the "Successful Bid." See Specific Disclosure Statement at 3. On January 7, 2014, LBAC, through its counsel, sent the Ad Hoc Secured Group written notice of LBAC's termination of the Plan Support Agreement and subsequently informed the Ad Hoc Secured Group of the termination of the DISH/LBAC Bid. See id. at 4. On January 13, 2014, the Ad Hoc Secured Group filed the *Statement of the Ad Hoc Secured Group of LightSquared LP Lenders and Notice of Intent To Proceed with Confirmation of the First Amended Joint Chapter 11 Plan for LightSquared LP, ATC Technologies, LLC, LightSquared Corp., LightSquared Inc. of Virginia, LightSquared Subsidiary LLC, LightSquared Finance Co., LightSquared Network LLC, LightSquared Bermuda Ltd., SkyTerra Holdings (Canada) Inc., and SkyTerra (Canada) Inc., Proposed by the Ad Hoc Secured Group of LightSquared LP Lenders* [Docket No. 1220], in which the Ad Hoc Secured Group challenged LBAC's termination of the DISH/LBAC Bid (the "Ad Hoc Secured Group Motion to Enforce"). LBAC then sought a declaratory judgment "declaring that both the PSA and LBAC Bid were terminated in their entirety on or before January 10, 2014." See *Objection of L-Band Acquisition, LLC to the January 13, 2014 Statement of the Ad Hoc Secured Group of LightSquared LP Lenders and Notice of Intent To Proceed with Confirmation of the First Amended Joint Chapter 11 Plan and Motion for Declaratory Relief,* dated January 16, 2014 [Docket No. 1232] at 18; *Reply in Further Support of Objection of L-Band Acquisition, LLC to the January 13, 2014 Statement of the Ad Hoc Secured Group of LightSquared LP Lenders and Notice of Intent To Proceed with Confirmation of the First Amended Joint Chapter 11 Plan and Motion for Declaratory Relief,* dated January 21, 2014 [Docket No. 1246]. On January 22, 2014, this Court issued a ruling that the Plan Support Agreement and the DISH/LBAC Bid were lawfully terminated by LBAC. See Jan. 22, 2014 Hr'g Tr. [Docket No. 1278].

[28] See fn 11, *supra*. 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, which is the current face amount of the SPSO Claim, excluding interest.

Board in July 2013 with respect to the LightSquared spectrum assets, which estimated that, in DISH's hands, the total value of LightSquared's assets would be between \$5.17 billion and \$8.99 billion (including value that would be realized by DISH based on enhanced ability to utilize its existing spectrum);[29] (ii) his knowledge of the fairness opinion and valuation of LightSquared prepared by Perella Weinberg Partners ("PWP")[30] for the DISH Board (the "PWP Valuation"); (iii) his knowledge of the so-called "technical issue" and how he believes it affects the value of the LightSquared spectrum; (iv) 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 DISH/LBAC Bid; and (v) 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 became remarkably less precise and straightforward when queried about his involvement in the events leading to the termination of the DISH/LBAC Bid, and his answers with respect to potential competition between DISH and

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[29] Mr. Ergen's presentation (the "Ergen Valuation"), was entitled "Strategic Investment Opportunity – L-Band Acquisition, LLC." (PX1047.) It was delivered to the DISH Board of Directors by Mr. Ergen at a special meeting on July 8, 2013. Under a line item entitled "Implied Net Primary Asset Value," the Ergen Valuation listed 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. Under the heading "Implied Supplemental Asset Value," the Ergen Valuation listed 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." 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 owned by DISH 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. 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 was estimated by Mr. Ergen to be between \$5.174 billion and \$8.996 billion, with a midpoint of \$7.085 billion.

[30] PWP served as financial advisor to the Special Committee of the DISH Board of Directors that was created on May 8, 2013 to evaluate and make recommendations to the DISH Board regarding a possible bid by DISH for LightSquared's assets and to review any potential conflicts of interest arising from Mr. Ergen's purchases of LightSquared debt.

LightSquared were facile and disingenuous. Moreover, his testimony with respect to actions taken by DISH with respect to the "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 via consummation of the DISH/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.

G. Mr. Omar Jaffrey

SPSO next called Mr. Omar Jaffrey, a principal of Melody, to testify. (Conf. Hr'g Tr. Mar. 28, 2014 (Jaffrey) 27:8-99:25.) Mr. Jaffrey testified that he contacted Mr. Falcone in the summer of 2013 to find a way for his firm to invest in LightSquared. (Id. at 28:20-25.) Melody was first retained by Harbinger to provide a $550 million commitment for a debtor-in-possession financing for a plan of reorganization proposed by Harbinger. (Id. at 29:4-15.) Pursuant to that commitment, Melody was entitled to the payment of an eight percent per annum commitment fee for as long as the commitment remained outstanding, as well as a $4 million upfront fee and a double-digit break-up fee in the event that LightSquared was sold – all payable by Harbinger. (Id. at 52:18-25; 55:17-56:24.) It was Mr. Jaffrey's belief that Melody's commitment to Harbinger was still outstanding as of the date of his testimony on March 28, 2014. (Id. at 91:25-92:6.)

In December 2013, Melody took on a second commitment – a $550 million commitment to the Debtors' Second Amended Plan that included debtor-in-possession financing of $285 million. (Id. at 30:21-31:4.) Correspondence between Mr. Jaffrey and others was introduced into evidence reflecting Melody's view that, as of the time Melody entered into this commitment, "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. (Id. at 40:10-41:16; SPX365 (December 22, 2013 Melody investment memo).)

In January 2014, the Second Amended Plan was abandoned[31] and discussions began surrounding what would become the Third Amended Plan which would, in Mr. Jaffrey's words, "allow the company to exit quicker from bankruptcy and drop an FCC conditionality." (Conf. Hr'g Tr. Mar. 28, 2014 (Jaffrey) at 49:8-11.) Extensive testimony was elicited from Mr. Jaffrey regarding the evolution of the economic terms of what eventually became the Plan; email correspondence from the January 2014 timeframe 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. (Id. at 48:12-52:6: 57:6-69:13.) The entire premise of the Melody proposal was the subordination of the SPSO Claim, a notion that was obviously consistent with Mr. Falcone's mindset. (Id. at 49:22-50:18; SPX072; SPX337.) As Mr. Jaffrey put it in an email, the goal was a "win-win" – for everyone but SPSO. (SPX341; Conf. Hr'g Tr. Mar. 28, 2014 (Jaffrey) at 65:21-69:22; 71:4-72:4.) 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.

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[31] Because the Second Amended Plan was conditioned on FCC approval of the License Modification Application, and there was uncertainty about the timing of such approval, the parties determined to develop a different plan that was not conditioned on FCC approval. (See Conf. Hr'g Tr. Mar. 20, 2014 (Smith) at 17:16-18:15; Conf. Hr'g Tr. Mar. 28, 2014 (Jaffrey) at 41:17-42:7.)

H. Mr. Philip Falcone

Mr. Philip Falcone was the final witness called to testify at the Confirmation Hearing. (Conf. Hr'g Tr. Mar. 31, 2014 (Falcone).) 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. Email 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 "for what it is and will ultimately grant LightSquared the license." (Id. at 130:18; 143:19; 127:21-23.) 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 put in an additional $150 million dollars to increase its post-confirmation stake in the reorganized company 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. (Id. at 102:18-103:25.)[32] 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 neither he nor anyone from Harbinger has a seat on the board of directors of the reorganized company and that he is giving up his

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32 Mr. Falcone also added that, under the Plan, Harbinger could pay "a couple of hundred" million for a call option which would enable Harbinger to increase its stake in the reorganized company from thirty-six percent to forty-five percent. (Conf. Hr'g Tr. Mar. 31, 2014 (Falcone) 103:4-13.) He testified that the preferred and common stock that Harbinger would receive under the Plan would rank junior to the SPSO Note. (Id. at 102:8-12.)

causes of action against the GPS industry. (Id. at 105:13-107:5.)[33] 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, at worst, reflects genuinely malevolent views towards 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.

III. THE MOELIS VALUATION ANALYSIS

The Debtors called Mr. Mark Hootnick of Moelis to testify in support of the valuation that undergirds the Plan and that provides the basis and support for SPSO's treatment under the Plan. (Conf. Hr'g Tr. Mar. 24, 2014 (Hootnick).)

In preparing Moelis' valuation, Mr. Hootnick conducted extensive research and analysis over the almost two years in which he has been involved as LightSquared's financial advisor and also relied on his experience with other valuation exercises of similar assets. (Id. at 129:13-18 (attesting that Moelis has "experience valuing spectrum other than in the LightSquared matter. . . We have a telecom practice that is run by my partner Stan Holtz who's been very involved in the entire LightSquared engagement. I've worked on a number of spectrum deals myself").) He also had "[e]xtensive discussions" with management on a "wide variety of topics," throughout these Chapter 11 Cases, including "regulatory issues" and LightSquared's "business plan" and "liquidity forecast." (Conf. Hr'g Tr. Mar. 24, 2014 (Hootnick) at 7:7-14.) Moelis' research, discussions with management, and discussions with Mr. McDowell concerning various assumptions on the likelihood of approval and timing of such approval of LightSquared's FCC

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[33] The Special Committee asserts that it adopted terms that were not beneficial to the Plan Support Parties, and actually contrary to "conditions precedent" initially proposed by the Plan Support Parties. For instance, the Special Committee rejected Harbinger's request for board representation in the New LightSquared Entities (see Conf. Hr'g Tr. Mar. 19, 2014 (Rogers) at 107:1-5), and Harbinger contributed to the estate its litigation claims against Mr. Ergen, the GPS industry, and the FCC. (Id. at 105:2-106:7.)

regulatory applications culminated with Moelis' valuation report submitted to the Court (PX1001) (the "Moelis Valuation Report"), which report contains a thorough analysis of the value of LightSquared's assets. (See Conf. Hr'g Tr. Mar. 24, 2014 (Hootnick) at 10:4-11.)

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 Report, Mr. Hootnick assumed that the FCC would grant LightSquared a license for 30MHz of spectrum, including the 5 MHz of NOAA Spectrum, for terrestrial use, on or before the end of 2015; he further assumed that the Lower Downlink would be approved for terrestrial use within seven years.[34] He did not take into account the alleged "technical issue" that has been raised by SPSO. He acknowledged that the FCC Statement 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.[35] Mr. Hootnick's valuation rises or falls with Mr. McDowell's opinions on the timing of FCC approvals.

In preparing the Moelis Valuation Report, Moelis adopted an industry-accepted valuation method in its valuation of LightSquared, specifically the use of a market multiple comparable based on the price per MHz/POP, which reflects the market price as a function of the size of the spectrum and the number of people it covers. (See Conf. Hr'g Tr. Mar. 24, 2014 (Hootnick) at

[34] Mr. Hootnick testified that both assumptions as to FCC approval are "outside dates," explaining that LightSquared, Mr. McDowell, and Moelis have utilized the "conservative view," while some expect the License Modification Application to be granted sooner. (Conf. Hr'g Tr. Mar. 24, 2014 (Hootnick) at 12:14-22; 22:14-23:13.)

[35] To perform its valuation of LightSquared's Lower Uplink and Upper Uplink (together, the "Uplinks") and the New Downlink, Moelis relied on discussions with Mr. Smith and Jeffrey Carlisle, LightSquared's Executive Vice President for Regulatory Affairs and Public Policy, and the opinion of Mr. McDowell, that, by the end of 2015, the FCC would have granted the License Modification Application, which includes the use of the Uplinks and the swap with the NOAA Spectrum to make a ten-by-twenty block of spectrum. (See Conf. Hr'g Tr. Mar. 24, 2014 (Hootnick) at 10:15-13:6, 24:21-25:3.) Messrs. Smith and Carlisle were the "two main parties interacting with the FCC." (Conf. Hr'g Tr. Mar. 24, 2014 (Hootnick) at 11:23-12:7.)

16:13-17:6 (describing the MHz/POP terminology and usage); Moelis Valuation Report at 10 (detailing, based on spectrum characteristics, LightSquared's attractive, low-frequency spectrum with strong propagation and in-building penetration).) Moelis reviewed "comparable spectrum" transactions and, by taking into account the unique considerations relevant to each spectrum block, derived the appropriate $/MHz/POP range multiples to apply to LightSquared's spectrum assets.[36] The processes, conclusions, and comparables reflected in the Moelis Valuation Report are similar to those reflected in the Ergen Valuation and PWP Valuation, each described herein.[37]

Based on the assumption that the License Modification Application would be granted by the forecasted dates, Moelis derived a "market comp range of sixty to ninety cents" per MHz/POP. (Conf. Hr'g Tr. Mar. 24, 2014 (Hootnick) at 22:14-24:3.) Using that determined range, Moelis derived a value for LightSquared's spectrum assets. To account for the fact that the License Modification Application may not be achieved until the end of 2015, Moelis discounted the derived value back to October of 2014 (the estimated date of LightSquared's emergence from chapter 11) to determine its present value. (See id. at 22:14-24:3.) Using this generally accepted method, Moelis concluded a value of LightSquared's Uplinks, together with the New Downlink, of approximately $4.8 billion to $7.2 billion, with a midpoint of $6 billion. (See id. at 22:14-23:13; Moelis Valuation Report at 11.)

With respect to the Lower Downlink spectrum, Moelis adopted a similar approach using the information from Mr. Smith and the expert opinion of Mr. McDowell that the Lower Downlink (located at 1526 to 1536 MHz) would be available within seven years of LightSquared's emergence from bankruptcy. (See Conf. Hr'g Tr. Mar. 24, 2014 (Hootnick) at

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36 Conf. Hr'g Tr. Mar. 24, 2014 (Hootnick) at 22:19-22 ("We came up with a market comp range of sixty cents to ninety cents a megahertz POP for use in our valuation. We then made some additional -- or adjustments based on the assumptions we talked about earlier."); see also id. at 29:2-14; Moelis Valuation Report at 12 (setting forth selected broadband wireless spectrum precedents).

37 See PX1047, PX1048; Conf. Hr'g Tr. Mar. 24, 2014 (Hootnick) at 32:5-37:16.

10:15-13:6.) Mr. Hootnick discounted that value back to present value from the outside date of October 2021, resulting in a multiple of $.26-$.39/MHz/POP, or a value of $811 million to approximately $1.22 billion, with a midpoint of $1.03 billion. (See id. at 24:4-12; Moelis Valuation Report at 11.)

Upon measuring the value of each component of LightSquared's spectrum and satellite portfolio, Moelis provided a conclusion regarding the total enterprise value of such assets. (See Moelis Valuation Report at 11.) Mr. Hootnick opined that LightSquared's total enterprise value is approximately $6.2 billion to $9.1 billion, with a midpoint of $7.7 billion. (See Conf. Hr'g Tr. Mar. 24, 2014 (Hootnick) at 25:4-27:7 (explaining sum of valuations of LightSquared's "U.S. spectrum value, the Canadian L-band spectrum, and the value of the satellite system"); Moelis Valuation Report at 11 (same).) After netting out certain payment obligations, LightSquared's total value approximated $4.47 billion to $7.4 billion, with a midpoint of $5.96 billion. (See Conf. Hr'g Tr. Mar. 24, 2014 (Hootnick) at 27:8-29:1.)

The Moelis Valuation Report is consistent with aspects of the valuations performed by the Ergen Parties. In July 2013, both Mr. Ergen and PWP performed valuations of LightSquared's spectrum to aid the DISH Board in its consideration of whether to pursue an acquisition of LightSquared's spectrum. (PX1047; PX1048.) Both Mr. Ergen and PWP valued LightSquared spectrum on an "as is" basis, without assuming favorable FCC modifications. (See id.)

Moelis, Mr. Ergen, and PWP incorporated the same basic spectrum valuation methodologies, assumptions, and views in their respective valuations of LightSquared. (See Conf. Hr'g Tr. Mar. 24, 2014 (Hootnick) at 32:13-34:1 (agreeing with Mr. Ergen's observations in the Ergen Valuation that L-Band is low band spectrum and is uniquely positioned due to its excellent propagation characteristics); 34:2-16 (noting that Ergen Valuation contains "a similar valuation exercise to what we've just walked through that Moelis did. . . . [They are] . . . very consistent as far as the market valuation of the L-band spectrum"); 36:22-37:4 (noting that PWP Valuation is "very similar").) Mr. Ergen's valuation applies a higher range of $/MHz/POP than that used by Moelis in its valuation (see id. at 34:2-16 ("[T]heir valuation range is actually a little bit higher than the Moelis range. We were sixty to ninety cents a megahertz POP. They're sixty-five to ninety-five cents[.]")), and includes only a portion of LightSquared's assets (see id. at 34:2-16 ("The other big differential, they only include 20 megahertz of our spectrum in their primary asset value."), 34:21-24.) As for the PWP Valuation, the $/MHz/POP range applied to LightSquared's Uplinks – "fifty to nine[t]y cents" – is similar to Moelis's $.60-$.90 range. (See id. at 36:22-37:4.) The Ergen Valuation and the PWP Valuation reflect a similar, but ultimately higher, value of LightSquared's satellite system. (See id. at 35:19-36:2 (as to Ergen Valuation: "They did a similar valuation and exercise but notably came up with a higher estimate of the satellite system than the Moelis valuation"); 37:5-16 (as to PWP Valuation: "they conclude to a range that's almost identical to the Moelis valuation or the higher end of their range of the satellites and the satellite spectrum").)

The Ergen Valuation reflects that LightSquared LP's spectrum assets carried an implied net primary value of up to $5.213 billion, with a midpoint of $4.277 billion. (See Ergen Valuation at 5.) The PWP Valuation reflects a $2.3 to $5.4 billion standalone valuation of LightSquared LP. (See PWP Valuation at 6.)

LightSquared, its FCC expert, and Moelis all assume that LightSquared's Upper Downlink will be relinquished in a future spectrum swap arrangement and, accordingly, the Moelis Valuation Report does not attribute any value to the Upper Downlink. (See Conf. Hr'g

Tr. Mar. 24, 2014 (Hootnick) at 16:2-6; 35:12-18.) Mr. Ergen valued the Upper and Lower Downlinks together, at between $312 million to $1.56 billion, with a midpoint of $936 million. (See Ergen Valuation at 5.)

IV. THE GLC VALUATION ANALYSIS

SPSO offered the expert valuation testimony of Mr. J. Soren Reynertson of GLC. (Conf. Hr'g Tr. Mar. 27, 2014 (Reynertson) 121:4-250:11.) Mr. Reynertson was paid $1.25 million dollars by SPSO for his work[38] and was given three weeks to form his opinions.[39] The Debtors raised a Daubert challenge to Mr. Reynertson's qualifications under Federal Rule of Evidence 702,[40] which was overruled by the Court, in part because there had been no notice of such 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. (Id. at 140:11-143:13.) The Debtors have renewed their objection to a portion of Mr. Reynertson's testimony in their Motion to Strike Hyslop and Reynertson.

Mr. Reynertson testified that he relied "100 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. (See Conf. Hr'g Tr. Mar. 27, 2014 (Reynertson) at 208:8-11; 246:15-247:7.) Despite this admission, Mr. Reynertson purported to value LightSquared's assets based on GLC's assessment of the risk associated with obtaining FCC approval for use of the spectrum, notwithstanding the fact that Mr. Reynertson was not offered as an FCC expert.

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[38] See Conf. Hr'g Tr. Mar. 26, 2014 (Ergen) 73:3-15.

[39] On March 4, 2014, when Mr. Reynertson submitted GLC's valuation report (PX1002 and SPX158, the "GLC Valuation Report"), he had had only three weeks of experience with spectrum and satellite valuation generally – those being the three weeks beginning with his retention by SPSO and concluding with delivery of the GLC Valuation Report. (See Conf. Hr'g Tr. Mar. 27, 2014 (Reynertson) at 199:20-200:6.)

[40] Conf. Hr'g Tr. Mar. 27, 2014 at 135:10-15 (Mr. Cohen: "They would like this witness to offer valuation testimony when he just told you he didn't do a valuation on the assets of the company, which are the spectrum and the satellites. We don't think . . . it meets the standards under [Federal Rule of Evidence] 702."); 137:1-140:21 (Mr. Cohen: "And with respect to those issues, I think he . . . acquired them for purposes of this case in the last five weeks. I don't think that makes him an expert.").

(See id. at 152:9-19 (explaining, for GLC Valuation Report, "[w]hat we did was evaluate each of the individual blocks of spectrum that LightSquared either owns, leases or has an option to auction on, and evaluated the risk associated with the interference issues, which are widely known, and determined with conversations with Hyslop and the research what the ultimate available footprint might look like"); 164:19-24 (purporting to identify range of risks in spectrum blocks); 235:2-10.)[41]

Mr. Reynertson's analysis utilized Mr. Hootnick's valuation methodology but changed many of the inputs, including (a) reducing the amount of available spectrum by 10 MHz by applying two 5 MHz guard bands as a result of purported interference concerns and (b) discounting the price per MHz/POP from the price used by Mr. Hootnick by assuming that LightSquared's License Modification Application would not be approved. (GLC Valuation Report at 12.)

With respect to the reduction by 10 MHz of LightSquared's spectrum for a guard band, the GLC Valuation Report concludes that "[a]fter resolution of the technical issues facing LightSquared spectrum, the Company will have 15-30 MHz of useable spectrum." (GLC Valuation Report at 12; Conf. Hr'g Tr. Mar. 27, 2014 (Reynertson) at 159:21-160:6.) This reduction of LightSquared's spectrum footprint was based, in part, on the alleged need to designate 50 percent of LightSquared's Uplinks as unusable guard bands due to certain alleged

[41] Mr. Reynertson, using his own judgment, made reductions to the value of LightSquared's spectrum based on the "risk" associated with achieving regulatory approval. (See Conf. Hr'g Tr. Mar. 27, 2014 (Reynertson) at 164:19-24 (noting that page 12 of GLC Valuation Report reflects "the sum of the proposed 2021 numbers the debtors hope to achieve, and then a reduction for the risks that we saw, the range of risks that we saw in each of the blocks").) Mr. Reynertson, however, could not assess those risks himself and did not have anyone upon whom he could rely to do so. He also drew his own conclusions as to which interference issues are insurmountable or, alternatively, would cause reductions in the value of the spectrum. (See id. at 164:19-24.) For example, he deducted from the value of LightSquared's spectrum the costs of relocating NOAA from its current spectrum block as a result of the granting of the License Modification Application. (See Conf. Hr'g Tr. Mar. 24, 2014 (Hootnick) 38:2-42:14 (discussing inaccuracies in the GLC Valuation Report).) In addition, Mr. Reynertson improperly discounted twice for the same purported "defect" in the uplink spectrum: the "guard bands" he created in the Uplinks are intended to "cure" the purported interference issues, yet he valued the remaining 5 MHz of spectrum in each uplink band as if the interference "problem" had not been resolved, and FCC approval had not been obtained.

interference issues.

Mr. Reynertson testified that he based his conclusions on the opinions of Mr. Hyslop. (See Conf. Hr'g Tr. Mar. 27, 2014 (Reynertson) at 246:15-247:7.) However, with respect to the use of guard bands, Mr. Reynertson could not have relied on Mr. Hyslop's opinion when he wrote the GLC Valuation Report (which was completed on March 4, 2014) or when he testified at his deposition (on March 5, 2014) because Mr. Hyslop did not think about a guard band as a potential solution until some days or weeks after his own deposition on March 8, 2014. (See Motion to Strike Hyslop and Reynerston ¶¶ 14-19, 32-34.) In addition, Mr. Reynertson conceded that if the "guard band" assumption that underlies his report is mistaken or unsupported, that will moot the portion of the GLC Valuation Report based thereon. (See Conf. Hr'g Tr. Mar. 27, 2014 (Reynertson) at 221:9-14 (conceding reliance on Hyslop to subtract 5 MHz for guard band, and, if that number is wrong, it would affect opinion).)

Many aspects of Mr. Reynertson's testimony are noteworthy: (i) he had never previously valued satellites or spectrum (see Conf. Hr'g Tr. Mar. 27, 2014 (Reynertson) at 126:14-23); (ii) he applied certain faulty and arbitrary assumptions in his valuation methodology (see fn 41, *supra*); and (iii) he was not provided with the valuation analyses that had been prepared by Mr. Ergen and by PWP during the summer of 2013, and, when presented with such analyses 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.[42]

The GLC Valuation Report 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

[42] The first time Mr. Reynertson saw the PWP Valuation and the Ergen Valuation was at his deposition on March 5, 2014, the day after he completed the GLC Valuation Report. (Conf. Hr'g Tr. Mar. 27, 2014 (Reynertson) 144:24-146:1.) Mr. Reynertson acknowledged that reviewing these reports would have been "informative" and would "have helped [him] understand how other sophisticated investors have looked at this spectrum." (Id. at 249:24-250:5.)

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, as discussed *infra*, the portion of the GLC Valuation Report that relies on the stricken Hyslop testimony shall be afforded little weight.

V. CONFIRMATION TESTIMONY REGARDING THE "TECHNICAL ISSUE"[43]

A. Mr. Douglas Hyslop

SPSO called Mr. Douglas Hyslop of Wireless Strategy LLC and SmartSky Networks LLC, engineering consulting firms which provide engineering services for wireless operators. (Conf. Hr'g Tr. Mar. 25, 2014 (Hyslop) [under seal].) SPSO retained Mr. Hyslop to provide expert testimony on the "technical issue." Mr. Hyslop was retained on February 28, 2014 and formed his opinions by March 3, 2014; his deposition was conducted on March 8, 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 the Confirmation Hearing. (See Motion to Strike Hyslop and Reynertson at ¶¶ 2-3, 20-31.) The parties dispute whether or not this opinion should be considered "new" and whether or not gamesmanship is implicated in the Debtors' approach to eliciting the opinion. For the reasons set forth in the Debtors' Motion to Strike Hyslop and Reynertson, the motion shall be granted as to Mr. Hyslop, and the requested portions of Mr. Hyslop's testimony shall be stricken from the record. The remainder of Mr. Hyslop's testimony, as to which the Court makes detailed findings under seal, does not lend credible support to SPSO's position with respect to the existence and magnitude of the "technical issue." (See Appendix A (filed under seal).)

[43] See fn 19, *supra*; Appendix A (filed under seal).

B. Mr. John Jacob Rasweiler V

Mr. John Jacob Rasweiler V testified as the Debtors' rebuttal expert with respect to the "technical issue." (Conf. Hr'g Tr. Mar. 28, 2014 (Rasweiler) [under seal].) Mr. Rasweiler is employed by Sublime Wireless, a professional engineering and services firm that provides communications 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 the "technical issue," Mr. Rasweiler provided credible and compelling testimony that the "technical issue" is unlikely to exist at all and that, even if it did exist, technology is available today that can eliminate the problem, rendering it a non-issue. In addition, Mr. Rasweiler identified new technology which, while not currently in commercial production, reflects further advances in certain devices that could be deployed to address the "technical issue." Mr. Rasweiler's testimony substantially undercut the credibility of Mr. Hyslop's conclusions with respect to many critical aspects of the "technical issue" alleged by SPSO. (See Appendix A (filed under seal).)

DISCUSSION

I. THE PLAN CANNOT BE CONFIRMED

A. Separate Classification of Prepetition LP Facility SPSO Claim Complies With Section 1122

Under the Plan, the Prepetition LP Facility SPSO Claim is placed in a separate class (Class 7B) from the Prepetition LP Facility Non-SPSO Claims (Class 7A). The proffered justification for such separate classification of 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 non-creditor 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 claims or interests of such class." See 11 U.S.C. § 1122(a). 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.

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 and interests is appropriate so long as the plan proponent can articulate a "reasonable" (or "rational") justification for separate classification. See, e.g., Aetna Cas. and Sur. Co. v. Clerk, U.S. Bankr. Ct., New York, N.Y. (In re Chateaugay Corp.), 89 F.3d 942, 949 (2d Cir. 1996); In re Lafayette Hotel Partnership, 227 B.R. 445, aff'd, 198 F. 3d 942, 950 (2d Cir. 1999); In re Adelphia Commc'ns Corp., 368 B.R. 140, 246-247 (Bankr. S.D.N.Y. 2007). Whether there is any "good business reason" to support a plan proponent's separate classification is a question of fact. Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture), 995 F.2d 1274, 1279 n. 7 (5th Cir. 1991), 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 Assocs. Ltd. P'ship, 159 B.R. 695, 703 (Bankr. 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 Premiere Networks Servs., Inc., 333 B.R. 130, 133-34 (Bankr. N.D. Tex. 2005) ("a non-creditor interest in the reorganized debtor meets the 'good business reason' standard and justifies separate classification of the creditor's claim"); In re Graphic Commc'ns, Inc., 200 B.R. 143 (Bankr. E.D. Mich. 1996) (holding that a rational business reason existed for classifying competitor separately from general trade creditors); In re Texas Star Refreshments, LLC, 494 B.R. 684, 696 (Bankr. N.D. Tex. 2013) (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 "non-creditor" interests that the creditor-competitor may pursue. In Premiere Networks, for example, the separately classified creditor's "non-creditor interest" was "a different stake in the future viability of the reorganized company." 333 B.R. at 134.[44]

The parties also cite to In re 500 Fifth Ave. Assocs., 148 B.R. 1010 (Bankr. S.D.N.Y. 1993), but disagree on its applicability here. In 500 Fifth Ave. Assocs., 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 non-recourse deficiency claims and other unsecured claims. Id. at 1019. 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

[44] In addition to a creditor being a competitor, other justifications for separate classification cited to the Court by the Debtors include (i) ulterior motives demonstrated by the creditor's conduct during a debtor's case and (ii) necessity. *LightSquared's Post-Trial Memorandum of Law in Further Support of (I) Confirmation of Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of Bankruptcy Code, (II) Motion To Designate Vote of SP Special Opportunities, LLC, and (III) Motion Seeking Approval of New DIP Facility* [Docket No. 1486] at 78, 82-86.

to a recourse creditor, and it 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. Id. The court, perhaps presaging Judge Gerber's views in Adelphia, 368 B.R. 140, 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. Id.

SPSO, relying on 500 Fifth Ave. Assocs., 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 Ave. Assocs. 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."[45] 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 evaluation of a classification scheme based on claim holder considerations would be a "complicated and arbitrary line-drawing exercise,"[46] 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 Ave. Assocs. does indeed hold that,

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[45] *LightSquared's (A) Memorandum of Law in Support of Confirmation of Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of Bankruptcy Code and (B) Omnibus Response to Objections to (i) Confirmation of Plan, (ii) Motion To Designate Vote of SP Special Opportunities, LLC, and (iii) Motion Seeking Approval of New DIP Facility* [Docket No. 1413] at 19 n.24.

[46] *Objection of SPSO to Confirmation of Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 1408] at 7 n.5.

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,[47] 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 (as opposed to DISH or Mr. Ergen) 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 of Directors 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.[48] 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 to engage in transactions with third parties that own spectrum assets;[49] (c) Mr. Ergen himself purports to having an interest in owning spectrum "personally" (if his testimony in the Adversary Proceeding is to be credited); and (d) both DISH

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[47] See 500 Fifth Ave. Assocs., 148 B.R. at 1019-20 (citing 5 L. King, COLLIER ON BANKRUPTCY pp. 1122.03[1]-[b](15th ed.1992)).

[48] This Court has previously found that "one could reasonably expect a competitor to vote differently than a non-competitor lender on material matters concerning LightSquared, and, more significantly, a competitor given access to material non-public information about LightSquared may use it to LightSquared's detriment, given that a competitor may possess a desire to see LightSquared fail." Adversary Proceeding Decision at 128.

[49] Conf. Hr'g Tr. Mar. 27, 2014 (Zelin) at 17:13-18:7 (explaining how DISH and LightSquared were competitors prior to the commencement of the Chapter 11 Cases: "It's clear what DISH's business plan was having experienced it and read about it in other matters where [Ergen] was looking to build a network, LightSquared was looking to get its spectrum issues behind it and build a network, or had been building a network until the spectrum issues popped up. They'd be competing for handset designs, customer designs. In fact, LightSquared had a deal with Sprint to be the backbone of their infrastructure before the filing. In the months before, DISH was making – Ergen was making a competing hostile offer to buy Sprint. So they might have been competing for kind of parties that could support the infrastructure as well"); Conf. Hr'g Tr. Mar. 27, 2014 (Reynertson) at 209:10-13) (acknowledging that DISH will be a direct competitor of LightSquared following LightSquared's emergence from bankruptcy, "I think DISH intends to – presumably intends to become a competitor. Certainly the marketplace thinks that they intend to become a competitor"); Conf. Hr'g Tr. Mar. 26, 2014 (Ergen) at 328:15-329:15 (admitting that (a) both DISH and LightSquared had previously sought (in LightSquared's case) to partner with or (in DISH's case) acquire Sprint as part of their respective spectrum-deployment strategies, and (b) DISH and LightSquared, each owners of valuable spectrum assets, will compete in the marketplace for lucrative partnership arrangements).

and the Debtors have announced their intention to develop and operate telephonic networks that would utilize spectrum assets and that would compete with each other for customers and business.[50] The Debtors and the Ergen Parties (one of which is SPSO) are competitors for spectrum assets under any reasonable meaning of the word.[51]

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 the Chairman of the DISH Board may at some point require him to take action that is contrary to the best interests of LightSquared and contrary to his interests as a creditor (through SPSO) of LightSquared LP. As Mr. Ergen himself made clear in pursuing his so-called personal bid for LightSquared's spectrum through LBAC, preserving optionality for DISH is a hallmark of his ongoing strategy for DISH in these cases, and more generally. See Adversary Proceeding Decision at FOF ¶ 178. 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.

Since becoming a holder of LP Debt, SPSO and Mr. Ergen have acted to further the interests of DISH and EchoStar with respect to LightSquared and its spectrum assets, which interests are different from the interests of LightSquared's other creditors. At all relevant times,

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50 DISH was seeking, among other things, to acquire spectrum in competition with LightSquared, to develop handsets in competition with LightSquared, and to take control of Sprint, with which LightSquared had hoped to join in building its network. (See Conf. Hr'g Tr. Mar. 27, 2014 (Zelin) at 15:18-18:7; Conf. Hr'g Tr. Mar. 20, 2014 (Smith) at 26:21-29:10 (explaining circumstances of LightSquared's relationship with Sprint and the difficulties that SPSO could have caused if it had been a lender at the time LightSquared first negotiated and entered into its agreement with Sprint and could cause in the future for negotiation of similar contractual arrangements).

51 In fact, as early as the spring of 2013, Mr. Zelin suggested placing SPSO in a separate plan class because, despite not knowing with certainty the identity of SPSO, the parties suspected it was a competitor. (Conf. Hr'g Tr. Mar. 27, 2014 (Zelin) 17:13-18:7 (explaining basis for Ad Hoc Secured Group separately classifying SPSO's claims in restructuring proposal in May 2013 to LightSquared: "I think in our judgment and the judgment of our clients, Ergen, whether he was SPSO, whether he was LBAC, the initials didn't make a difference to me, Ergen was Ergen. He was a competitor, somebody who would have competing interests").)

SPSO has acted in a manner which is consistent with DISH's strategic motivations, instead of as an ordinary creditor, and also has taken steps that had the potential to destroy LightSquared's value and interrupt its business plans and operations, including the following:

- SPSO deliberately delayed the closing of trades of LP Debt, which created uncertainty as to ownership and impeded LightSquared's negotiation of a consensual plan of reorganization. (Adversary Proceeding Decision at 155, 166-67.)

- Mr. Ergen told the DISH Board that SPSO's blocking position was available to facilitate an acquisition of LightSquared's spectrum by DISH. (Adversary Proceeding Decision FOF ¶¶ 131-32.)

- When DISH did not act quickly enough, Mr. Ergen himself undertook to do so, by submitting a "personal" bid for LightSquared's most significant assets. Mr. Ergen later sold LBAC (and thus the option to purchase LightSquared's assets through such bid) to DISH for $1. (Adversary Proceeding Decision FOF ¶¶ 136-37, 161-62.)

- SPSO and the Ergen Parties negotiated and bound the Ad Hoc Secured Group to a plan that would effectuate the DISH/LBAC Bid and prevent the Ad Hoc Secured Group from negotiating any other plan with LightSquared and its other stakeholders. (Adversary Proceeding Decision FOF ¶¶ 273-74.) In January 2014, they withdrew the DISH/LBAC Bid. (See fns 26-27, *supra*.)[52]

- Although the Ad Hoc Secured Group filed its Motion to Enforce, seeking to compel specific performance of the DISH/LBAC Bid and advance its creditor interests (which would have paid SPSO almost in full), SPSO declined to support that effort and, instead, allowed its lawyers to act for DISH and LBAC in opposing and defeating such motion. (See *Objection of L-Band Acquisition, LLC to the January 13, 2014 Statement of the Ad Hoc Secured Group of LightSquared LP Lenders and Notice of Intent To Proceed with Confirmation of the First Amended Joint Chapter 11 Plan and Motion for Declaratory Relief*, dated January 16, 2014 [Docket No. 1232]; *Reply in Further Support of Objection of L-Band Acquisition, LLC to the January 13, 2014 Statement of the Ad Hoc Secured Group of LightSquared LP Lenders and Notice of Intent To Proceed with Confirmation of the First Amended Joint Chapter 11 Plan and Motion for*

[52] During the day of the auction scheduled for December 11, 2013, LBAC's and SPSO's counsel told Mr. Zelin that she hoped that someone else showed up or it would be bad for his clients. (Conf. Hr'g Tr. Mar. 27, 2014 (Zelin) at 37:25-39:3.) Later that same day, after the auction was cancelled by the Special Committee, counsel told the Ad Hoc Secured Group that LBAC was not prepared to close on the terms that they had negotiated. (Id. at 39:4-21.)

Declaratory Relief, dated January 21, 2014 [Docket No. 1246]; Conf. Hr'g Tr. Mar. 26, 2014 (Ergen) at 131:12-138:4.)[53]

- SPSO and the Ergen Parties spoke to FCC personnel about DISH's plans for LightSquared's spectrum should DISH ultimately acquire it. (Conf. Hr'g Tr. Mar. 20, 2014 (Smith) at 22:5-12.)

- In the first quarter of 2014, Mr. Ergen met with executives of Inmarsat on two separate occasions. At these meetings, Mr. Ergen discussed LightSquared even though LightSquared is currently negotiating a modification of its cooperation agreement with Inmarsat and such modification is a condition of the Plan. (Conf. Hr'g Tr. Mar. 26, 2014 (Ergen) at 188:4-190:19; 207:24-209:5.)

- SPSO and the Ergen Parties raised a "technical issue" with respect to LightSquared and insisted that notification of the purported "technical issue" be given to all parties evaluating a potential bid in the auction for LightSquared's spectrum scheduled to occur in December 2013. (<u>See</u> Conf. Hr'g Tr. Mar. 27, 2014 (Zelin) at 37:25-39:21; 40:1-43:20; 57:6-18.) DISH's engineers have been told by different vendors, including Huawei and Avago, that the "technical issue" was not an impediment to use of LightSquared's Uplinks. One email from Huawei acknowledged Mr. Ergen's intent to use the "technical issue" as a device to "lower" the acquisition price for LightSquared's spectrum. (PX1026.)

- SPSO has argued that the NOAA Spectrum should and would be auctioned, an argument which is not consistent with the interests of an ordinary, non-competitor creditor. (<u>See</u> *Objection of SPSO to Confirmation of Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 1408] at 37-38; Conf. Hr'g Tr. Mar. 20, 2014 (Smith) at 23:8-17.)

While SPSO maintains that is not a competitor of the Debtors because, although it is affiliated with DISH and EchoStar, those companies are in the pay television business while the Debtors own spectrum "but have no ability or authority to use it for commercial purposes,"[54] this position is demonstrably unsupportable and is contrary to Mr. Ergen's sworn testimony.[55] Mr.

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[53] Mr. Ergen testified that he did not even talk to SPSO's counsel about the specific performance on behalf of SPSO because he alone viewed the claim as frivolous. (<u>See</u> Conf. Hr'g Tr. Mar. 26, 2014 (Ergen) at 133:24-142:3.)

[54] <u>See</u> *Objection of SPSO to Confirmation of Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 1408] ¶ 13, n.4.

[55] Mr. Ergen attempted to disclaim that DISH and LightSquared were competitors. Mr. Ergen testified that (a) LightSquared did not have a network today that could compete with a DISH network of the future and (b) LightSquared did not have the financial wherewithal to bid on other available spectrum and thus did not compete

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 telecommunication companies such as AT&T and Verizon. (Jan. 13, 2014 Hr'g Tr. (Ergen) at 26:18-20; 96:18-98:22; 100:25-101:4.)[56] Doing so requires obtaining spectrum, which Mr. Ergen describes as a limited commodity. (Id. at 47:3-48:10; 96:5-14.) DISH's takeover of DBSD and TerreStar and its failed attempts at transactions with, among others, Clearwire Corp., Sprint Corp., and Inmarsat plc.[57] demonstrate that DISH is an active market participant in the race for spectrum and a player on the every-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 Prepetition LP Credit Agreement and, as a result, was prohibited from purchasing LP Debt. (Adversary Proceeding Decision FOF ¶¶ 22, 25, 26.) 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. (See, e.g., Mar. 26, 2014 Conf. Hr'g Tr. (Ergen) at 279:18-282:2; 328:15-330:2; Mar. 27, 2014 Conf. Hr'g Tr. (Reynertson) at 209:11-13.) 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 exercised by

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with DISH. (See Conf. Hr'g Tr. Mar. 26, 2014 (Ergen) at 279:2-282:12.) Mr. Ergen later admitted that both DISH and LightSquared today would compete in the marketplace as sellers of spectrum or as potential partners for other network owners. (See id. at 328:15-330:2.)

56 Mr. Ergen's January 13, 2014 testimony was given in the Adversary Proceeding trial.

57 DISH Form 10-K at F-18 (Feb. 21, 2014); Jan. 13, 2014 Hr'g Tr. (Ergen) 95:6-96:4; 101:5-103:5; 105:11-108:10; Mar. 26, 2014 Conf. Hr'g Tr. (Ergen) 328:15-329:15.

Mr. Ergen with respect to these entities, SPSO is properly viewed as a competitor of the Debtors.[58] SPSO's attempts to distance itself from the overwhelming evidence of its competitor status and interests 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.[59] The unfair discrimination against SPSO reflected in the Plan will be dealt with separately herein.

For all of these reasons, the separate classification of the Prepetition LP Facility SPSO Claim is thus necessary and appropriate. SPSO must be viewed as a competitor of the Debtors with significant "non-creditor" interests, 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 Prepetition LP Facility Non-SPSO Claims is permissible under section 1122, that does not mean that it is required; indeed, it is possible to envision a plan of reorganization which classifies *all* Prepetition LP Facility Claims in the same class, subject to being able to navigate successfully

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[58] See Conf. Hr'g Tr. Mar. 20, 2014 (Smith) at 21:13-25 ("The primary reason [for separately classifying SPSO's claims] is that SPSO is a competitor of LightSquared. . . . [A]s a competitor, and we absolutely view them as a competitor here in that their interests are not those typically of a financial investor, meaning that their actions and behaviors are driven by different motivations."); 28:7-29:10 ("Part of the classification certainly has to do with the competitor status, as I said. And I'd like to illustrate a point. So there are certain rights that our first and second lien holders have. It's [sic] right to information, it's [sic] approval rights. So, for example, under the current LP debt documents, back when we were building our network in 2011, we signed an agreement with Sprint. That was an agreement that needed lender approval. So we had to make them aware of exactly what we were doing before we had signed a document. We had to seek their approval so we got certain waivers so that we could actually enter into that agreement. That's a situation and an example that I would not want a competitor to know what we were doing before we did it. In that case specifically, I understand through press reports and other statements that DISH was also trying to seek a similar agreement with Sprint in and around the same time for a network sharing agreement. And that's something where we can't be effective as a company if that type of information is given to a competitor and they can see the terms of the agreement, they can see exactly what we're doing, and they still have time to go in and try and take it from us. So part of this is governance as well, which is we need to control the information, and part of the position and the treatment that SPSO receives does limit what we have to share with them and it's really focused on the competitive nature of what we're doing.").

[59] *Post Confirmation Trial Brief of SP Special Opportunities, LLC and Objection to Confirmation of Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 1517] at 42-43.

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 Shall 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." 11 U.S.C. § 1126(e). The seminal decision in this Circuit addressing vote designation is the Second Circuit's 2011 decision in In re DBSD N. Am., Inc., 634 F.3d 79 (2d Cir. 2011), in which the court made the following observations:

> The Code provides no guidance about what constitutes a bad faith vote to accept or reject a plan. Rather, § 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 § 1126(e) designation 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(e) comes into play when voters venture beyond mere self-interested promotion of their claims. "[T]he section was intended to apply to those who were 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 part of the bankrupt assets," or one who votes with an "ulterior motive," that is, with "an interest other than an interest as a creditor."

Id. at 101-102 (all citations omitted). Moreover, votes cast by parties who purchase claims in a competitor's bankruptcy case are viewed by courts as being particularly worthy of scrutiny. Id. at 105, n. 12 (citations omitted); see also In re Allegheny Int'l, Inc., 118 B.R. 282, 296 (Bankr. W.D. Pa. 1990).

As described in greater detail in the Vote Designation Motion and the Ad Hoc Secured Group's joinder to that motion [Docket No. 1384] (the "Vote Designation Joinder"), the Debtors maintain that (i) Mr. Ergen's attempt to secure control of the LP Debtors' assets by purchasing a blocking position in the LP Debt is precisely the behavior the Second Circuit attempted to deter and punish in DBSD and (ii) the behavior of SPSO in these cases is even worse than the behavior of DISH in DBSD. (See Vote Designation Motion at ¶¶ 69-85; Vote Designation Joinder at ¶¶ 10, 14, 16-17.) They allege the following in support of their conclusion:

- SPSO and the Ergen Parties have followed the DBSD and TerreStar "playbooks" to gain control of a company in distress by buying claims and manipulating the chapter 11 process for their non-creditor interests, but, in this case, they did so with stealth.
- 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, as he testified, to obtain higher returns or to ensure he had "bankruptcy protections" against cramdown.
- 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 interests as a creditor.
- Rather than acting in its interests as a creditor, SPSO opposed a near full recovery in cash under the Ad Hoc Secured Group's plan by authorizing its counsel to object to the Ad Hoc Secured Group Motion to Enforce and to seek a declaratory judgment that the DISH/LBAC Bid was terminated.[60]

And, once again, the Debtors and the Ad Hoc Secured Group urge that the bad acts of all Ergen Parties other than SPSO should be imputed to SPSO for purposes of vote designation. (See *Corrected Post-Trial Confirmation Brief of the Ad Hoc Secured Group of LightSquared LP Lenders* [Docket No. 1494] at 70 (pointing out that "[i]f this were not the case, it would be easy to eviscerate the protections intended by section 1126(e) by simply forming multiple entities and having one buy claims while the others engaged in disruptive inequitable conduct—exactly as the Ergen Parties did here").) While there is certainly truth to such an observation, those are not

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[60] See Vote Designation Motion at ¶¶ 69-85; Vote Designation Joinder at ¶¶ 10, 14, 16-17; *Corrected Post-Trial Confirmation Brief of the Ad Hoc Secured Group of LightSquared LP Lenders* [Docket No. 1494] at 70.

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 to reject a 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 interests, 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 Interests held by Fortress.[61]

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) "bought 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. DBSD, 634 F.3d at 104. So too in Allegheny, in which creditor Japonica purchased its claims after balloting on a plan had already begun. In re Allegheny Int'l, Inc., 118 B.R. at 286. As Judge Gerber noted in DBSD, DISH intended "to use

61 Mr. Falcone offered to move Fortress' and the other LP preferred holders' claims ahead of the SPSO Claim. (SPX069 ("Then move it ahead of charlie."); SPX071 ("What if we move the LP pref ahead of Charlie?"); SPX070 ("We are working on elevating the pref ahead of Charlie. Will that help?").)

[its] status as a creditor to provide advantages over proposing a plan as an outsider or making a traditional bid for the company or its assets." DBSD, 421 B.R. at 139-40. However, both Judge Gerber and the Second Circuit were particularly focused on the timing of DISH's debt purchases which were made after the plan in DBSD had been filed. Here, SPSO made no purchases of debt above par and acquired a significant portion (approximately $287 million) of its claim before the Chapter 11 Cases were commenced, when the LP Debt was trading at or below approximately 60 cents on the dollar; moreover, SPSO acquired all of its LP Debt below par and prior to the filing of any plan.[62] SPSO is thus arguably, at least in part, a "pre-existing creditor,"[63] 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. DBSD, 634 F.3d at 106. The Court declines to extend the holding of DBSD to cover votes cast with respect to claims which were acquired before a plan had been proposed 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, 63-64 (Bankr. 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, Inc., 453 B.R. 132 (S.D.N.Y. 2011). In GSC, there were allegations that a

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[62] See Adversary Proceeding Decision FOF ¶¶ 63, 89.

[63] It is unclear exactly what the Second Circuit intended by the words "pre-existing" – i.e., pre-petition or pre-plan proposal.

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 debtors' 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 [p]lan was to benefit at the expense of other creditors." Id. at 161 (emphasis in original). 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 creditor's non-creditor interests. See also In re Figter Ltd., 118 F.3d 635 (9th Cir. 1997) (denying vote designation where creditor acted to preserve what he reasonably perceived as his fair share of the debtor's estate); In re Landing Assocs., Ltd., 157 B.R. 791, 807-08 (Bankr. W.D.Tex. 1993) (noting that creditors act with a variety of motives and evaluating an admixture of creditor-related and non-creditor-related motives); In re Dune Deck Owners Corp., 175 B.R. 839, 845 (S.D.N.Y. 1995) (stating that court must decide whether the creditor opposes the plan because of how it affects his claim, or instead, 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 an ample basis to find that, notwithstanding SPSO's alleged ulterior motives, its non-creditor/competitor interests, and its demonstrably inequitable conduct in acquiring at least a substantial portion of its claim, it cast its vote to block a plan that provided it with abysmal treatment that no similarly-situated creditor would have accepted.

The Debtors would have the 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(e) 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. It focuses on the voting conduct of the creditor holding the claim. Simply put, had SPSO voted to reject a plan that proposed to pay it in full in cash or a plan proposing that SPSO receive 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, "[i]t is one thing to designate a creditor that votes against a [p]lan that manifestly compensates the designated stakeholder's economic expectations *in full*" but quite another thing to designate SPSO's vote on this Plan.[64] Here, while it is not subject to credible dispute that SPSO has non-creditor 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 Cramdown Requirements of Section 1129(b) Are Applicable to Class 7B

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. 11 U.S.C. § 1129(b)(1). See, e.g., Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.), 843 F.2d 636, 650 (2d Cir. 1988); In re Chemtura Corp., 439 B.R. 561, 592, n. 131 (Bankr. S.D.N.Y. 2010). The Plan satisfies neither requirement with respect to Class 7B.

[64] *Post Confirmation Trial Brief of SP Special Opportunities, LLC and Objection to Confirmation of Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 1517] at ¶ 185.

1. **The Plan Is Not Fair and Equitable With Respect to Class 7B**

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 (i) that the holders of such claims (a) retain 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 creditors' interests in the estates' interests in such collateral; (ii) for the sale of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens to comply with clause (i) or (iii) of section 1129(b)(2)(A) (a provision which the parties agree is not applicable here); or (iii) for the realization by such holders of the indubitable equivalent of such claims. 11 U.S.C. § 1129(b)(2)(A).

The Plan is not fair and equitable with respect to Class 7B. Although the parties here disagree as to whether the Plan must comply with section 1129(b)(2)(A)(i) or section 1129(b)(2)(A)(iii) with respect to SPSO, see RadLAX Gateway Hotel, LLC v. Amalgamated Bank, __ U.S. __, 132 S. Ct. 2065, 2072 (2012), the Plan fails to satisfy either subsection. On its face, the Plan does not comply with subsection (A)(i) inasmuch as it replaces SPSO's first lien with a third lien. Since the SPSO Claim will not be subordinated in its entirety, the analysis of this species of "fair and equitable" treatment ends there.

Nor does the Plan fare better under section 1129(b)(2)(A)(iii), which requires the realization by the creditor of the "indubitable equivalent" of its claims. 11 U.S.C. § 1129(b)(2)(A)(iii). In DBSD, the bankruptcy court held that, although "indubitable equivalent" is not defined in the Bankruptcy Code, "courts generally will find the requirement satisfied where a plan both protects the creditor's principal and provides for the present value of the creditor's claim." DBSD, 419 B.R. at 207 (citing In re Sparks, 171 B.R. 860, 866 (Bankr. 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." Id. Courts have held that the "indubitable equivalent" standard requires that there be no doubt that replacement recoveries are equal to existing security interests. See In re Philadelphia Newspapers, LLC, 599 F.3d 298, 310 (3d Cir. 2010) ("Thus the 'indubitable equivalent' under subsection (iii) is the unquestionable value of a lender's secured interest in the collateral."); see also In re Salem Suede, Inc., 219 B.R. 922, 935 (Bankr. D. Mass. 1998) (requiring that "there [be] no reasonable doubt that [the subject creditor] will receive the full value of what it bargained for") (internal citation omitted).

Here, the Plan proposes to give SPSO the SPSO Note, which (i) accrues PIK interest at the rate of LIBOR plus twelve percent, (ii) has a seven year maturity, and (iii) 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 of the Plan; (b) such note does not provide for postpetition interest accrued through the Effective Date; (c) such note contains economic terms that are inferior to those SPSO enjoys pursuant to the Prepetition LP Facility, as the SPSO Note 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 Prepetition LP Facility; and (d) such note will be subject to more rigorous transfer restrictions and be less liquid than SPSO's Prepetition LP Facility Claim, while at the same time containing reduced covenant protections for SPSO.[65]

[65] *Post Confirmation Trial Brief of SP Special Opportunities, LLC and Objection to Confirmation of Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 1517] at ¶ 158.

The Debtors submit that the SPSO Note will provide SPSO with the indubitable equivalent of its claim by providing SPSO with payment in full. To determine whether the SPSO Note provides for the indubitable equivalent of the SPSO Claim, the Debtors suggest that the Court must (i) compare the value of the collateral securing the SPSO Note to the value of the SPSO Claim to ensure SPSO's principal is protected and (ii) analyze the interest rate and maturity of the SPSO Note to ensure SPSO is receiving the present value of its claim; if an equity cushion can be shown, the Debtors argue, indubitable equivalence is established. (See Conf. Hr'g Tr. May 6, 2014 at 70:1-81:4.) Pointing to the Moelis Valuation Report, a collateral valuation with a midpoint of $7.7 billion, 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 Prepetition LP Facility. (See id.)

Nevertheless, to "erase any shadow of doubt (to the extent any such doubt existed), that SPSO was not receiving fair and equitable treatment,"[66] 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,[67] including substantially all of the assets of NewCo and its direct and indirect subsidiaries.[68] The SPSO Note, according to the Debtors, is thus secured by a new collateral package that is more "expansive" than that provided under the Prepetition LP

66 *LightSquared's (A) Memorandum of Law in Support of Confirmation of Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of Bankruptcy Code and (B) Omnibus Response to Objections to (i) Confirmation of Plan, (ii) Motion To Designate Vote of SP Special Opportunities, LLC, and (iii) Motion Seeking Approval of New DIP Facility* [Docket No. 1413] at ¶ 175.

67 Because the SPSO Claim will not be subordinated in its entirety, it must be considered a secured claim for purposes of the cramdown analysis.

68 See *Notice of Filing of Clean and Blackline Versions of (A) Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of Bankruptcy Code, (B) Debtors' Third Amended Specific Disclosure Statement and (C) Revised Form of Final DIP Order* [Docket No. 1336] at Exhibit B (Projections); Mar. 24, 2014 Conf. Hr'g Tr. (Hootnick) 25:4-27:7; 52:19-24; 54:12-20; 62:2-6; 66:7-11; 112:11-113:2; see also Mar. 20, 2014 Conf. Hr'g Tr. (Smith) 45:10-47:6; 48:4-50:23; Mar. 6, 2014 Dep. Tr. (Montagner) 10:17-14:5; 38:4-39:18; 67:25-68:5.

Facility;[69] 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, given the value of the Inc. Debtors. (See *Corrected Post-Trial Confirmation Brief of the Ad Hoc Secured Group of LightSquared LP Lenders* [Docket No. 1494] at 75-76; see also Mar. 26, 2014 Conf. Hr'g Tr. (Ergen) 43:2-13 (testifying that, in the new proposal sent by SPSO on December 31, 2013, SPSO was willing to pay $348 million dollars for the Inc. Debtors' assets); Mar. 24, 2014 Conf. Hr'g Tr. (Hootnick) 60:9-16 ("Moelis has never been asked nor have we done a separate valuation for the Inc. assets. We . . . believe it to be worth at least a few hundred million dollars. I know that other parties in this room believe they could be worth as much as a billion dollars. We don't have a full presentation nor have we gone to an internal committee to give you a decided-on view, but I think it's safe to say that it's worth a few hundred million dollars.")).[70]

SPSO disagrees entirely. In addition to disputing the Debtors' valuation and projections, SPSO argues that the third lien it will receive under the SPSO Note cannot satisfy indubitable equivalence where SPSO currently purports to enjoy a first lien. (*Objection of SPSO to Confirmation of Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 1408] at ¶¶ 82-87).

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)(iii), such cases are few and far between. See, e.g., Woods v. Pine Mountain, Ltd. (In re Pine Mountain, Ltd.), 80 B.R. 171,

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[69] See Plan at I.A.303 ("the liens securing the SPSO Note shall be silent, third priority liens limited to the assets of NewCo and each of its subsidiaries . . .").

[70] At closing argument, counsel for the Special Committee also highlighted for the Court the increased value of the Debtors' assets under the Plan due to the fact that the Plan integrates the estates of LightSquared LP and LightSquared Inc. and thus creates increased value through (i) synergies between the two estates and (ii) the preservation of a valuable net operating loss. (May 5, 2014 Conf. Hr'g Tr. at 28:24-30:7.)

174-75 (9th Cir. B.A.P. 1987) (finding indubitable equivalent where secured creditor received new promissory notes junior only to a construction loan); Affiliated Nat'l Bank-Englewood v. TMA Assocs., Ltd., 160 B.R. 172, 176 (D. Col. 1993) (holding that secured creditor received indubitable equivalent despite payment in full to partially junior and partially senior creditor). 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 oversecured and that the creditor's equity cushion protected it from any diminution of its security interest. In In re Pine Mountain, for example, the 9th Circuit B.A.P. based its determination that the secured creditor 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. 80 B.R. at 174-75. Similarly, in Affiliated Nat'l Bank-Englewood, the court based its holding on the bankruptcy court's determination that property securing the creditor's $1 million claim was worth between $1.8 million and $2.0 million. 160 B.R. at 174-75.

The Debtors readily concede that, although the Plan is not conditioned on FCC approval, the Debtors' valuation of the SPSO Note and SPSO's proposed recovery thereunder indeed rely 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.[71] 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 of the question of indubitable equivalence.

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[71] *LightSquared's Post-Trial Memorandum of Law in Further Support of (I) Confirmation of Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of Bankruptcy Code, (II) Motion To Designate Vote of SP Special Opportunities, LLC, and (III) Motion Seeking Approval of New DIP Facility* [Docket No. 1486] at 23.

There is enormous disagreement on valuation, however. Not surprisingly, the Debtors and the Plan Support Parties, 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 Debtors' spectrum assets, as did PWP when it issued a fairness opinion for the DISH Special Committee in connection with the now-terminated DISH/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 MHz/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 "technical issue" with respect to portions of the spectrum.

The Court makes the following findings with respect to valuation.

a. 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 PWP for the DISH Special Committee or by Mr. Ergen himself. The methodology employs market comparables based on the price per MHz/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.

(See Moelis Valuation Report at 10; Mar. 24, 2014 Conf. Tr. (Hootnick) at 16:13-20:5.) 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 Report 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.[72]

b. The GLC Valuation

The GLC Valuation Report offered by SPSO 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 "technical issue." He appears to have relied in part on a Hyslop opinion that was first revealed at the Confirmation Hearing; 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 informed by a review of the valuations prepared by Mr. Ergen and PWP. The Court affords it little weight.

[72] The Moelis Valuation Report was not the first valuation performed by Moelis with respect to LightSquared. Moelis has performed valuations of the Debtors' assets on several previous occasions, including in connection with proposed DIP financing; none of these reflects a valuation as high as that reflected in the Moelis Valuation Report.

c. The Ergen Valuation

In connection with the consideration of Mr. Ergen's LBAC bid by the DISH Board and the DISH Special Committee, Mr. Ergen prepared the Ergen Valuation, a six-page presentation, dated July 3, 2013, entitled "*Strategic Investment Opportunity – L-Band Acquisition, LLC*." (PX1047.) The Ergen Valuation reflects Mr. Ergen's analysis of the aggregate value of LightSquared's assets to DISH, comprised of (a) the value of 20 MHz of the LightSquared spectrum and satellites themselves and (b) the incremental value that would be realized by DISH due to the substantial additional value that LightSquared's 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 for 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 \$/MHz /POP than the Moelis Valuation (\$0.65 to \$0.95 versus \$0.60 to \$0.90). 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 "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.

d. The PWP Valuation

In addition to the Ergen Valuation, a valuation prepared by PWP was considered by the DISH Special Committee. (PX1048.) PWP was retained by the DISH Special Committee to issue a fairness opinion with respect to the potential $2.2 billion DISH/LBAC Bid in July 2013. In connection with its assignment, PWP performed an extensive valuation analysis of LightSquared's assets and concluded that "the cumulative value . . . is estimated to be $4.4 billion to $13.3 billion." (PWP Valuation at 39.) This valuation range includes the stand-alone value of LightSquared's 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 businesses.

e. Additional Valuation Issues

In order to demonstrate the existence of an equity cushion, the Debtors point not only to the Moelis Valuation Report but also to (i) the Ergen Valuation, which yields an approximately 23 percent "equity cushion" (not including value attributable to the Lower Downlink) and (ii) the PWP Valuation, which yields an approximately 15 percent equity cushion, both of which are higher than the 10 percent equity cushion which has been found to be sufficient by courts in this District. (See Conf. Hr'g Tr. May 6, 2014 at 76:13-80:3.) 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 PWP Valuations and, as such, these valuations are no longer indicative of current value. The Debtors contend that the Ergen and PWP 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, other than as reflected in Appendix A hereto (filed under seal), this issue was not explored or fully developed during the evidentiary hearing.[73]

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[73] As a consequence of the Court's overall ruling on valuation, there is no need to quantify the effect, if any, on the value of LightSquared's spectrum assets due to the "technical issue."

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"[74] 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 the 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 has found, the Moelis Valuation Report 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 Plan 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. 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.[75] 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 Interests, including Fortress, would receive some $223 million in cash and additional Preferred PIK Interests 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." (See SPX069.) Breathtakingly simple – but entirely unsupportable.

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[74] Jan. 16, 2014 Hr'g Tr. (Falcone) 15:17-16:1. Mr. Falcone's January 16, 2014 testimony was given in the Adversary Proceeding trial.

[75] *Post Confirmation Trial Brief of SP Special Opportunities, LLC and Objection to Confirmation of Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 1517], Attachment B.

Because the Debtors' 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 Prepetition LP Facility Claim such that the Plan is fair and equitable with respect to Class 7B.[76] Even if the Court were to find that 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 compared to the Prepetition LP Facility (PIK versus cash), the longer maturity of the SPSO Note as compared to the Prepetition LP Facility (seven years versus four years), and the fact that the note, instead of providing SPSO with a first lien, provides for far riskier third lien treatment subordinated behind at least $2.2 billion of senior debt.

2. **The Plan Unfairly Discriminates Against Class 7B**

Contrary to the requirement of section 1129(b)(1) of the Code, the Plan discriminates unfairly against Class 7B. While the "currency" with which the Prepetition LP Facility SPSO Claim is paid (i.e., the SPSO Note) does not have to be exactly the same as that provided to the Prepetition 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 Corp., 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1987); see also In re Sea Trail Corp., No. 11-07370-8, 2012 WL 5247175, at *9

[76] The Court does not reach the second prong of the indubitable equivalent analysis – appropriateness of the interest rate of the note – and makes no findings with respect to the appropriateness of the proposed rate of interest of the SPSO Note, which is LIBOR (with a floor of 1.00%) plus 12.00%. (Plan at § I.A.300).

(Bankr. E.D.N.C. Oct. 23, 2012) (holding that a chapter 11 plan providing one class of unsecured creditors with proceeds of asset sales and avoidance actions and another class of unsecured creditors with title to a sewer facility and assignment of a sewer service agreement was not unfairly discriminatory); In re Hawaiian Telcom Commc'ns, Inc., 430 B.R. 564, 605 (Bankr. D. Haw. 2009) (plan that awards cash to general unsecured creditors and warrants to unsecured senior noteholders does not unfairly discriminate; section 1129(b) of the Bankruptcy Code does not preclude a plan's disparate treatment of classes of same-priority claims, it prohibits only unfair discrimination); In re Greate Bay Hotel & Casino, Inc., 251 B.R. 213, 222-23, 231-32 (Bankr. D. N.J. 2000) (chapter 11 plan providing undersecured noteholders with new notes and new common stock on account of their deficiency claims but other unsecured creditors with cash was not unfairly discriminatory because the debtors' value was determined to be sufficient to ensure payment).

To determine whether a plan discriminates unfairly, courts consider whether (i) there is a reasonable basis for discriminating, (ii) the debtor cannot consummate the plan without the discrimination, (iii) the discrimination is proposed in good faith, and (iv) the degree of discrimination is in direct proportion to its rationale. In re WorldCom, Inc., 2003 Bankr. LEXIS 1401, *174-175 (Bankr. S.D.N.Y. Oct. 31, 2003) (citations omitted). The Debtors argue that each of these elements has been satisfied, because (a) 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, (b) the treatment of the SPSO Claim is necessary because the Plan represents the "best and only path for LightSquared to emerge," (c) the Plan has been proposed in good faith, and (d) there is nothing "unfair" about the fact that the Plan satisfies the SPSO Claim in full.[77] SPSO vehemently disputes such assertions, arguing that the disparate treatment of SPSO 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, at worst, is entirely worthless."[78]

At a minimum, the treatment proposed in the Plan clearly does not pass muster under prongs (i) and (iv) 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 contemplated by the Plan: close to full cash payment on confirmation (not the Effective Date) for Class 7A versus an equity-like deeply subordinated seven year third-lien PIK interest note for Class 7B – 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 equityholders below it. (See, e.g., Conf. Hr'g Tr. Mar. 31, 2014 (Falcone) at 103:9-25 (testifying regarding $150 million call option of Harbinger that would be part of the second lien and above SPSO); Conf. Hr'g Tr. Mar. 24, 2014 (Hootnick) at 68:7-25 (describing LightSquared's future ability pursuant to the Plan to raise another $500 million which would come in ahead of the second lien debt and the SPSO Note).)

While some discrimination in this case may be necessary to address the non-creditor/competitor interests of SPSO, see Section I.A., *supra*, the Plan's treatment of Class 7B is not designed to achieve that goal. The legitimate business reasons for separately classifying the SPSO Claim hardly entitle the Debtors to discriminate against SPSO in ways that far exceed

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[77] *LightSquared's Reply in Support of Its Post-Trial Memorandum of Law in Further Support of (I) Confirmation of Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of Bankruptcy Code, (II) Motion To Designate Vote of SP Special Opportunities, LLC, and (III) Motion Seeking Approval of New DIP Facility* [Docket No. 1525] at Ex. A, p. 21.

[78] *Objection of SPSO to Confirmation of Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 1408] at ¶ 72.

those necessary to address the legitimate concerns attendant to SPSO's competitor status and connections to DISH, e.g., through appropriate covenants and other non-economic 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 7B. (Conf. Hr'g Tr., Mar 20, 2014 (Smith) at 26:18 -27:14.) 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, e.g., Conf. Hr'g Tr. Mar. 24, 2014 (Hootnick) at 45:4-7 ("And [the plan] satisfies the requirement of certain constituents, particularly the non-SPSO lenders who have been promised an early pay-out by the LBAC approach [and] who have required throughout that they be paid off quickly"); Conf. Hr'g Tr. Mar. 27, 2014 (Zelin) at 69:15 ("I think our clients want to be paid in full in cash").) There are many creative ways to attempt to address the limited availability of cash,[79] 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)(b), the Plan fails to pass muster on unfair discrimination grounds as well and, thus, cannot be confirmed.

D. The Claim of SPSO Shall Be Subordinated to the Extent of Harm Caused to Innocent Creditors

As set forth in detail in the Adversary Proceeding Decision, the Court has concluded that SPSO has engaged in inequitable conduct in connection with its acquisition of its now nearly $1 billion LP Debt claim. Although the Confirmation Hearing did not encompass a re-trial of those issues that were presented and have now been adjudicated in connection with Adversary

[79] See, e.g., In re Central European Distribution Corporation, et al., Case No. 13-10738 (CSS) (Bankr. D. Del. March 13, 2013), Findings of Fact and Conclusions of Law (I) Approving (A) The Disclosure Statement, (B) The Prepetition Solicitation Procedures, and (C) Forms of Ballots, and (II) Confirming the Second Amended and Restated Joint Prepackaged Chapter 11 Pan of Reorganization of Central European Distribution Corporation, et al., dated March 13, 2013 [Docket No. 166] (confirming plan employing a reverse Dutch auction procedure in which noteholders could elect to bid for cash treatment).

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." (See Adv. Pro. Ex. PX0867; Adversary Proceeding Decision FOF ¶¶ 131-32.) There, says the Ad Hoc Secured Group, it is made crystal clear that the Ergen-led strategy was 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 later 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.[80] The fly now regrets having accepted the invitation of the spider to enter its parlour.

Not surprisingly, there is no documentary evidence reflecting the alleged "bait and switch" strategy. Mr. Ergen's May 2, 2013 DISH Board presentation,[81] 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 timeframe contain carefully constructed high level summaries of the status of the DISH/LBAC Bid and, not surprisingly, contain no hint of any such strategy. Consistent with the allegations of the Ad Hoc Secured

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[80] See *Corrected Post-Trial Confirmation Brief of the Ad Hoc Secured Group of LightSquared LP Lenders* [Docket No. 1494] at 2-3, 32-33, 36-38.

[81] Adv. Pro. Ex. PX0867.

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.[82] In addition to the unsettling content and tenor of some of the documents, Mr. Ergen's testimony on this issue was quite evasive.

Moreover, the words and behavior of Mr. Ergen in connection with the December 11 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 attend the auction with a sizeable team of DISH personnel and the DISH Board on standby[83] 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?[84] Why in December did the DISH Board waive its 48-hour meeting notice requirement[85] until January 9, 2014 – the very day on which the DISH/LBAC Bid termination became effective? There are no good answers to these and many other questions about the conduct of LBAC and SPSO.

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[82] Evidence was presented at the Confirmation Hearing that DISH's engineers have been told by different vendors, including Huawei and Avago, that the "technical issue" is not an impediment to use of LightSquared's Uplinks. One email from Huawei acknowledged Mr. Ergen's intent to use the "technical issue" as a device to "lower" the acquisition price for LightSquared's spectrum. (PX1026) (Huawei employee stating that "technically, we are optimistic to make L-band . . . work for DISH but understand it might involve more than technical for Charlie to make decision now, and wise to leave the door open and drive the price down in the future.").

[83] Mr. Ergen flew to New York to attend the auction with a team of DISH personnel, including Stanton Dodge (DISH General Counsel), Tom Cullen (DISH Executive Vice President, Corporate Development), George Brokaw (DISH Independent Director), Carl Vogel (DISH Director), and at least two members of DISH's technical team. (See Conf. Hr'g Tr. Mar. 26, 2014 (Ergen) at 81:16-83:7; 230:18-231:13.) Mr. Ergen also had a quorum of DISH's Board ready to be on standby during the auction. ((Conf. Hr'g Tr. Mar. 26, 2014 (Ergen) at 82:18-83:7.)

[84] See fn 52, *supra*.

[85] Before the auction, Mr. Ergen consulted with the DISH Board with respect to the auction and put the DISH board on notice to act immediately. The Board granted a waiver of the typical forty-eight hour requirement for board meetings until January 9, 2014, which was the day that the trial in the Adversary Proceeding was scheduled to begin. (Conf. Hr'g Tr. Mar. 26, 2014 (Ergen) at 256:25-257:6; 286:7-287:5; SPX028.)

Nonetheless, the fact remains that the LBAC transaction was tied to the achievement of certain milestones set forth in the PSA.[86] And LBAC, as this Court has ruled, was free to terminate the PSA and then terminate its bid – for any reason – once any of those milestones was missed.[87] 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 back-up bidder until mid-February 2014 only if another party had outbid it at the auction.[88] 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 in undisputable, 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 11 auction fully prepared to proceed, and then terminating his bid shortly thereafter.[89] Notwithstanding, the record of the Confirmation Hearing 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 DISH/LBAC Bid were attributable to SPSO.

II. ADDITIONAL OBJECTIONS TO THE PLAN

SPSO has raised numerous additional objections to confirmation of the Plan including: the failure to satisfy the "best interests of creditors" test under section 1129(a)(7) of the Code;

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86 Section 6.1(f)(1) of the Plan Support Agreement permitted LBAC to terminate on three business days' written notice in the event that one or more of the milestones set forth on Exhibit C to the Plan Support Agreement were not satisfied. See Plan Support Agreement [Docket No. 765] at Ex. A, §6.1(f)(1).

87 See Jan. 22, 2014 Hr'g Tr. [Docket No. 1278].

88 Id. at 109:23-110:9; *Order (A) Establishing Bid Procedures, (B) Scheduling Date and Time for Auction, (C) Approving Assumption and Assignment Procedures, (D) Approving Form of Notice and (E) Granting Related Relief*, dated October 1, 2013 [Docket No. 892].

89 Mar. 26, 2014 Conf. Hr'g Tr. (Ergen) at 93:25-102:6.

the failure of the Plan to contain projections that extend beyond the first quarter of 2016; the impermissibility of the Plan's proposed Non-Debtor Releases; the effect of the Plan on SPSO's inter-creditor rights under the Prepetition LP Credit Agreement; certain infirmities with the proposed New DIP Facility, including its alleged lack of adequate protection; the alleged artificial impairment of certain accepting classes; the Debtors' failure to demonstrate that the Plan is feasible; and the Debtors' 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 not 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.[90] Against the backdrop of allegations – and findings – that SPSO and Mr. Ergen indeed orchestrated an end-run around the restrictions on the Prepetition 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. (See *Corrected Post-Trial Confirmation Brief of the Ad Hoc Group of Secured Lenders* [Docket 1494] at 23.) 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

[90] See Memorandum Decision Granting Motions to Dismiss Complaint [Adv. Docket No. 68], 504 B.R. 321, 339 (Bankr. S.D.N.Y. 2013).

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, (i) confirmation of the Third Amended Joint Plan is denied; (ii) SPSO's Motion to Strike McDowell and Hootnick is denied; (iii) the Debtors' Motion to Strike Hyslop and Reynertson is granted as to Mr. Hyslop and denied as to Mr. Reynertson; (iv) the Vote Designation Motion is denied; (v) the New DIP Motion and its request for related relief, including the request to approve the Plan Support Party Break-up Fee, is denied, as moot; (vi) the Exhibit 2 Motion is denied; and (vii) the request for equitable subordination of the SPSO Claim is granted for the reasons set forth in the Adversary Proceeding Decision, with the extent of such subordination to be determined in further proceedings to be held in this Court. Counsel to the Debtors shall be provided with an unredacted copy of Appendix A and shall distribute it to those parties entitled to receive it pursuant to applicable confidentiality agreements and sealing orders.

IT IS SO ORDERED.

Dated: July 11, 2014
New York, New York

/s/ Shelley C. Chapman
UNITED STATES BANKRUPTCY JUDGE

APPENDIX A

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DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE DISH NETWORK CORPORATION DERIVATIVE LITIGATION

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

Consolidated with A688882

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CLARK COUNTY, NEVADA

IN RE DISH NETWORK CORPORATION DERIVATIVE LITIGATION	Case No. A-13-686775-B Dept. No. XI *Consolidated with A688882* **VOLUME 6 OF APPENDIX TO THE REPORT OF THE SPECIAL LITIGATION COMMITTEE OF DISH NETWORK CORPORATION+ (EXHIBITS 469, 470, 471, 472, 473, 474, 475, 476 & 478 FILED UNDER SEAL)**

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Case No. A-13-686775-B
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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff Jacksonville Police and Fire Pension Fund ("Plaintiff"), by and through its undersigned counsel, respectfully submits this Status Report in advance of the October 30, 2014 teleconference with the Court, proposed by the Special Litigation Committee ("SLC"), regarding pending motions to dismiss filed by the SLC, Charles W. Ergen and Cantey Ergen, the other Director Defendants, and the Officer Defendants scheduled for argument on November 10, 2014.

This afternoon, while meeting and conferring in advance of the October 30 teleconference, counsel to the SLC indicated its intention to ask the Court to stay the litigation pending a forthcoming, second motion to dismiss by the SLC, to be filed by November 17, 2014. For the reasons that follow, the SLC's position is without merit: (i) the Court has already set a schedule and rejected a request to stay resolution of the motions to dismiss pending the SLC's report; (ii) any further briefing from the SLC would be improperly based on purported facts and inferences that are not in the operative complaint; and (iii) based on persuasive recent precedent involving the same counsel that represents the SLC in this action, the SLC's prejudging of the merits of the claims at issue independently supports a finding that a stay is improper. The SLC has already moved to dismiss and filed its report. Further delay to accommodate a second motion to dismiss while all other motions to dismiss have been fully briefed and are scheduled for argument is unnecessary, inappropriate and prejudicial. Accordingly, Plaintiff respectfully asks the Court to maintain the current schedule, including the November 10, 2014 argument on the SLC's and other Defendants' pending motions to dismiss.

First, the Court has already rejected the argument that the SLC's report would support delaying argument on the motions to dismiss. During an August 6, 2014 teleconference, after Plaintiff filed the Second Amended Complaint, the Court denied Defendants' request to delay filing their motions to dismiss until after the SLC filed its report and instead set a briefing schedule, with briefing to be completed by October 2, 2014. The Court ordered the SLC – with the benefit of the motion to dismiss briefing – to submit its report by October 24, 2014, and scheduled argument on Defendants' motions to dismiss for October 28, 2014.[1] The SLC report predictably indicates that the SLC has no intention of pursuing any claims and there is therefore no reason to prolong the schedule in this matter further.

Second, the SLC's counsel represented today that its second motion to dismiss will be on standing grounds only, and will not address the merits of the claims. This issue is of course already addressed in the SLC's pending motion to dismiss and does not depend on the SLC's report. Moreover, during the September 19, 2013 conference with this Court, counsel for the Director Defendants stated that the *Zapata* standard applies in this Court. Pursuant to this standard, the SLC's post-investigation motion to dismiss "is perhaps best considered as a hybrid summary judgment motion," and is only appropriate after discovery on the SLC's investigation and independence. *Zapata Corp. v. Maldonado*, 430 A.2d 779, 787-88 (Del. 1981).

[1] To accommodate the schedules of the Director Defendants' counsel, the Court has moved argument on the motions to dismiss to November 10, 2014. As a professional courtesy to the Director Defendants' counsel, Plaintiffs' counsel did not object to this short postponement. Any further delay would prejudice Plaintiff and the other shareholders of DISH who, if the case moves forward, are entitled to timely discovery.

Thus, if the Court sustains Plaintiff's claims, Plaintiff is entitled into discovery on the SLC before a further motion is filed at the conclusion of such discovery. If the Court were to dismiss Plaintiff's claims under Rule 12(b)(5), there is no reason for further discovery and the issue would be moot. But to allow the SLC's prejudged report to serve as the basis for a dispositive motion without first addressing whether: (i) the Second Amended Complaint states claims for relief; and (ii) discovery into whether the SLC is independent and deserves any deference would deprive Plaintiff the opportunity to develop a factual record and litigate meritorious claims. Any suggestion that the SLC needs more time, or that the Court would benefit from additional repetitive argument from the SLC, is spurious at best.

Third, in a well-reasoned opinion, the U.S. District Court for the District of Oregon recently rejected a motion to stay derivative litigation. In *In re Galena Biopharma, Inc. Derivative Litigation*, the court refused to stay litigation in order to allow an SLC represented by the same counsel as the SLC here (Young Conaway, Stargatt & Taylor, LLP) to conduct an investigation because, as here, the committee had prejudged the merits. *Galena*, Lead Case No. 3:14-cv-382-SI (D. Or. Oct. 22, 2014) (attached as **Ex. 1**). The court concluded that because the committee and its counsel had prejudged the merits, a stay would be improper and that it would not defer to the committee because "it is unlikely that any future decision by the SLC to terminate this litigation will withstand scrutiny under *Zapata*." *Id.* at 15. Here, having long ago concluded that the SLC would never pursue claims against Mr. Ergen or any other Defendant, the court should similarly not order a stay and not give the SLC any deference. Having already filed its 332-page report, the SLC should not be permitted any further opportunity to consume the Court's, Plaintiff's, and DISH's resources by filing a second motion to dismiss.

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Plaintiff respectfully submits that there is no basis for a stay, argument on the motions to dismiss should proceed as scheduled on November 10, 2014, and, based on the detailed allegations set forth in the Second Amended Complaint and the extensive briefing to date, the Court should allow Plaintiff to prosecute this action moving forward without giving deference to the SLC.

Dated this 29th day of October, 2014.

HOLLEY, DRIGGS, WALCH,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing STATUS REPORT was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 21st day of October, 2014. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:

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An employee of Holley, Driggs, Walch, Puzey & Thompson

EXHIBIT 1

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

In Re GALENA BIOPHARMA, INC. DERIVATIVE LITIGATION, This Document Relates To: ALL ACTIONS	Case No. 3:14-cv-382-SI LEAD 3:14-cv-514-SI 3:14-cv-516-SI **OPINION AND ORDER**

Christopher A. Slater and Michael J. Ross, SLATER ROSS, Sovereign Hotel, 4th Floor, 710 S.W. Madison Street, Portland, OR 97205; Robert B. Weiser, Brett D. Stecker, Jeffrey J. Ciarlanto, THE WEISER LAW FIRM, P.C., 22 Cassatt Avenue, First Floor, Berwyn, PA 19312; Kathleen A. Herkenhoff, THE WEISER LAW FIRM, P.C., 12707 High Bluff Drive, Suite 200, San Diego, CA 92130; Michael J. Hynes and Ligaya Hernandez, HYNES KELLER & HERNADEZ, LLC, 1150 First Avenue, Suite 501, King of Prussia, PA 19406; William B. Federman and Sara E. Collier, FEDERMAN & SHERWOOD, 10205 N. Pennsylvania Avenue, Oklahoma City, OK 73120. Of Attorneys for Plaintiffs.

Lois O. Rosenbaum and Stephen H. Galloway, STOEL RIVES LLP, 900 S.W. Fifth Avenue, Suite 2600, Portland, OR 97204; Paul R. Bessette, Michael J. Biles, James P. Sullivan, KING & SPALDING LLP, 401 Congress Avenue, Suite 3200, Austin, TX 78701. Of Attorneys for Defendants.

Michael H. Simon, District Judge.

Before the Court is the motion of nominal defendant Galena Biopharma, Inc. ("Galena") to stay the pending consolidated derivative actions for 90 days to allow sufficient time for an investigation by a single-member special litigation committee ("SLC") formed by Galena's Board of Directors ("Board"). For the following reasons, Galena's motion to stay is denied.

STANDARDS

"[F]ederal courts should apply state law governing the authority of independent directors to discontinue derivative suits to the extent such law is consistent with [federal law]." *Burks v. Lasker*, 441 U.S. 471, 486 (1979). Therefore, the propriety of Galena's requested stay is a question to be resolved under the law of Galena's state of incorporation, Delaware.

Under Delaware law, a properly formed SLC is generally entitled to a stay of derivative litigation for a reasonable period of time necessary to complete its investigation. *See In re Oracle Corp. Derivative Litig.*, 808 A.2d 1206, 1211 (Del. Ch. 2002); *Kaplan v. Wyatt*, 484 A. 2d 501, 510 (Del. Ch. 1984); *Abbey v. Computer Commc'ns Tech. Corp.*, 457 A.2d 368, 375-76 (Del. Ch. 1983). There is an exception, however, if it is clear from the stay application that any decision by the committee to terminate litigation will not withstand scrutiny. *See Biondi v. Scrushy*, 820 A.2d 1148, 1165 (Del. Ch. 2003) (denying an SLC's motion to stay because the SLC would not meet the independence requirement of *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981)). Any such decision by the SLC would need withstand *Zapata's* requirement that the SLC be independent and act in good faith and that the investigation be reasonable and conducted objectively. *See Zapata*, 430 A.2d at 788 (holding that an SLC could move to dismiss a derivative action "[a]fter an objective and thorough investigation" and that the company would "have the burden of proving independence, good faith and a reasonable investigation, rather than [a court] presuming independence, good faith and reasonableness."); *see also Booth Family Trust v. Jeffries*, 640 F.3d 134, 138-39 (6th Cir. 2011) ("Under *Zapata* . . . . If a court finds that a corporation's special litigation committee was independent, conducted its investigation in good faith, had reasonable bases for its conclusion and the decision to dismiss the lawsuit is not inconsistent with business judgment, the court will dismiss the derivative action.").

BACKGROUND

A. The Alleged Wrongdoing

As alleged in the Verified Amended Consolidated Shareholder Derivative Complaint ("Amended Complaint"), Galena is a biotechnology company based in Portland, Oregon. The Company is focused on the development and commercialization of targeted oncology treatments that address major unmet medical needs to advance cancer care. Galena is pursuing the development of cancer therapeutics, including its main product candidate, NeuVax™, for the treatment of breast cancer and other tumors.

In July 2013, Galena entered into a contract with The DreamTeam Group or one of its subsidiaries, MissionIR (also known as "Mission Investor Relations") (collectively "DreamTeam"). Galena paid DreamTeam $50,000 for 240 days of advertising, branding, marketing, investor relations, and social media services. Plaintiffs allege that as part of these services DreamTeam was to place, or plant, misleading articles and comments on investor websites touting Galena. Plaintiffs further allege that Defendants hired DreamTeam with the plan to wait until the share price of Galena was high enough and then sell their personally-held stock.

After Galena hired DreamTeam, DreamTeam published a variety of articles. For example, on or about August 6, 2013, DreamTeam published, on the online investment advice website *Seeking Alpha*, an article entitled "Galena Biopharma Presents an Attractive Investment Opportunity." This article recommended investment in Galena stock, but failed to disclose any financial relationship between the author, who was identified only as "Wonderful Wizard," and either Galena or DreamTeam. Another article placed by DreamTeam touting Galena in *Seeking Alpha* appeared on November 22, 2013, this time by an author identified as "Kingmaker," who also failed to disclose any relationship with either Galena or DreamTeam. These two articles about Galena in *Seeking Alpha* were purportedly written by two different people, each recommending investment in Galena, but were allegedly written by the same author.[1] Overall, there were 26 articles about Galena published on *Seeking Alpha* between July 2013 and February 2014, the time period in which DreamTeam was providing paid promotional services for Galena.

In September 2013, shortly after the publication of the August 6th DreamTeam article on *Seeking Alpha*, Galena conducted a $37.5 million public offering of common stock and warrants. On November 6, 2013, Galena issued a press release, entitled "Galena Biopharma Reports Third quarter 2013 Results." This press release quoted Galena's then-president and chief operating officer, Mark Ahn, as stating that Galena's "commercial success to date with Abstral® has been very encouraging and we are excited to report initial revenues ahead of schedule. . . . [We] expect continuing strength with the launch. We are also making steady progress in advancing our NeuVax™ and FBP cancer immunotherapy pipeline." The press release also set forth the "financial highlights" for the third quarter 2013. That same day Galena filed a Form 10-Q with the SEC, signed by Ahn and vice president and chief financial officer Ryan Dunlap, which reiterated the financial results announced in the press release. Neither the press release nor the 10-Q disclosed the stock promotion agreement with DreamTeam.

On November 26, 2013, four days after the November 22nd *Seeking Alpha* article, Galena's Compensation Committee granted a collective total of 2.75 million shares of stock options to Defendants director Rudolph Nisi; current president and chief executive officer and former chief operating officer and executive vice president, Mark W. Schwartz; Chairman of the Board Sanford Hillsberg; director Richard Chin; director Stephen Galliker; director William

[1] Ultimately, the website *Seeking Alpha* removed from its website the August 6, 2013 article by "Wonderful Wizard" and the November 22, 2013 article by "Kingmaker." *Seeking Alpha*'s Vice President of Content and Editor-in-Chief, Eli Hoffman, explained that the removal of the articles was done because they violated *Seeking Alpha*'s terms of use when the author failed to disclose to *Seeking Alpha* that "Kingmaker" and "Wonderful Wizard" were, in fact, the same person.

Ashton; Ahn; and Dunlap. These options issued in November carried an exercise price of $3.88 per share. These grants were the only ones issued by the Compensation Committee at that time of year. The usual practice by the Compensation Committee was to grant stock options to Galena's officers and directors in January of a calendar year. The options granted in November 2013 vested on February 26, 2014, shortly before the eight-month DreamTeam promotional campaign was scheduled to end.

By early January 2014, Galena's stock price had risen significantly. In October 2013 it traded at between $2 and $3 per share. By January 2014, it more than doubled and traded at between $5 and $7 per share.

As alleged in the Amended Complaint, at the beginning of 2014 Defendants had reason to believe that the stock promotion deal with DreamTeam could be discovered at any time, so most of them engaged in a significant number of high-volume, single-day sales of their personally-held Galena stock. In a period of less than one month, between January 17, 2014 and February 12, 2014 (a period of eighteen trading days), many Defendants sold more than a total of 2.9 million shares, collectively receiving proceeds of more than $16 million. Specifically, Ahn sold approximately 800,000 shares for proceeds of approximately $3.8 million; Schwartz, sold 100,000 shares for proceeds of approximately $557,000; Hillsberg sold 450,000 shares for proceeds of approximately $2.7 million; director Steven Kriegsman sold 600,000 shares for proceeds of approximately $3.8 million; Chin sold 262,500 shares for proceeds of approximately $1.2 million; Galliker sold 300,000 shares for proceeds of approximately $1.2 million; and Nisi sold 450,000 shares for proceeds of approximately $2.7 million.[2] The Amended Complaint alleges that these were direct sales and were not pursuant to any pre-arranged Rule 10b5-1

[2] The Amended Complaint does not specifically allege any improper sale of shares and related proceeds by Defendants Dunlap or Ashton.

trading plan and that none of the selling Defendants had engaged in open market sales of Galena stock during the four years before January 2014.

On February 12, 2014, the last day any of the Defendants sold their personally-held stock, Adam Feuerstein published an online article on *TheStreet.com*, titled "Galena Biopharma Pays for Stock-Touting Campaign While Insiders Cash Out Millions." In his article, Mr. Feuerstein alleged that Galena was engaging in a misleading brand-awareness campaign aimed at boosting its stock price. The article also reported that Galena had paid DreamTeam to publish articles promoting the Company's stock without disclosing who paid for those articles. On this news, Galena's stock dropped $0.85 per share to close at $4.34 per share on February 12, 2014, a one-day decline of 16 percent.

Two days later, on February 14, 2014, *Seeking Alpha* published another article, titled "A Deeper Look at the Galena Biopharma Controversy," which noted that "the company's monstrous rise appeared to occur without a catalyst" and that "[l]ogic thus dictates that this meteoric rise was primarily the result of promotional efforts by DreamTeam, and had little to do with a change in the underlying fundamentals of the company." That same day, Ahn issued a letter to Galena's shareholders to "set the record straight," admitting that the Company had paid DreamTeam to promote the Company's stock and that company insiders had divested shares in mid-January 2014 and denying all other allegations. Galena's stock dropped $0.63 per share to close at $3.73 per share on February 14, 2014, a one-day decline of 14 percent. Thus, during the one-month period between January 16, 2014 and February 14, 2014, Galena's share price fell by approximately 50 percent from its all-time high of $7.48 per share.

On February 18, 2014, Mr. Feuerstein responded to Ahn's letter in an article, titled "Galena's CEO's Response to Stock Promotions Leaves Questions Unanswered." The article highlighted what Mr. Feuerstein considered to be inconsistencies and unanswered questions. For example, Mr. Feuerstein questioned why, if there was nothing improper with DreamTeam's services provided to Galena, did DreamTeam, after its relationship with Galena became public, try to remove all evidence of DreamTeam's services from the internet by deleting articles, blogs, comments, Twitter feeds, and the compensation disclosure noting the $50,000 payment made by Galena. Mr. Feuerstin also questioned Ahn's inconsistent statements about why he sold his Galena shares—explained on February 4, 2014 as to "diversify for my family" and explained after the DreamTeam story broke that company insiders were prohibited from selling shares earlier because Galena was in negotiations to acquire Mills Pharmaceuticals.

On March 13, 2014, financial analyst and author Richard Pearson published the results of his investigation into the relationship between Galena, CytRx Corp., and DreamTeam on *Seeking Alpha* in an exposé, entitled "Behind the Scenes with Dream Team, CytRx and Galena." The article detailed Mr. Pearson's findings after going "undercover" as a writer for DreamTeam assigned to promote Galena. Mr. Pearson's article stated that Defendants approved all articles written about Galena before the articles were published. Mr. Pearson opined that Galena's "[m]anagement will have a very difficult time convincing investors that 'we didn't know'" and that "it seems no coincidence that there appears to have been great urgency to get these articles in almost exact proximity to sales/issuances of stock by insiders and the companies at both Galena and CytRx." Mr. Pearson concluded that "[t]he promotional articles and the paid retention of the Dream Team Group were coordinated with the release of news and data from the companies such that they coincided with the share prices of both stocks rising dramatically."

On March 17, 2014, two trading-days after the publication of the Pearson exposé, Galena announced that it was under investigation by the SEC, stating in its 10-K regulatory filing: "In

February 2014, we learned that the SEC is investigating certain matters relating to our company and an outside investor-relations firm that we retained in 2013. We have been in contact with the SEC staff through our counsel and are cooperating with the investigation." Upon disclosure of the SEC investigation, Galena's common stock share price dropped to $2.68, representing a 16.5 percent loss in market capitalization in a single day.

On August 21, 2014, Galena issued a press release stating that Ahn "resigned as the President and CEO and as a director of the company to pursue other long held personal and professional goals." The same day *TheStreet.com* reported, based on the account of "a source close to the company," that Ahn had been "fired" by the Board at a "special meeting" held on August 18, 2014.

B. Galena's Appointment of the Special Committee

On February 17, 2014, three days after Ahn's letter to shareholders discussing the allegations of wrongdoing and before any lawsuits had been filed, Galena's Board formed a Special Committee of the Board of Directors ("Special Committee"), consisting of Defendants Kriegsman, Galliker, Ashton, and Hillsberg to investigate the allegations of wrongdoing being reported in the press. On or about February 27, 2014, the first lawsuit was filed against Galena: a shareholder derivative action filed in the Circuit Court of the State of Oregon for the County of Multnomah. On March 5, 2014, a securities class action was filed in this Court, and on March 7, 2014, the first lawsuit in this consolidated derivative action was filed. Additional securities class action lawsuits were filed in this Court on March 10, 2014 and March 12, 2014. On March 14, 2014, Irving Einhorn joined the Board of Directors of Galena. At approximately the same time that Einhorn joined the Board, the Special Committee was reconstituted to include only two members: Einhorn and Ashton (who had not sold any shares during the relevant period).

Additional lawsuits in this consolidated derivative action were filed on March 31, 2014, and one additional securities class action lawsuit was filed in this Court on April 4, 2014. The Special Committee investigated the allegations contained in the press reports and the allegations of the derivative and class action complaints filed in this Court and the Multnomah County Circuit Court.[3]

The Special Committee consisting of Einhorn and Ashton investigated for approximately four months. The investigation included interviewing numerous employees, officers, and directors of Galena and reviewing more than 140,000 pages of documents. On July 15, 2014, the Special Committee of Einhorn and Ashton issued their report to Galena's Board.[4] The report contained the following findings of fact by the Special Committee, as relevant to this case: (1) they found no evidence that Galena was aware that DreamTeam paid persons to write online articles or send emails favorable to Galena or its products; (2) they found no evidence that Galena was aware that persons affiliated with DreamTeam used multiple aliases when writing about Galena; (3) they found no evidence that Galena hired DreamTeam with the specific intent to increase the price of Galena's stock; (4) they found no evidence that articles allegedly written at the direction of DreamTeam contained false or misleading statements of material fact; (5) they

[3] In May and June of 2014, additional derivative actions were filed in the Delaware Court of Chancery. The Special Committee did not specifically investigate the allegations of the Delaware complaints, although many of the underlying facts are the same as alleged in the Oregon actions.

[4] It appears that the report by the Special Committee was not made public until September 25, 2014, when Galena posted a copy of the report on its public website and issued a press release regarding the report. *See* http://galenabiopharma.com/special-committee-report/ (last visited on October 19, 2014). A complete copy of the report, including appendices but excluding exhibits, is attached as an Appendix to this Opinion and Order. Although Galena had filed its second quarter 2014 Form 10-Q on August 11, 2014, disclosing that the Special Committee had completed its investigation, that filing failed to disclose the Special Committee's conclusions or the existence of the July 15, 2014 report. The Form 10-Q did, however, disclose that Einhorn had been appointed as a single-member SLC.

found no substantial evidence that the articles allegedly written at the direction of DreamTeam had a material effect on the price of Galena's stock; (6) they found no evidence that, with the exception of Ahn, Galena insiders had knowledge of DreamTeam's activities before trading Galena's stock; (7) they found no evidence that Galena's officers and directors had material nonpublic information before trading in Galena's stock; and (8) they found no evidence that the trades by officers and directors in the first quarter of 2014 violated any company policy. Based on these findings of facts, the Special Committee of Einhorn and Ashton concluded that there is no credible basis for finding that Galena or its officers and directors violated applicable law or that the officers and directors breached their fiduciary duties as alleged in the Oregon derivative and class action complaints. The Special Committee also recommended that Galena should not pursue claims against any person or entity as a result of the findings of the investigation.

C. Galena's Appointment of the Special Litigation Committee

On July 21, 2014, six days after the Special Committee of Einhorn and Ashton issued the report concluding that Galena and its officers and directors did not violate any law or breach any applicable fiduciary duties and that the company should not pursue any litigation, Galena's Board disbanded the Special Committee. The Board then appointed a new, "fully empowered" single-member SLC consisting only of Einhorn. This single-member SLC was authorized by the Board to: (1) investigate and evaluate the allegations and issues raised in the lawsuits filed in both Oregon and Delaware; (2) prepare reports, arrive at decisions, and take other actions in connection with these lawsuits as the SLC deems appropriate and in the best interests of Galena and its stockholders, in accordance with Delaware law; and (3) engage accountants and advisors, including independent legal counsel, that the SLC deems necessary or desirable in order to assist it in the discharge of its responsibilities.

In August 2014, the SLC retained the law firm of Young, Conaway, Stargatt & Taylor, LLP to act as its counsel. The SLC, with the assistance of its counsel, has begun to investigate the allegations contained in the various lawsuits.

D. Additional Procedural History

On August 6, 2013, Galena's Board amended Galena's bylaws through unanimous written consent of the Board, adding a forum selection clause. On April 18, 2014, Galena filed a motion to dismiss this consolidated derivative action, asserting that the forum selection clause adopted by the Board was valid and enforceable and required dismissal of the action before this Court. After this motion was fully briefed, but six days before oral argument, the Court asked the parties to "address the process and timing by which Galena shareholders can amend or repeal a bylaw amendment and the date of the Galena annual meeting." Galena then withdrew its motion to dismiss. Under Delaware law a board is prohibited from unilaterally amending a corporation's bylaws unless the company's Certificate of Incorporation specifically allows such an amendment. As Plaintiffs have now explained, in Galena's Certificate of Incorporation there is no such authority for the Board unilaterally to amend Galena's bylaws; instead, the Certificate requires a shareholder vote with not less than 75 percent voting to approve any proposed amendment to the bylaws.

DISCUSSION

Galena moves to stay this action so that the single-member SLC consisting of Mr. Einhorn can conduct and conclude its investigation. Delaware law has a strong presumption that derivative litigation should be stayed pending an SLC investigation. *See, e.g.*, *Biondi*, 820 A.2d at 1163 (noting that "the general rule under Delaware law is that a stay must be granted when a special litigation committee is formed to consider whether derivative actions should be prosecuted"); *In re Oracle*, 808 A.2d at 1211 ("[T]his court has acknowledged its duty to stay derivative actions at the instance of a special litigation committee, 'pending the investigation and report of the Committee. . . .'") (citations omitted); *Kaplan*, 484 A.2d at 510 ("It is a foregone conclusion that such a stay must be granted. Otherwise, the entire rationale of *Zapata*, i.e., the inherent right of the board of directors to control and look to the well-being of the corporation in the first instance, collapses."). As explained by the Delaware Chancery Court:

> If *Zapata* is to be meaningful, then it would seem that such an independent committee, once appointed, should be afforded a reasonable time to carry out its function. It would likewise seem reasonable to hold normal discovery and other matters in abeyance during this interval. If a derivative plaintiff were to be permitted to depose corporate officers and directors and to demand the production of corporate documents, etc. at the same time that a duly authorized litigation committee was investigating whether or not it would be in the best interests of the corporation to permit the suit to go forward, the very justification for the creating of the litigation committee in the first place might well be subverted. Likewise, in effect, it would likely amount to simultaneous discovery of the same persons and materials by two separate sources, both allegedly acting on behalf of the corporation.

Abbey, 457 A.2d at 375.

Although granting a motion to stay a derivative action pending an SLC investigation is the general rule, there are limited exceptions to that rule. The Delaware Chancery Court has discussed at length the essentially discretionary nature of a trial court's decision to stay an action, and noted that Delaware courts have strayed from that principle in articulating a seemingly firm rule favoring stays. *Carlton, Invs. v. TLC Beatrice Int'l Holdings, Inc.*, 1996 WL 33167168, at *8 (Del. Ch. June 6, 1996); *see also Biondi*, 820 A.2d at 1165 n.42 (noting that *Carlton* demonstrated that there are exceptions to the general rule favoring stays). The court in *Carlton* noted that the decision whether to grant a stay involves balancing the equities and denied the motion to stay because the equities favored continuing the litigation in light of the length of time the litigation had been pending, the discovery and motions practice that had occurred, and the resources expended litigating the case. *Carlton*, 1996 WL 33167168, at *9-10.

The Delaware Chancery Court also denied a motion to stay pending an SLC investigation where it appeared at the time of the application for stay that any later conclusion by the SLC that a lawsuit would not be in the company's best interest would not withstand judicial review. *Biondi*, 820 A.2d at 1165. In *Biondi*, the court found that because the chairman of the SLC previously had publicly commented that the findings of an investigation by a law firm that had been retained by the company (and was not affiliated with the SLC) "puts to rest any question" of wrongdoing by one of the company insiders that the SLC was charged with investigating, any future decision by the SLC would not withstand scrutiny because "there will always be a reasonable doubt that its investigation was designed to paper a decision that had already been made." *Id.* at 1166 ("How can the court and the company's stockholders reasonably repose confidence in an SLC whose Chairman has publicly and prematurely issued statements exculpating one of the key company insiders whose conduct is supposed to be impartially investigated by the SLC? The answer is that they cannot."); *see also London v. Tyrrell*, 2010 WL 877528, at *16 (Del. Ch. Mar. 11, 2010) ("In sum, the independence inquiry under *Zapata* is critically important if the SLC process is to remain a legitimate mechanism in our corporate law. SLC members should be selected with the utmost care to ensure that they can, in both fact and appearance, carry out the extraordinary responsibility placed on them to determine the merits of the suit and the best interests of the corporation, acting as proxy for a disabled board." (footnote and citation omitted)). The court in *Biondi* denied the motion to stay, finding that it would be "wasteful to stay litigation" for an investigation that could announce support for litigating the derivative suits but could not issue "a contrary decision to terminate the litigation" because such a decision "must necessarily be rejected because the SLC cannot demonstrate its independence." *Biondi*, 820 A.2d at 1166.

Galena argues in its reply brief that the "unique circumstances" of *Biondi* are not present in this case. Galena fails to mention, however, the fact that the earlier two-member Special Committee, of which Einhorn was one of only two members, issued a report exonerating the company insiders from any wrongdoing.[5] The Court disagrees with Galena's argument that the "unique circumstances" of *Biondi* are not present in this case.

In *Biondi* the SLC consisted of more than one person, while here there is only a single member, Einhorn. In *Biondi*, the court was concerned about one of the SLC members who, before the SLC completed its investigation, made a public statement that an investigation by a separate law firm "puts to rest" the allegations of wrongdoing by the company insider. Here, the sole member of the SLC, Einhorn, did not merely comment on an outside investigation, but conducted an investigation as part of the two-person Special Committee and issued a report finding that the company insiders did not engage in the wrongdoing as alleged in this case. This report recommended that the company not pursue any litigation. Six days after issuing this

[5] Additionally, in support of its motion to stay, Galena filed the affidavit of Irving M. Einhorn. In his affidavit, Einhorn explains that in February 2014 Galena's Board created a Special Committee of four directors to investigate the allegations of wrongdoing and report back to the Board its findings and recommendations. After Einhorn joined the Board on March 14, 2014, the Special Committee was "reconstituted" by the board to include only Einhorn and Board member William Ashton. Einhorn further explains in his affidavit that on July 21, 2014, "the Board determined to disband the special committee and to appoint in its place a fully empowered Special Litigation Committee (the 'SLC') of the Board, with me as its sole member." Mr. Einhorn in his affidavit, and Galena in its motion to stay, however, did not disclose to the Court that just six days before the Board disbanded the Special Committee consisting of Einhorn and Ashton, that same two-person Special Committee delivered to Galena's Board the Special Committee's report dated July 15, 2014, containing the findings and recommendations of Einhorn and Ashton described above. *See* Appendix. For the reasons explained in this Opinion and Order, the Court considers the existence of the July 15, 2014 report from Einhorn and Ashton, including its findings and recommendations, to be material to the Court's decision on the pending motion to stay.

report, Einhorn was appointed as the sole member of the SLC. Galena now asks the Court to delay three months so that Einhorn can conduct another investigation into the conduct alleged in this case. Einhorn has, however, already investigated the conduct alleged in this case and reached a conclusion regarding the very issue that he, as the sole member of the SLC, is now tasked to investigate.

The Court finds that it is unlikely that any future decision by the SLC to terminate this litigation will withstand scrutiny under *Zapata*. As in *Biondi*, here the Court and Galena's stockholders cannot "reasonably repose confidence in an SLC" whose sole member has "publicly and prematurely issued statements exculpating" the alleged wrongdoers "whose conduct is supposed to be impartially investigated by the SLC[.]" *Biondi*, 820 A.2d at 1266. It would be difficult for Galena to meet its burden to prove that Einhorn, as the SLC, conducted an objective, reasonable, and independent investigation done in good faith, after having already formed judgment as part of the two-member Special Committee. *See id.*; *see also Booth*, 640 F.3d at 145 (noting that "the mere appearance of the special litigation committee's lack of independence is enough to deny [the defendant's] motion based on the special litigation committee's recommendation and allow the derivative suit to proceed"); *London*, 2010 WL 877528, at *15 ("When SLC members are simply exposed to or become familiar with a derivative suit before the SLC is formed this may not be enough to create a material question of fact as to the SLC's independence. But if evidence suggests that the SLC members prejudged the merits of the suit based on that prior exposure or familiarity, and then conducted the investigation with the object of putting together a report that demonstrates the suit has no merit, this will create a material question of fact as to the SLC's independence.").[6]

Further, under Delaware law, "the sole member of a one-person special committee [must] meet unyielding standards of diligence and independence." *Sutherland v. Sutherland*, 2007 WL 1954444, at *3 n.10 (Del. Ch. July 2, 2007). As the Delaware Chancery Court has warned, "[i]f a single member committee is to be used, the members should, like Caesar's wife, be above reproach." *Lewis v. Fuqua*, 502 A.2d 962, 967 (Del. Ch. 1985). Here, because Einhorn has already conducted an investigation, issued a report to the Board as part of the two-person Special Committee, and publicly announced his conclusion that the Galena insiders did not engage in any wrongdoing, Einhorn fails an "unyielding" evaluation of his independence and objectivity to proceed with the SLC investigation. *Sutherland*, 2007 WL 1954444, at *3 n.10.

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[6] Galena also cites to an opinion in the consolidated derivative actions against it pending in the Delaware Court of Chancery. That case involves many of the same facts alleged in the case before this Court. Galena notes that the Delaware Court of Chancery stayed that consolidated derivative action in support of Galena's argument before this Court that a stay is appropriate. Galena did not provide the Court with a copy of the Delaware Court of Chancery's order. The Court takes judicial notice of the Order and the related briefing filed before the Delaware Court of Chancery, Consolidated Case No. 9715-VCN. In the Delaware case, unlike in this Case, the stay was agreed upon and jointly submitted by the parties. The Delaware order states that "Plaintiffs, Galena, and the SLC . . . agreed to resolve the motion to stay. . . ." Although the Court does not rely on the Delaware Chancery Court order or the stipulation of the parties in that case in resolving this pending motion, the Court notes that nothing filed with the Delaware Court of Chancery in connection with the motion to stay discloses the July 15, 2014 report of the two-member Special Committee. If any party believes that the Court has not properly taken judicial notice of the documents filed before the Delaware Court of Chancery, that party has leave to seek reconsideration of this portion of the Court's Opinion and Order. *See* Fed. R. Evid. 201(e).

CONCLUSION

Galena's motion to stay (Dkt. 38) is DENIED.

IT IS SO ORDERED.

DATED this 22nd day of October, 2014.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge

APPENDIX

REPORT TO THE BOARD OF DIRECTORS OF GALENA BIOPHARMA, INC. REGARDING THE 2012-2014 MARKET VISIBILITY CAMPAIGNS AND THE SALES BY INSIDERS IN THE FIRST QUARTER OF 2014

July 15, 2014

SPECIAL COMMITTEE OF THE BOARD OF DIRECTORS

William L. Ashton
Irving M. Einhorn

COUNSEL TO THE SPECIAL COMMITTEE

Locke Lord LLP

Michael F. Perlis
Christopher Lee
Lilian M. Khanjian

Privileged and Confidential:

Protected by Attorney-Client Privilege and as Attorney Work Product

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I. EXECUTIVE SUMMARY

On February 12, 2014, Adam Feuerstein, staff writer for the website TheStreet, published an article reporting that the website Seeking Alpha had removed two articles touting Galena Biopharma, Inc. (the "Company" or "Galena") from its website because the articles were written by the same person using different aliases.[1] Mr. Feuerstein made a similar report a year earlier, writing that Seeking Alpha removed five articles touting the Company from its website because the articles were written by a single individual using three pseudonyms.[2] Mr. Feuerstein, however, claimed that this time there was evidence linking the articles to an investor relations firm the Company had retained known as the Dream Team Group ("DTG").[3]

Mr. Feuerstein reported that DTG had disclosed that the Company had paid it $50,000 in July of 2013 for 240 days of "advertising, branding, marketing, investors relations, and social media services" on its website.[4] Based on a document obtained by TheStreet titled "Galena Biopharma Case Study: Investor Awareness Campaign," he concluded that DTG wrote several favorable articles about the Galena under the guise of individual investors.[5] Mr. Feuerstein emphasized that none of the articles disclosed a financial relationship between DTG and the Company.[6] Mr. Feuerstein conceded, however, that Seeking Alpha never determined if DTG paid the bloggers allegedly using multiple aliases.[7] He ultimately concluded that the articles allegedly written at the direction of DTG must have been the cause for the dramatic increase in value of the Galena's stock over the previous eight months.[8]

Shortly thereafter, Richard Pearson, a frequent blogger, published an article on Seeking Alpha claiming that he had been approached by DTG to write paid promotional articles about

[1] Ex. 2. Article titled "Galena Biopharma Pays For Stock-Touting Campaign While Insiders Cash Out Millions" by Adam Feuerstein dated February 12, 2014.
[2] Ex. 1. Article titled "Seeking Alpha Author Used Multiple Aliases To Tout Biotech Stocks" by Adam Feuerstein dated January 28, 2013
[3] Ex. 2. Article titled "Galena Biopharma Pays For Stock-Touting Campaign While Insiders Cash Out Millions" by Adam Feuerstein dated February 12, 2014.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*

two of its clients, including the Company.[9] According to Mr. Pearson's account, Tom Meyer, his contact at DTG, offered to pay him $300 per article written about the Company.[10] Mr. Pearson wrote that he soon discovered that Mr. Meyer, who claimed to write paid promotional articles about the Company himself, used a slew of aliases when writing about the Company.[11] These aliases included Christine Andrews, John Rivers, James Ratz, James Johnson, Ted Meyer, Wonderful Wizard, Equity Options Guru, Kingmaker, and Expected Growth.[12] Mr. Pearson further wrote that, through Mr. Meyer, he met John Mylant, another of DTG's alleged paid promotional bloggers.[13]

As his article read, in order to investigate the extent of management's involvement in the "paid promotion scheme," Mr. Pearson began submitting "dummy articles" regarding Galena and another company to DTG.[14] His payments, he claimed, were conditioned on two prerequisites: the Company "signing off" and "editing" the articles and his ability to keep the payments a secret.[15] According to Mr. Pearson, he played along in his self-described undercover role and submitted at least two separate articles to DTG.[16] One company, Mr. Pearson wrote, heavily edited his article while, in contrast, the article he submitted about Galena to DTG was allegedly cancelled by Galena before publication.[17] Mr. Pearson attributed the cancellation to the publication of the Feuerstein article and the subsequent public scrutiny that followed.[18] In the end, Mr. Pearson concluded that the articles allegedly written at the direction of DTG, such as those written by Mr. Meyer and Mr. Mylant, had an "enormous effect" on the companies' stock prices.[19] Since the publication of Mr. Pearson's article, he has come under criticism for shorting the other company's stock before publishing his scathing article and for denying that he

[9] Ex. 3. Article titled "Behind The Scenes With Dream Team, CytRx And Galena" by Richard Pearson dated March 13, 2014.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*

previously published articles touting Galena.[20] It has since been discovered that he touted the Company in a January 27, 2014 article.[21]

The publication of the Feuerstein and Pearson articles, along with the public disclosure that officers and directors of the Company had sold a large number of shares of the Company's stock just before the publications, led to a cascade of derivative and class actions tying the events to an alleged "pump and dump" scheme by insiders.[22] In response to the articles and complaints, the Board of Directors of the Company (the "Board") formed a Special Committee charged with determining the merits of the articles and complaints. The Special Committee thereafter retained Locke Lord LLP as counsel and began an investigation.

This report memorializes the findings of the Special Committee's investigation, which included the interviews of numerous employees, officers, and directors and the review of over 140,000 pages of documents. Although the Special Committee lacked subpoena power, we believe that we obtained sufficient information to make the following findings of fact:

(1) We found no evidence that the Company was aware that DTG paid bloggers[23] to write favorable articles about the Company or its products;

(2) We found no evidence that the Company was aware that certain bloggers used multiple aliases when writing about the Company;

(3) We found no evidence that the Company hired DTG with the specific intent to increase the price of the Company's stock, although DTG apparently used the Company's stock price as a measure of its effectiveness;

(4) We found no evidence that articles allegedly written at the direction of DTG contained false or misleading statements of material fact;

(5) We found no substantial evidence that the articles allegedly written at the direction of DTG had a material effect on the price of the Company's stock;

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[20] Ex. 166. Article titled "At Financial News Sites, Stock Promoters Make Inroads" dated March 20, 2014; Ex. 4. Article titled "3 Oncology Biotechs To Watch" by Richard Pearson dated January 27, 2014.

[21] *Id.*

[22] Exs. 41-50. Class action and derivative complaints filed on various dates.

[23] The term "bloggers" as used in this report means authors that wrote articles or email blasts on non-DTG affiliate websites without indicating that the communication was on behalf of DTG or that they were an employee of DTG.

(6) We found no evidence that, with the exception of Mark Ahn, insiders[24] had knowledge of DTG's activities before trading in the Company's stock;

(7) We found no evidence that officers and directors had material nonpublic information before trading in the Company's stock; and

(8) We found no evidence that the trades by officers and directors in the first quarter of 2014 violated Company policy.

Based on these findings of fact, we conclude that there is no credible basis for finding that the Company or insiders violated applicable law as alleged in the class and derivative actions or that insiders breached their fiduciary duties to the Company under any jurisdictional standard. Moreover, we do not recommend that the Company pursue claims against any person or entity as a result of the findings of this investigation.

During our investigation, we discovered that another of the Company's investor relations firms, Lidingo Holdings LLC ("Lidingo"), might have engaged in improper conduct relative to the payment of bloggers for promotional articles written about the Company. As a result, the scope of our investigation expanded to include an analysis of whether the Company's retention and management of Lidingo violated any law or Company policy. In connection with that analysis, we have made the following findings of fact:

(9) We found evidence that Lidingo paid bloggers to write promotional articles about the Company and that the Company was aware of this fact;

(10) We found evidence that Lidingo intended and claimed to have raised the Company's stock price through its efforts;

(11) We found that Mark Ahn granted stock options to Lidingo as part of its compensation for its services without Board approval, which is contrary to Company policy;

(12) We found no evidence that articles allegedly written at the direction of Lidingo had a material effect on the stock price; and

[24] The term "insiders" means the officers and directors who sold shares of Company stock in the first quarter of 2014. Namely, Sanford Hillsberg, Steven Kriegsman, Stephen Galliker, Mark Ahn, Rudoplh Nisi, Richard Chin, and Mark Schwartz.

(13) We found no evidence that, with the exception of Mark Ahn, the selling directors had knowledge of Lidingo's activities before trading in the Company's stock.

Based on these findings of fact, we conclude that it is possible that Lidingo violated Section 17(b) of the Securities Act of 1933. Section 17(b) provides:

> It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

In 1998, the Director of the Securities and Exchange Commission's ("SEC") Division of Enforcement explained that Section 17(b) makes it unlawful for a person to publicize a security for payment unless the nature, amount, and source of the compensation is disclosed.[25] The Director, however, stated that "[t]here is nothing illegal about companies paying fees to touters. The law requires the touters to disclose... The laws do not cover the companies themselves who make payments."[26] Accordingly, we believe that the Company has limited, if any, exposure to liability under Section 17(b).

Although it was not our charge to determine whether insiders breached their fiduciary duties to the Company in connection with their involvement, if any, in the retention or management of Lidingo, we conclude that our findings of fact negate a finding that any officer or director breached their fiduciary duty to the Company in this regard with the possible exception of Mark Ahn. The grant of stock options by Mr. Ahn to Lidingo was unauthorized, but even if this unauthorized act were to rise to the level of a breach of fiduciary duty, we conclude that the

[25] Ex. 167. Article titled "SEC Cracks Down On Internet Stock Fraud" dated October 29, 1998; *see also generally* Ex. 57. SEC Press Release 98-117.
[26] *Id.*

Company suffered no appreciable harm from the grant. Indeed, the Company received monies when Lidingo exercised certain of its options and Mr. Ahn made the grant of options in return for services he believed would benefit the Company, facts that militate against a finding that he breached his fiduciary duty to the Company. Thus, while the Company should take remedial measures to prevent a reoccurrence of a similar event, we do not recommend pursing a claim against Mr. Ahn.

II. SCOPE AND METHODOLOGY OF INVESTIGATION

By its investigation, the Special Committee, with the assistance of Locke Lord LLP, sought to determine: (i) whether the Company violated any law or internal policy in connection with its retention or management of DTG or Lidingo; (ii) whether DTG or Lidingo paid bloggers to write favorable articles about the Company, and, if so, whether the Company had knowledge of that fact; (iii) whether bloggers who wrote favorable articles about the Company used multiple aliases to pose as separate individuals, and, if so, whether the Company had knowledge of that fact; (iv) whether the Company retained DTG or Lidingo in order to manipulate the price of the Company's stock; and (v) whether the sales by officers and directors in the first quarter of 2014 violated any law or Company policy. Throughout the investigation, the Company provided unfettered access and cooperation.

A. Mandate From The Board

In response to the allegations made in the Feuerstein and Pearson articles, the Board voted unanimously to form a Special Committee charged with determining whether the Company violated any law or internal policy in connection with its retention and management of DTG or whether any Company insider traded on material non-public information in the first quarter of 2014.[27] The scope of the investigation expanded during its course to include a review of the Company's retention and management of Lidingo between 2012 and 2014. The Board originally appointed William Ashton, Steven Galliker, Sanford Hillsberg, and Steven Kriegsman as members of the Special Committee.[28] The Board later reconstituted the Special Committee to

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[27] Ex. 24. Minutes of the Board dated February 17, 2014.
[28] *Id.*

consist of William Ashton and Irving Einhorn.[29] The Special Committee retained Michael F. Perlis and the law firm of Locke Lord LLP as counsel.

B. Document Review

Locke Lord LLP reviewed approximately 140,000 pages of documents covering sixteen categories of documents. This review included documents related to trades of the Company's stock by any director or officer in the first quarter of 2014, Board and committee minutes, Board and committee agendas, Board presentation materials, documents related to product progression, documents reflecting a change in the Board's composition, financial statements, analyst reports, insider trading policies, press releases, 10b5-1 plans, communications between the Company and the press, communications between the Company and analysts, communications between the Company and the Food and Drug Administration ("FDA"), communications between the Company and DTG, and communications between the Company and Lidingo.

C. Witness Interviews

The Company provided Locke Lord LLP with unlimited access to interview any Company employee, officer, or director. After a review of the documents, we determined that an interview of twelve Company employees, officers, and directors was appropriate.[30] Those interviewed were: Mark Ahn, Chief Executive Officer and Director; Mark Schwartz, Executive Vice President and Chief Operating Officer; Ryan Dunlap, Chief Financial Officer; Remy Bernarda, Vice President of Marketing and Communications; John Burns, Senior Manager of Finance; Angela DiPilato, Senior Accountant; Madeline Hatton, Manager of Operations and Administration; Sanford Hillsberg, Chairman of the Board; Richard Chin, Director; Steven Kriegsman, Director; Rudolph Nisi, Director; and Stephen Galliker, Director. All of the interviews were conducted by two Locke Lord LLP attorneys and a member of the Special Committee.

As part of the investigation, we sought to interview the plaintiffs or counsel for plaintiffs in the derivative and class actions asserting allegations that the Company and its directors and

[29] Mr. Ashton and Mr. Einhorn's biographies can be found on pp. 9-10 of this report.
[30] Mark Ahn and Ryan Dunlap were interviewed twice by the Special Committee.

officers acted improperly in connection with the Company's retention and management of DTG and in their sales of Company stock in the first quarter of 2014.[31] Plaintiffs' counsel either did not respond, declined to be interviewed, or proposed a quid pro quo in exchange for an interview. With respect to the latter, counsel for plaintiffs Partik Rathore, Eleanor Werbowsky and Jeffrey Klein stated that they would only agree to be interviewed by the Special Committee if the Special Committee agreed to be interviewed by plaintiffs' counsel.[32] The Special Committee did not believe plaintiffs' counsel's request was appropriate and, therefore, did not agree to the proposed arrangement.

We also attempted to interview analysts that covered the Company during the relevant time period. Numerous analysts from various financial institutions, such as Roth Capital Partners, Maxim Group, Cantor Fitzgerald, and MLV & Co, reported on the Company's prospects and progression from 2012 to 2014. We attempted to determine what, if any, influence the articles written by bloggers on websites such as TheStreet, Seeking Alpha, or Wall St Cheat Sheet had on their reports. All of the analysts either declined to be interviewed or did not respond to our request. Their unwillingness to be interviewed was understandable; however, common sense dictates that they did not rely on articles written by bloggers to formulate their opinions, and we found no evidence to the contrary.

We also attempted to interview two executives of DTG, Michael McCarthy, Managing Director, and Jamie Spangler, Business Development. Counsel for DTG, Paul Huey-Burns of the law firm of Shulman Rogers, stated that Mr. McCarthy and Mr. Spangler would not agree to be interviewed, but that they would consider answering written questions. On May 30, 2014, we submitted eight written questions to Mr. McCarthy and Mr. Spangler through counsel, including whether it was true that DTG paid certain bloggers to write articles about the Company; whether bloggers who wrote articles about the Company used multiple aliases in order to pose as multiple individuals; and whether the Company hired DTG to affect the Company's stock price, among

[31] Ex. 51. Letters from Locke Lord LLP to counsel for plaintiffs dated April 24, 2014.
[32] Ex. 52. Letters from various counsel for plaintiffs on various dates.

others.[33] On June 12, 2014, Mr. Huey-Burns informed us that Mr. McCarthy and Mr. Spangler denied any wrongdoing, but that they could not answer the questions in less than six weeks.[34] Three weeks later, we received a letter from Jacob Frenkel of Shulman Rodgers stating that since Mr. McCarthy and Mr. Spangler required additional time to provide responses, they decided to decline to respond rather than delay the completion of this report.[35] Given the nature of the questions we propounded, we found the series of communications and requests for additional time to be disingenuous.

It is important to note that, after thoughtful consideration, we did not attempt to interview Mr. Feuerstein, Mr. Pearson, or representatives of Lidingo. We concluded that Mr. Feuerstein and Mr. Pearson almost certainly published the full extent of their knowledge as to these matters in their articles. Moreover, we concluded that, given the sensitive nature of the investigation, attempts to interview them could have led to an inappropriate disclosure of our investigation's progress. With respect to Lidingo, we determined that we had reviewed documents sufficient to determine if the Company acted improperly in its retention or management of Lidingo.

D. King & Spalding LLP's Role

King & Spalding LLP is the Company's outside counsel in the class and derivative actions and the pending SEC investigation into related matters. In that role, attorneys at King & Spalding LLP accompanied Company employees and certain directors during the interview process. King & Spalding LLP also assisted Locke Lord LLP in gathering documents and information.

E. Key Members Of The Investigative Team

William L. Ashton is Chair of the Special Committee and a senior executive with more than twenty-eight years of experience in biotechnology and pharmaceutical leadership and management. Most recently, at Amgen, Inc., he served as Vice President of Corporate and Government Affairs and Vice President of Sales, and was directly responsible for product

[33] Ex. 53. Letter from Christopher Lee to Paul Huey-Burns dated May 30, 2014.
[34] Ex. 54. Email from Paul Huey-Burns to Michael F. Perlis dated June 12, 2014.
[35] Ex. 68. Letter from Jacob Frenkel to Michael F. Perlis dated July 8, 2014.

launches, as well as interaction with key government agencies including the Centers for Medicare and Medicaid Services. After retiring from Amgen, Inc., Mr. Ashton joined the University of the Sciences in Philadelphia where he currently serves as Associate Provost and Senior Vice President of Strategic Business Development, Founding Dean, Mayes College of Healthcare Business and Policy, and Assistant Professor of pharmaceutical business. Mr. Ashton joined the Board in 2013.

Irving M. Einhorn is a member of the Special Committee and a former Regional Administrator of the SEC's Los Angeles office where he oversaw the enforcement of regulatory responsibilities in Arizona, Nevada, Hawaii, and California. Before becoming Regional Administrator, Mr. Einhorn was an Assistant Chief Trial Attorney with the Division of Enforcement's Trial Unit. Mr. Einhorn joined the Board as a Director in 2014.

Michael F. Perlis is counsel to the Special Committee and a Partner at Locke Lord LLP.[36] Mr. Perlis is a former assistant director of the SEC's Division of Enforcement, where he investigated and prosecuted a wide range of cases including insider-trading matters, foreign payment cases, financial fraud cases, and cases relating to organized crime in legitimate business. During his tenure, Mr. Perlis reviewed over fifty internal investigations as part of the SEC's Voluntary Disclosure Program. Since 1980, he has defended numerous class actions, derivative actions and SEC enforcement proceedings. In these matters, he has represented directors, officers, corporations, accountants, and directors and officers liability and comprehensive general liability insurance carriers. He has also represented several special committees of boards of directors of companies in connection with internal investigations.

[36] Locke Lord LLP has never represented the Company, the Board, or any committee of the Board prior to this matter.

III. FINDINGS OF FACT: THE COMPANY'S USE OF INVESTOR RELATIONS FIRMS

The Company retained several investor/public relations firms between 2012 and 2014 to increase retail investor interest and public awareness of the Company as a whole.[37] This investigation focused on two of those firms: DTG and Lidingo.

A. DTG

In the summer of 2013, Mark Ahn asked Remy Bernarda, who had recently joined the Company on May 1, 2013, to interview several investor relations firms that could potentially increase the Company's public exposure.[38] Ms. Bernarda interviewed three firms, including DTG, which specialized in social media.[39] After interviewing the firms, Ms. Bernarda recommended to Mr. Ahn that the Company retain Tiberend Strategic Advisors ("Tiberend"), an investor relations firm specializing in life science companies.[40] Ms. Bernarda was familiar with Tiberend and appreciated that Tiberend treated bloggers on websites like Seeking Alpha and Motley Fool like traditional journalists.[41] Mr. Ahn accepted Ms. Bernarda's recommendation, and the Company retained the firm.[42]

Conversely, Ms. Bernarda advised Mr. Ahn against retaining DTG for various reasons, including because DTG proposed taking over the Company's social media websites, including its Facebook, LinkedIn, and Twitter accounts, which she believed might draw scrutiny from regulatory authorities.[43] Notwithstanding this advice, Mr. Ahn decided to retain DTG on the Company's behalf.[44] The Company executed two contracts with DTG. The first on July 23,

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[37] The Company's investor base consists of two constituencies: retail and institutional investors. The market visibility campaign targeted retail investors in a highly competitive biotech market.
[38] Interview of Remy Bernarda dated May 20, 2014.
[39] *Id.*
[40] *Id.*; www.tiberend.com.
[41] Interview of Remy Bernarda dated May 20, 2014; Ex. 72. Email from Remy Bernarda to Mark Ahn dated July 15, 2013.
[42] Interview of Remy Bernarda dated May 20, 2014. Ex. 72. Email from Mark Ahn to Remy Bernarda dated July 15, 2013.
[43] Interview of Remy Bernarda dated May 20, 2014; Ex. 72. Email from Remy Bernarda to Mark Ahn dated July 15, 2013.
[44] Interview of Remy Bernarda dated May 20, 2014; Ex. 11. Dream Team/Mission IR contract signed by Mark Ahn on July, 23 2013.

2013 at a rate of $25,000 per quarter for a contract period of ninety days.[45] The second on December 3, 2013 at a rate of $25,000 per quarter for a contract period of one hundred and fifty days.[46] These contractual payments were disclosed by DTG on its website, although the disclosure has since been removed.[47] DTG informed Mr. Ahn that it had been advised by counsel that the disclosure of the payments was required under Section 17(b) of the Securities Act of 1933.[48]

Pursuant to the contracts, DTG agreed to profile the Company on its affiliate websites, which included MissionIR, Tiny Gems, and Small Cap Relations, among others.[49] At the time, DTG boasted a network of over two dozen affiliate websites.[50] DTG further agreed to leverage its online social network and to distribute articles to its blog and message platforms.[51] There was no specific written agreement to connect the Company with bloggers who wrote articles for publication on non-Dream Team affiliated websites.[52]

The articles attributed to DTG we found generally fell into two categories. The first category was articles written by DTG and published on its affiliate websites. These articles did not disclose that DTG had been compensated by the Company.[53] There was, however, a disclaimer link on the webpage that would connect to a compensation disclosure where a person could find the Company listed.[54]

The second category was articles written by bloggers for publication on non-affiliate websites such as Seeking Alpha. DTG, through Michael McCarthy and Jamie Spangler, would email Mark Ahn and/or Remy Bernarda a draft of an article for editing and approval for

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[45] Ex. 11. Dream Team/Mission IR contract signed by Mark Ahn on July, 23 2013.
[46] Ex. 12. Dream Team/Mission IR contract signed by Mark Ahn on December, 3 2013.
[47] Ex. 2. Article titled "Galena Biopharma Pays For Stock-Touting Campaign While Insiders Cash Out Millions" by Adam Feuerstein dated February 12, 2014.
[48] Ex. 71. Email from Michael McCarthy to Mark Ahn dated February 11, 2014.
[49] Exs. 11 and 12. Dream Team/Mission IR contracts signed by Mark Ahn on July, 23 2013 and December 3, 2013, respectively.
[50] Ex. 14. Printout of Dream Team Family of Business Brands webpage.
[51] Exs. 11 and 12. Dream Team/Mission IR contracts signed by Mark Ahn on July, 23 2013 and December 3, 2013, respectively.
[52] *Id.*
[53] Ex. 15. Articles published on www. http://blog.dreamteamgroup.com/ on September 18, 2013. Ex. 16. Articles published on http://missionir.com/blog/ on September 29, 2013.
[54] See generally Ex. 13. Printout of Dream Team Statements and Policies.

publication.[55] The draft articles would not contain a by-line and DTG would not specify which websites would be publishing the articles.[56] At first, Ms. Bernarda was surprised that DTG had requested that the Company review the drafts before publication.[57] But in the end, Ms. Bernarda and Mr. Ahn reviewed and edited some of the articles before publication. Based on our review, however, Ms. Bernarda and Mr. Ahn reviewed the articles only for factual and typographical errors.[58] We found no edits to content, substance, or style. What was described in the Pearson article as editing appears to have been nothing more than proofreading.

Because most, if not all, of the articles written by the bloggers identified in the Feuerstein and Pearson articles were taken down from the internet before our investigation began, we were unable to determine whether the Company reviewed and approved the publication of all the articles at issue. We were, however, able to confirm that the Company did review and approve for publication an article written by Tom Meyer on Wall St. Cheat Sheet titled "4 Reasons Why Galena Biopharma Is Headed Higher" and by John Mylant titled "Galena Biopharma Stock Grows On More Than Speculation."[59] We were unable to compare the draft and final versions of Mr. Mylant's article, but with respect to Mr. Meyer's article, the Company made virtually no changes before its publication.[60] Neither the draft nor the final version of Mr. Meyer's article included a disclosure that Mr. Meyer was paid by DTG to write the article.[61]

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[55] *See, e.g.*, Ex. 81. Email from Michael McCarthy to Remy Bernarda and Mark Ahn dated November 14, 2013; Ex. 92. Email from Jonathan Keim to Mark Ahn dated November 25, 2013; Ex. 114. Email from Michael McCarthy to Remy Bernarda and Mark Ahn dated February 4, 2014.

[56] *Id.*

[57] Ex. 83. Email from Remy Bernarda to Mark Ahn dated November 19, 2013.

[58] See, e.g., Ex. 94. Email from Remy Bernarda to Jonathan Keim, Michael McCarthy and Mark Ahn dated December 3, 2013; Ex. 95. Email from Mark Ahn to Remy Bernarda, Jonathan Keim and Michael McCarthy dated December 3, 2013; Ex. 108. Email from Remy Bernarda to Michael McCarthy dated January 22, 2014; Ex. 110. Email from Mark Ahn to Michael McCarthy dated January 31, 2014.

[59] Compare Ex. 7. Article written by Tom Meyer titled "4 Reasons Why Galena Biopharma Is Headed Higher" dated December 4, 2013 with Exs. 94-95. Emails from Remy Bernarda and Mark Ahn to Jonathan Keim and Michael McCarthy dated December 3, 2013; see also Ex. 110. Email from Mark Ahn to Michael McCarthy and Remy Bernarda dated January 31, 2014.

[60] Exs. 94-95. Emails from Remy Bernarda and Mark Ahn to Jonathan Keim and Michael McCarthy dated December 3, 2013; Ex. 110. Email from Mark Ahn to Michael McCarthy and Remy Bernarda dated January 31, 2014.

[61] Ex. 7. Article written by Tom Meyer titled "4 Reasons Why Galena Biopharma Is Headed Higher" dated December 4, 2013; Exs. 94-95. Emails from Remy Bernarda and Mark Ahn to Jonathan Keim and Michael McCarthy dated December 3, 2013.

Importantly, of the six articles we were able to review, we found no false or misleading statement of material fact. Without a doubt, the articles generally favored the Company (and contained some "puffery"), but they highlighted facts that were publicly available at the time. The articles provided general information about the market and competitive landscape that was contemporaneously available in analyst reports.[62]

For example, the article titled "Galena Biopharma Presents An Attractive Investment Opportunity" by the Wonderful Wizard concerned the Company's 52-week stock performance, an analysis of the Company's product pipeline, and the market and competitive landscape.[63] The article's representation of the Company's publicly available stock performance was true. Further, the article's assertions concerning the Company's growing product pipeline were supported by the launch of Abstral, the status of NeuVax, and the Company's agreement with Teva Pharmaceuticals ("Teva") to commercialize NeuVax, all events that had been publicly disclosed in press releases and SEC filings.[64] The article described market conditions by citing to data concerning breast cancer from sources such as the National Cancer Institute and American Cancer Society. Those figures were cited elsewhere and appear to have been accurate.[65] The remainder of the article was statements of opinion and not fact.

Similarly, the article titled "Will Galena Biopharma Triple Soon?" by James Katz concerned Abstral sales, partnerships, NeuVax enrollment, and the progress of the Company's Folate Binding Protein.[66] The information contained in the article such as the results of Phase 1 and 2 trials for NeuVax, enrollment of patients in the Phase 3 trial of NeuVax, the Company's

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[62] Exs. 119-125, 127-129, 131-135, 137-142, 144, 148, 150, 153, and 156. Analyst reports dated variously.

[63] Ex. 5. Article titled "Galena Biopharma Presents An Attractive Investment Opportunity" dated August 3, 2013.

[64] Ex. 73. Press release dated March 18, 2013 titled "Galena Biopharma Acquires Abstral(R) (fentanyl) Sublingual Tablets in U.S., a Novel, Best-in-Class Treatment Approved for Breakthrough Cancer Pain"; Ex. 77. Press release dated December 7, 2012 titled "Galena Biopharma Presents Final Landmark 60-Month Results From NeuVax(TM) Phase 1/2 Trials at the 35th Annual CTRC-AACR San Antonio Breast Cancer Symposium"; Ex. 78. Press release dated December 4, 2012 titled "Galena Biopharma Announces Signature of Commercialization Partnership With Teva for Israel".

[65] Ex. 79. "Childhood Cancer Statistics, Research Funding Statistics" as provided by American Child Cancer Organization; Ex. 98. "Cancer Facts and Figures 2013", American Cancer Society, 2013; Ex. 77. Press release dated December 7, 2012 titled "Galena Biopharma Presents Final Landmark 60-Month Results From NeuVax(TM) Phase 1/2 Trials at the 35th Annual CTRC-AACR San Antonio Breast Cancer Symposium".

[66] Ex. 6. Article titled "Will Galena Biopharma Triple Soon?" dated November 12, 2013.

partnership with Teva, and the results of the Phase 1 trial for Folate Binding Protein all appear to be sourced from publicly available documents such as Company press releases and filings.[67] The article further provided some revenue projections based on certain assumptions, but the projections were in-line with analyst reports.[68] We found no misstatement of material fact in the article.

An article written by Kingmaker and titled "Galena BioPharma Continues to Develop a Deep Pipeline of Products" tracked the previous articles in highlighting facts that were also available in Company press releases.[69] The article summarized the Phase 1 trial results for Folate Binding Protein and included data matching the data available in the Company's November 11, 2013 press release.[70] The article also described the Company's stock price movement, third quarter financial results, and upcoming NeuVax enrollment, all of which are accurate and publicly available.[71]

In his article, "4 Reasons Why Galena Biopharma is Headed Higher," Tom Meyer generally discussed the appreciation of the Company's stock price and the launch of Abstral.[72] The articles outlined several factors that positioned the Company for growth, including analyst coverage, institutional holdings, and Abstral. With respect to analyst coverage, Mr. Meyer noted that Oppenheimer & Company issued an outperform rating for the Company on November 26, 2013. This was a true statement.[73] With respect to institutional holdings, Mr. Meyer further wrote that institutions held approximately 17% of the Company's outstanding shares. This was

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[67] Ex. 73. Press release dated March 18, 2013 titled "Galena Biopharma Acquires Abstral(R) (fentanyl) Sublingual Tablets in U.S., a Novel, Best-in-Class Treatment Approved for Breakthrough Cancer Pain"; Ex. 77. Press release dated December 7, 2012 titled "Galena Biopharma Presents Final Landmark 60-Month Results From NeuVax(TM) Phase 1/2 Trials at the 35th Annual CTRC-AACR San Antonio Breast Cancer Symposium"; Ex. 78. Press release dated December 4, 2012 titled "Galena Biopharma Announces Signature of Commercialization Partnership With Teva for Israel"; Ex. 87. Article titled "The Cancer Pain Drug Market" dated November 17, 2009.

[68] Ex. 136. Needham Analyst Report titled "Neuvax Remains Key Driver" dated November 7, 2013. Ex. 137. Noble Financial Analyst Report titled "For Galena, the value driver is the lead NeuVax program" dated November 8, 2013.

[69] Ex. 88. Article titled "Galena Biopharma Continues to Develop a Deep Pipeline of Products" dated November 22, 2013.

[70] Ex. 89. Press release titled "Galena Biopharma Announces Initial Results From the Folate Binding Protein Vaccine Phase 1 Trial at the Society for Immunotherapy of Cancer Conference" dated November 11, 2013.

[71] Ex. 90. Press Release titled "Galena Biopharma Reports Third Quarter 2013 Results" dated November 6, 2013. Ex. 91. Press release titled "Galena Biopharma Initiates Patient Enrollment in NeuVax(TM) Phase 3 PRESENT Trial to Prevent Breast Cancer Recurrence" dated January 20, 2012.

[72] Ex. 7. Article titled "4 Reasons Why Galena Biopharma Is Headed Higher" dated December 4, 2013

[73] Ex. 143. Analyst report by Oppenheimer & Company dated November 26, 2013.

also a true statement.[74] With respect to Abstral, Mr. Meyer accurately repeated statistics concerning the cancer drug market from a consulting company, Decision Resources.[75] We found no misstatement of material fact.

In "Galena Biopharma Has Promising Pipeline for Revenue Growth," John Mylant discussed the Company's financials as reported in its 10Q filing, the Company's acquisition of Mills Pharmaceuticals, and the Company's positive analyst coverage, all which were public and true.[76] Also discussed in the article was the Company's product pipeline with a description of Abstral and NeuVax, and their market size and potential. We found no material misstatements in the discussion on the Company's products.[77] Citing Decision Resources, Mr. Mylant stated that Abstral sales could potentially generate $40 million per year, which appeared to be an accurate reference.[78] The article concluded by stating that the Company's potential growth was based on FDA approval of NeuVax and Gale-401, but there was no guarantee that the products would reach the market. We found no false or misleading statements of material fact in the article.

Last, an article titled, "The Momentum Continues for Galena Biopharma" by Christine Andrews touted the Company's stock as one of the hottest in the past year citing its 190% growth in 2013. That was an understatement because the Company's stock price in fact increased approximately 324% in 2013.[79] The article contained facts and figures gathered from Decision Resources regarding market size, which appeared accurately referenced.[80] The article describes the Company's positive analyst coverage, including Oppenheimer & Company's outperform rating and Piper Jaffray, Maxim Group, and Roth Capital Partners' valuations, which were accurate and public. The article further highlights the Company's acquisition of Mills Pharmaceuticals, the Company's partnership with Dr. Reddy's Laboratories, and the potential

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[74] Ex. 97. Analyst Report titled "Galena: On track to advance clinical programs, acquisition of Abstral transforms GALE to a commercial stage biotech company - Outperform" dated May 10, 2013.
[75] Ex. 87. Article titled "The Cancer Pain Drug Market" dated November 17, 2009.
[76] Ex. 8. Article titled "Galena Biopharma Has A Promising Pipeline For Revenue Growth " dated February 5, 2014.
[77] Ex. 91. Press release titled "Galena Biopharma Initiates Patient Enrollment in NeuVax(TM) Phase 3 PRESENT Trial to Prevent Breast Cancer Recurrence" dated January 20, 2012. Ex. 90. Press release titled "Galena Biopharma Reports Third Quarter 2013 Results" dated November 6, 2013.
[78] Ex. 87. Article titled "The Cancer Pain Drug Market" dated November 17, 2009.
[79] Ex. 9. Article titled "The momentum Continues for Galena Biopharma" dated January 15, 2014.
[80] Ex. 87. Article titled "The Cancer Pain Drug Market" dated November 17, 2009.

market for GALE 401 at $200 million, which was information available in the Company's January 13th and 14th 2014 press releases.[81] Ms. Andrews concluded by stating that the Company was valued at $700 million, which was approximately $12 million less than its then market capitalization.[82] As with the other articles we reviewed attributed to the Dream Team in the Feuerstein and Pearson article, we found no false or misleading statements of material fact in Ms. Andrews' article.

The articles appear to be regurgitations of publically available information found in press releases and analyst reports. Because most, if not all, of the articles allegedly written at the direction of the Dream Team have been removed from the internet, we were unable to analyze every article at issue for potential misstatements of material fact; but, if our sampling is any indication, then we would not expect that any of the articles contained false or misleading statements of material fact.

Moreover, given that DTG declined to respond to the questions we propounded, we were unable to determine if DTG actually paid bloggers to write articles about the Company. Nevertheless, we found no evidence at the Company indicating that to be the case or that the Company was aware of that purported fact. There was never any reference to payments being made to bloggers in any of the communications between the Company and DTG. Ms. Bernarda assumed that the bloggers were employees of DTG and not independent third parties, and therefore were being paid as employees.[83]

Likewise, we were unable to determine if bloggers were using multiple aliases to pose as separate individuals. There was no mention of aliases in the communications between the Company and DTG. Indeed, as previously stated, the draft articles did not include by-lines and it appears that the Company did not consciously track the names of the bloggers writing about the Company. For example, Ms. Bernarda reviewed an article written by Tom Meyer published on

[81] Ex. 116. Press release titled "Galena Biopharma Acquires Mills Pharmaceuticals, LLC" dated January 13, 2014. Ex. 117. Press release titled "Galena Biopharma and Dr. Reddy's Announce Strategic Partnership for NeuVax(TM) in India" dated January 14, 2014.
[82] *See* Galena Biopharma Historical Market Cap Data.
[83] Interview of Remy Bernarda dated May 20, 2014.

Wall St. Cheat Sheet on December 3, 2013. Yet, when she learned that Mr. Meyer had written a favorable article about the Company in Forbes a mere two weeks later, she did not recognize Mr. Meyer.[84] Thus, to the extent that bloggers were using multiple aliases, we found no evidence at the Company indicating that to be the case or that the Company was aware of that purported fact.

i. Movement Of The Price Of The Company's Stock

One of the central allegations of the Feuerstein and Pearson articles is that the Company hired DTG to boost the Company's stock price.[85] Mr. Ahn denied that was the purpose for the hiring,[86] but the communications between the Company and DTG indicate that DTG used the Company's stock price as metric of its effectiveness. For example, on July 31, 2013, Mr. McCarthy emailed Mr. Ahn a summary of the Company's stock price steadily rising from $1.81 to $1.95 with a notation "$2.00 here we come!"[87] Similarly, on November 13, 2013, Jamie Spangler emailed Mr. Ahn and Ms. Bernarda a graph of the Company's stock trading above $3.00 a share with a subsequent remark, "I am just happy that everything is paying off."[88] The best example, however, is a document prepared by DTG and titled "Case Study: Investor Awareness Campaign." The case study was a year-end summary of DTG's purported activities and included a graph of the Company's stock price from July of 2013 to December of 2013 relative to its activities.[89] The timeline suggested that DTG's activities correlated with a 97% increase in the Company's stock price.[90] Notably, the first time the Company became aware of the case study was when Tiberend informed Ms. Bernarda on February 10, 2014 that DTG had posted the case study on its website for promotional purposes.[91] The Company terminated its contractual relationship with DTG two days later, the same day that the Feuerstein article also happened to be published.[92]

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[84] Ex. 99. Email from Remy Bernarda to Claire Sojda dated December 16, 2013.
[85] Ex. 2. Article titled "Galena Biopharma Pays For Stock-Touting Campaign While Insiders Cash Out Millions" by Adam Feuerstein dated February 12, 2014; Ex. 3. Article titled "Behind The Scenes With Dream Team, CytRx And Galena" dated March 13, 2014.
[86] Interview of Mark Ahn dated May 8, 2014.
[87] Ex. 75. Email from Michael McCarthy to Mark Ahn dated July 31, 2013.
[88] Ex. 80. Email from Jamie Spangler to Mark Ahn and Remy Bernarda dated November 13, 2013.
[89] Ex. 17. Case Study: Investor Awareness Campaign.
[90] *Id.*
[91] Ex. 104. Email from Gregory Tiberend to Remy Bernarda dated February 10, 2014.
[92] Ex. 106. Email from Remy Bernarda to Michael McCarthy dated February 12, 2014.

Our investigation, moreover, has revealed that DTG's activities had no demonstrable material effect on the Company's stock price.[93] As an initial point, it bears noting that DTG appeared to take credit for activities unrelated to its work. For example, DTG appeared to take credit for the publication of a host of articles on Seeking Alpha, but we have confirmed that at least two of those articles written by Grant Zeng and Regarded Solutions were published independently of DTG.[94] Mr. Zeng was a Senior Biotech Analyst for Zachs Investment Research, who wrote at least two articles about the Company in 2013. Each of those times, he informed Mr. Ahn and Ms. Bernarda directly that he had written an article that would be published on Seeking Alpha.[95] One of those articles titled "Galena: The Launch Of Abstral And Other Important Catalysts" was listed in a summary of articles DTG purportedly had published on Seeking Alpha at its direction.[96] The article written by Regarded Solutions, also known as Alan Saltzman, was the result of a question and answer session arranged by Tiberend.[97] Nevertheless, we credited DTG with their alleged activities and compared it to the movement of the Company Stock, and found no direct correlation.

The chart below (a full size version is attached as Appendix I) illustrates the price of the Company's stock from July 1, 2013 to February 24, 2014 in relation to the Company's press releases, the publication of analyst reports, and articles allegedly written at the direction of DTG.[98]

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[93] We recognize that an effort to increase a company's market visibility in a positive and truthful way can have an effect on a company's stock price.

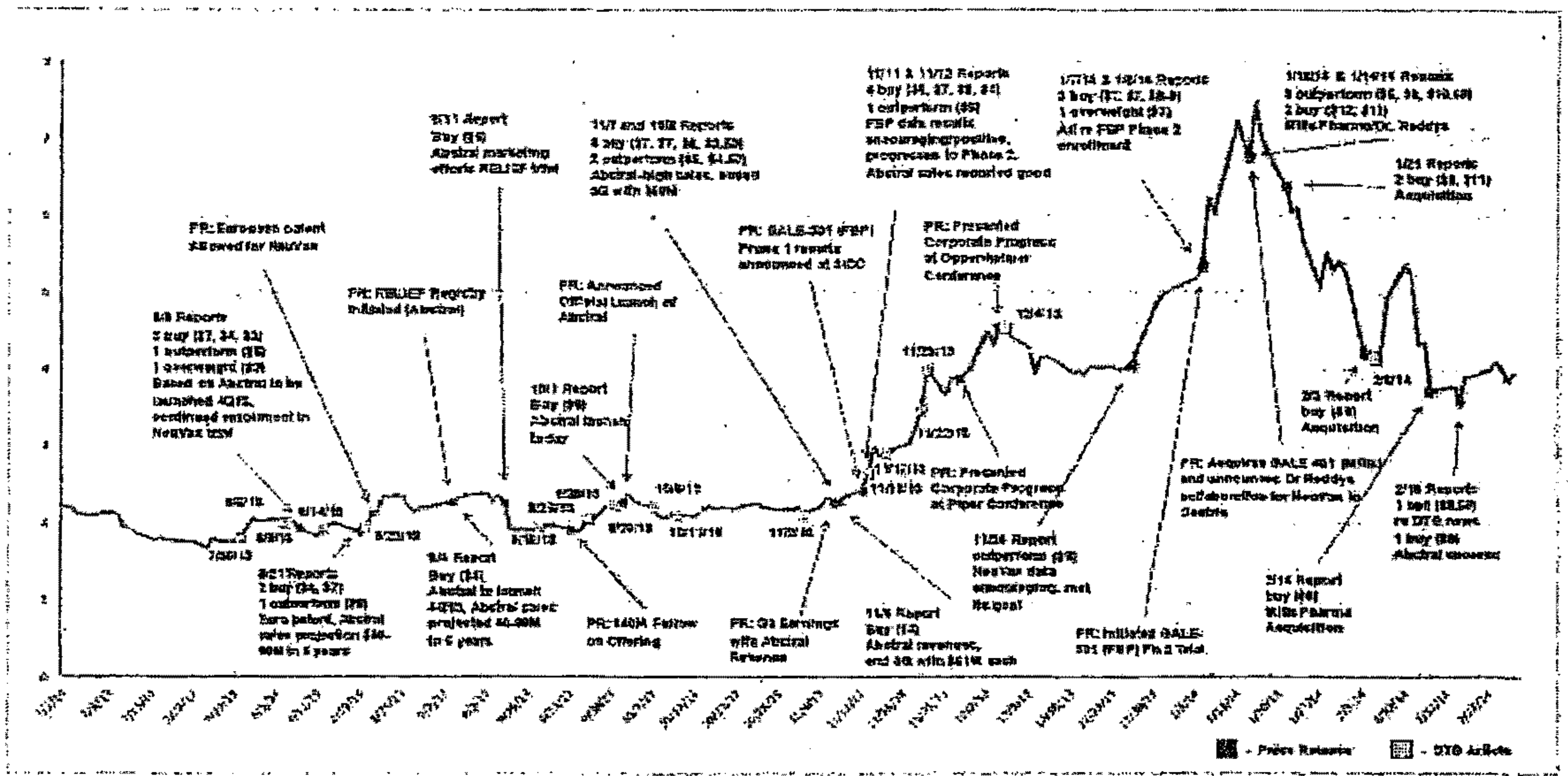
[94] Ex. 10. Email from Michael McCarthy to Remy Bernarda dated November 26, 2013.

[95] Exs. 111-113. Email from Mark Ahn to Grant Zeng and Remy Bernarda dated July 29, 2013; Email from Mark Ahn to Grant Zeng and Remy Bernarda dated July 30, 2013; Email from Grant Zeng to Mark Ahn and Remy Bernarda dated October 8, 2013.

[96] Ex. 10. Email from Michael McCarthy to Remy Bernarda dated November 26, 2013; Ex. 113. Email from Grant Zeng to Mark Ahn and Remy Bernarda dated October 8, 2013.

[97] Ex. 76. Email from Remy Bernarda to Mark Ahn dated August 1, 2013.

[98] Ex. 157. Full size version of this illustration.



The chart reflects that the Company's stock moved marginally between July 1, 2013 and November 2, 2013 during which time DTG purported to publish or have published twelve articles about the Company. The Company's stock only truly began to rise after the Company released the results of the Phase 1 trial of its Folate Binding Protein vaccine on November 11, 2013.[99] Between November 11, 2013 and December 4, 2013, the Company's stock more than doubled in price. During that same period, the Company made two presentations on the Company's progress at the Piper Jaffray and Oppenheimer & Company conferences. DTG published or caused to be published five articles about the Company during this period. While this would suggest that DTG articles could have had a material effect on the stock price, that notion is disabused when considering that the stock nearly doubled again in price between December 4, 2013 and January 20, 2014, a time when no articles attributed to DTG were published. The Company's rising stock price during that period seems to have been driven principally by the announcements that the Company had acquired Mills Pharmaceuticals LLC and partnered with Dr. Reddy's Laboratories in India, and subsequent buy recommendations by analysts. Indeed, the stock's market price tracked consistently with the analysts' projections in

[99] Ex. 89. Press release titled "Galena Biopharma Announces Initial Results From the Folate Binding Protein Vaccine Phase 1 Trial at the Society for Immunotherapy of Cancer Conference" dated November 11, 2013.

their reports. Moreover, the Company's stock price likely profited from the general upswing in the biotech market during that period.[100] Accordingly, DTG's assumption that its activities were the driving force behind the Company's rising stock price appears to have been hubris. There is no conclusive evidence that was the case.

With respect to the collapse of the Company's stock price, we found that there were several reasons for the sharp decline. First, allegations that the stock price may have been inflated by DTG's activities depressed the price. To illustrate, Cantor Fitzgerald almost immediately downgraded the Company's stock from a buy to a sell "based on concerns of an overhang created by recent news of the use of promotional practices by a contracted IR firm and stock sales by insiders."[101] Second, there was a substantial short interest in the Company. Near the time the Feuerstein article was published, the Company already had a high short interest of 23% of the float.[102] The short interest naturally increased following the Feuerstein and Pearson articles to approximately 31%.[103] Third, there was a general bear trend in the biotech market beginning in late February and early March of 2014.[104] Finally, the large volume of sales by insiders in January and February of 2014 was not well-received by the market. All of these factors had a cumulative and depressive effect on the Company's stock price.

ii. The Insiders' Knowledge Of DTG's Activities

With the exception of Mark Ahn, all of the directors we interviewed uniformly stated that they first became aware that the Company had retained DTG after the Feuerstein article was published.[105] This comports with Mr. Ahn's representation that he retained DTG without first consulting the Board.[106] Moreover, while the October 11, 2013 and January 16, 2014 Board meeting minutes indicate that Ms. Bernarda discussed investor relations and public relations

[100] Ex. 158. Comparison of Company Stock Price relative to NASDAQ Biotech Index from July 1, 2013 to May 6, 2014.
[101] Ex. 155. Analyst report by Cantor Fitzgerald dated February 18, 2014.
[102] Ex. 154. Analyst report by MLV & Co. dated February 14, 2014.
[103] Ex. 159. Graph of short interest between July 2013 to April 2014.
[104] Ex. 158. Comparison of Company Stock Price relative to NASDAQ Biotech Index from July 1, 2013 to May 6, 2014.
[105] Interview of Steven Kriegsman dated June 3, 2014; Interview of Richard Chin dated June 16, 2014; Interview of Rudolph Nisi dated June 4, 2014; Interview of Sandy Hillsberg dated May 28, 2014; Interview of Steven Galliker dated May 21, 2014.
[106] Interview of Mark Ahn dated May 8, 2014.

matters with the Board, all of the directors and officers present stated that these discussions were related only to analyst activity and not DTG.[107] The Board presentation materials corroborate this account and indicate that the presentation regarding investor relations and public relations centered on analyst activity.[108]

With the exception of Mark Ahn, Mr. Schwartz was the only Company officer that sold Galena shares in the first quarter of 2014. Mr. Schwartz stated in his interview that he did not play a management role in the Company's investor or public relations affairs.[109] He stated that while on occasion he would review an article drafted by an analyst for factual accuracy, he does not recall ever reviewing an article drafted by DTG.[110] In fact, although he was aware generally that the Company had retained investor/public relations firms, he was not aware of their specific names or activities.[111] Mr. Schwartz's statements were credible and were not contradicted by the other interviewees or documents.

Accordingly, we have determined that, with the exception of Mark Ahn, insiders had no knowledge of DTG's activities for the Company before trading.

B. Lidingo Holdings LLC

Lidingo was another investor relations firm that operated concurrently with DTG, but had roots much earlier than the summer of 2013. In late 2011, Sanford Hillsberg had heard from a friend and chief executive of another company that Lidingo had provided him with effective investor relations services.[112] Mr. Hillsberg conveyed this information to Mr. Ahn and suggested that he take a look at Lidingo.[113] On January 4, 2012, the Company retained Lidingo as a consultant tasked with reviewing the Company's research and development plan, providing strategic input on the Company's investor relations efforts, generating independent coverage of

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[107] Interview of Steven Kriegsman dated June 3, 2014; Interview of Richard Chin dated June 16, 2014; Interview of Rudolph Nisi dated June 4, 2014; Interview of Sandy Hillsberg dated May 28, 2014; Interview of Steven Galliker dated May 21, 2014; Interview of Ryan Dunlap dated May 15, 2014; Interview of Remy Bernarda dated May 20, 2014; Interview of Mark Ahn dated May 8, 2014; Interview of Mark Schwartz dated May 14, 2014.
[108] Ex. 27. Board presentation materials dated October 11, 2013; Ex. 28 Board presentation materials dated January 16, 2014.
[109] Interview of Mark Schwartz dated May 14, 2014.
[110] *Id.*
[111] *Id.*
[112] Interview of Sanford Hillsberg dated May 28, 2014.
[113] Interview of Sanford Hillsberg dated May 28, 2014; Interview of Mark Ahn dated June 9, 2014.

the Company through third parties, and distributing key press releases and news items through its network.[114] In practice, this translated into transforming press releases and analyst reports into so called "email blasts," posting messages on message boards, and publishing original articles on various websites.[115] The contract price was $20,000 per month for a period of twelve months.[116] In accordance with Company practice, the officers identified Lidingo as a company with a contract value exceeding $100,000 in materials sent to the Audit Committee for its November 8, 2012 meeting.[117] The Audit Committee ratified and affirmed the contract at the November 8, 2012 meeting.[118]

Unfortunately, we were unable to obtain any copies of the "email blasts," messages, or articles written by Lidingo or its "writers." During his second interview, Mr. Ahn claimed to have never reviewed Lidingo's work product, even though there are numerous emails between Mr. Ahn and Lidingo either requesting copies or representing that copies had been sent.[119] We found Mr. Ahn's claim highly suspect. The documents and interviews of senior management portray Mr. Ahn as an engaged and hands-on chief executive. It is hard to believe that Mr. Ahn did not review the work product of an investor relations firm he paid $20,000 per month. Moreover, members of senior management stated in their interviews that Mr. Ahn managed the Company's relationship with Lidingo himself.[120] Indeed, Ms. Bernarda stated that, based on statements from Mr. Ahn, she believed that the Company had terminated its relationship with Lidingo in the spring of 2013, and only recently found out that Mr. Ahn renewed its contract without her knowledge.[121] Ms. Bernarda's representations were supported by another witness'

[114] Ex. 36. Lidingo Consulting Agreement dated January 4, 2012. Ex. 55 Emails between Milla Bjorn and Madeline Hatton regarding execution of Lidingo Consulting Agreement dated January 4, 2012.
[115] Interview of Mark Ahn dated June 9, 2014; Ex. 56. Email from Milla Bjorn to Mark Ahn dated January 18, 2012.
[116] Ex. 36. Lidingo consulting agreement dated January 4, 2012.
[117] Ex. 168. Presentation Materials for Audit Committee Meeting dated November 8, 2012.
[118] Ex. 169. Minutes of Audit Committee Meeting dated November 8, 2012.
[119] Interview of Mark Ahn dated June 9, 2014; Ex. 67. Email from Mark Ahn to Milla Bjorn dated April 11, 2013; Ex. 69. Email from Milla Bjorn to Remy Bernarda dated April 12, 2013; Ex. 84. Email from Mark Ahn to Andrew Hardy, Milla Bjorn and Ryan Dunlap dated November 20, 2013; Ex. 85. Email from Milla Bjorn to Mark Ahn, Andrew Hardy and Ryan Dunlap dated November 20, 2013.
[120] Interview of Remy Bernarda dated May 20, 2014; Interview of Ryan Dunlap dated June 5, 2014; Ex. 82. Email from Ryan Dunlap to Roswitha Swensen dated November 13, 2013.
[121] Interview of Remy Bernarda dated May 20, 2014; Ex. 65. Email from Remy Bernarda to Angela DiPlato dated April 8, 2013.

account.[122] Thus, while we found no direct evidence that Mr. Ahn reviewed Lidingo's work product, the record reflects an inference that he reviewed it.

More troubling is that Lidingo clearly represented its task to be to increase the price of the Company's stock. In a November 12, 2012 email, Lidingo represented that the Company's stock price had increased the day following its October email blasts on the 3rd, 17th, 25th, and 31st.[123] Lidingo promised that if the Company paid Lidingo an additional $15,000 to $20,000, Lidingo would guarantee it would increase the price of the Company's stock by 25% by the end of 2012 or refund the Company its payment.[124] Mr. Ahn responded by agreeing to pay Lidingo an additional $20,000.[125] In his second interview, Mr. Ahn claimed that he never took Lidingo's representations seriously and, to be sure, he did not request a refund when Lidingo failed to follow through on its promise.[126] We nevertheless found the implications in the emails troubling. Notably, Lidingo's representation that the Company's stock price had increased the day following its email blasts was inaccurate. The Company's stock price increased the day following only two of four email blasts.[127]

Also problematic is that Lidingo represented that it paid "writers" to write articles about the Company,[128] and the Company was aware of this fact.[129] There was constant pressure on the Company from Lidingo to make its contractual payments because the email blasts were purportedly expensive[130] or because Lidingo was purportedly adding new "writers" to write about the Company.[131] Both the Company's payments to Lidingo and Lidingo's payments to "writers" implicate Section 17(b) of the Securities Act of 1933, but since we have been unable to

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[122] Interview of Madeline Hatton dated July 1, 2014.
[123] Ex. 62. Email from Milla Bjorn to Mark Ahn dated November 12, 2012.
[124] *Id.*
[125] Ex. 62. Email from Mark Ahn to Milla Bjorn dated November 12, 2012.
[126] Interview of Mark Ahn dated June 9, 2014; Ex. 161. Illustration of Company stock price from November 9, 2012 to January 2, 2013.
[127] Ex. 162. Illustration of Company stock price from October 1, 2012 to November 2, 2012; Our methodology was to compare the stock prices at the close of the market days.
[128] Given the record of Lidingo's actions, we did not believe it was necessary to seek out Lidingo, particularly in view of our failed efforts to interview DTG.
[129] Ex. 59. Email from Milla Bjorn to Madeline Hatton dated April 7, 2012.
[130] Ex. 63. Email from Milla Bjorn to Mark Ahn, Angela DiPilato, and Madeline Hatton dated January 22, 2013; Ex. 66. Email from Milla Bjorn to Mark Ahn and Remy Bernarda dated April 9, 2013.
[131] Ex. 64. Email from Milla Bjorn to Mark Ahn dated April 6, 2013; Ex. 66. Email from Milla Bjorn to Mark Ahn and Remy Bernarda dated April 9, 2013.

review the email blasts or articles and Lidingo does not maintain any noticeable website, we have been unable to determine if adequate compensation disclosures were made.

i. The Company's Grant Of Stock Options To Lidingo

Lidingo first made a request for stock options as part of its compensation on April 5, 2012.[132] Lidingo requested 400,000 stock options, 200,000 to vest immediately and 200,000 to vest over the second and third quarter of 2012.[133] We found no response from the Company to this request. The request for options was renewed on April 19, 2013, when Lidingo asked Mr. Ahn for an equity stake as compensation for its services.[134] Mr. Ahn replied that he would review the request with Ms. Bernarda (which he apparently never did) and respond at a later date.[135] Lidingo emailed Mr. Ahn again on July 10, 2013 noting that the Company's stock price was not performing well, and offering its services.[136]

On August 1, 2013, Mr. Ahn, on behalf of the Company, executed a second consulting agreement with Lidingo with the following scope of work: (i) review the Company's financial requirements; (ii) analyze and assess alternatives for the Company's financial requirements; (iii) create awareness of the Company through email and other distribution mechanisms; (iv) provide analysis of the Company's industry and competitors in the form of general industry reports directly to the Company; and (v) assist the Company in developing corporate partnering relationships.[137] The contract price was $20,000 per month and an option to purchase 250,000 shares of the Company's stock, 100,000 shares to vest immediately and 150,000 shares to vest over eight months.[138] Critically, Mr. Ahn executed the second consulting agreement without first consulting Company counsel or the Board notwithstanding that he had no authority to grant stock options unilaterally to a vendor.[139] Indeed, even after the fact, Mr. Ahn never informed the

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[132] Ex. 58. Email from Milla Bjorn to Mark Ahn dated April 5, 2012.
[133] *Id.*
[134] Ex. 70. Email from Milla Bjorn to Mark Ahn dated April 19, 2013.
[135] Ex. 70. Email from Mark Ahn to Milla Bjorn dated April 21, 2013.
[136] Ex. 170. Email from Milla Bjorn to Mark Ahn dated July 10, 2013.
[137] Ex. 37. Lidingo consulting agreement dated August 1, 2013.
[138] *Id.* Ex. 86. Email from Ryan Dunlap to Andrew Hardy and Milla Bjorn dated November 20, 2013 attaching Nonstatutory Stock Option Granted Under Galena Biopharma, Inc. 2007 Incentive Plan.
[139] Interview of Mark Ahn dated June 9, 2014; Interview of Steven Kriegsman dated June 3, 2014; Interview of Richard Chin dated June 16, 2014; Interview of Rudolph Nisi dated June 4, 2014; Interview of Sandy Hillsberg

Board that he had granted options to Lidingo so that the Board could ratify the grant.[140] This could have been done when the Board considered and granted options to several employees in November of 2013.[141] The only reference to Lidingo made to the Board was in the January 16, 2014 Board presentation materials, which listed Lidingo as a vendor with a contract greater than $100,000, but there was no mention of an options grant.[142]

We have learned through public disclosures that two other companies granted Lidingo options as part of its compensation for its services.[143] Indeed, Lidingo represented to Mr. Ahn that equity stakes are how Lidingo generates its income.[144] Irrespective of the wisdom of granting options to a vendor that represented that it could influence the price of the Company's stock, in this case, Mr. Ahn exceeded his authority in granting Lidingo stock options.[145] To date, Lidingo has exercised 149,998 options and currently has 100,002 options outstanding.[146] To the extent that Lidingo attempts to exercise its remaining options, the Company should give due consideration to whether honoring them is appropriate.

Because we were unable to review the email blasts and articles, we were unable to conduct an analysis as to the potential material effect Lidingo's activities had on the price of the Company's stock. That being said, of the four occasions Lidingo represented that it raised the price of the stock, the stock price in fact dropped on two of those dates.[147] Accordingly, we found no reason to believe that Lidingo's activities had any more influence on the price of the Company's stock than DTG's activities, which in our view was none. Under public scrutiny for

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dated May 28, 2014; Interview of Steven Galliker dated May 21, 2014; Ex. 163. Amended and Restated 2007 Incentive Plan.

[140] Interview of Steven Kriegsman dated June 3, 2014; Interview of Richard Chin dated June 16, 2014; Interview of Rudolph Nisi dated June 4, 2014; Interview of Sandy Hillsberg dated May 28, 2014; Interview of Steven Galliker dated May 21, 2014; Ex. 163. Amended and Restated 2007 Incentive Plan; Ex. 22. Unanimous written consent of the Board dated November 22, 2013.

[141] Ex. 22. Unanimous written consent by the Board dated November 22, 2013.

[142] Ex. 28. Board presentation materials dated January 16, 2014; Ex. 61. Email from Angela DiPlato to Ryan Dunlap dated November 5, 2012;

[143] See, e.g., Ex. 164. Consulting agreement by and between Advanced Medical Isotope Corporation and Lidingo Holdings LLC dated June 4, 2012; Ex. 165. Lion Biotechnologies, Inc.'s S-1 Statement.

[144] Ex. 84. Email from Andrew Hardy to Mark Ahn dated November 19, 2013.

[145] Mr. Ahn stated in his second interview that he believed the grant of stock options to Lidingo allowed the Company to increase its immediate cash on hand, which benefited the Company.

[146] Ex. 38. Galena stock option exercise request forms dated November 21, 2013, December 31, 2013, February 6, 2014, and March 4, 2014.

[147] Ex. 62. Email from Milla Bjorn to Mark Ahn dated November 12, 2012.

its contractual relationship with DTG, the Company terminated the Lidingo contract on April 3, 2014.[148]

We note that, significantly, with the exception of Mr. Ahn, none of the selling directors or Mr. Schwartz were aware that the Company had executed a second contract with Lidingo until the January 16, 2014 Board meeting and none were aware of Lidingo's specific activities even after the meeting.[149]

While Mr. Ahn's unilateral and unauthorized decision to grant stock options to Lidingo for questionable and apparently ineffective services reflected poor judgment, we do not necessarily conclude that Mr. Ahn breached his fiduciary duty to the Company in doing so. Mr. Ahn did not grant stock options to Lidingo out of self-interest or for personal profit, but rather because he believed that Lidingo's services would benefit the Company by exposing more of the public to its accomplishments. Even if one could find that Mr. Ahn breached his fiduciary duty to the Company by granting Lidingo stock options, we conclude that there was no appreciable harm for the purported breach. The Company received monies when Lidingo exercised its options and services for the grants. Accordingly, we do not recommend filing an action against Mr. Ahn for a breach of fiduciary duty.

C. Section 17(b) of the Securities Act of 1933

Section 17(b) of the Securities Act of 1933 prohibits disseminating information about a security without disclosing any consideration received or to be received, directly or indirectly, in connection with sales of the security.[150] Section 17(b) is aimed at preventing the misleading impression of impartiality in certain recommendations.[151] The prohibition focuses on the person making the recommendation and does not expressly extend to the company or other person

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[148] Ex. 115. Email from Mark Ahn to Milla Bjorn dated April 3, 2014.
[149] Interview of Steven Kriegsman dated June 3, 2014; Interview of Richard Chin dated June 16, 2014; Interview of Rudolph Nisi dated June 4, 2014; Interview of Sandy Hillsberg dated May 28, 2014; Interview of Steven Galliker dated May 21, 2014.
[150] 515 U.S.C. § 77q(b).
[151] *See, e.g.*, *SEC v. Liberty Capital Group, Inc.*, 75 F. Supp. 2d 1160 (W.D. Wa. 1999) (upholding SEC complaint challenging investor relations firm's newsletter and Web site characterizations of companies as "picks" and "hot stocks").

paying for the recommendation.[152] A company soliciting or paying for the recommendation, however, might be held accountable for aiding and abetting, although not in a private action.[153]

In this instance, whether DTG or Lidingo paid bloggers or "writers" to tout the Company is a factual question that we cannot answer, but one that the SEC may ultimately determine under its subpoena power. Our investigation revealed that the articles written by DTG on its affiliate websites did not contain a compensation disclosure, but did contain a link to a compensation disclosure. Whereas, the articles written by bloggers purportedly on behalf of DTG such as Tom Meyer and John Mylant did not contain compensation disclosures.

With respect to Lidingo, we were unable to review copies of its email blasts and articles, but we have serious doubts that those contained compensation disclosures. Accordingly, DTG, Lidingo, Mr. Meyer, Mr. Mylant, and others similarly situated may have violated Section 17(b) of the Securities Act of 1933, but that is for others to decide. What is clear is that the bloggers are the ones principally exposed to liability under this statute, not the Company, which may have unwittingly compensated the bloggers indirectly for their work. Accordingly, we conclude the likelihood of liability for the Company under Section 17(b) to be low.

IV. FINDINGS OF FACT: SALES OF COMPANY'S STOCK BY INSIDERS IN 2014

In January and February of 2014, with the exception of Mr. Ashton, all of the directors sold a significant percentage of their shares of Company stock. The volume of shares sold by all but one of the directors combined with publication of the Adam Feuerstein article led to public speculation that the Company hired DTG to inflate artificially the Company's stock in order to allow the directors to sell their shares before a market correction. Based on our investigation, there is no evidence that the Company or the directors perpetuated such a scheme.

A. The Company's Insider Trading Policy

The Company's original insider trading policy was a permanent blackout on trades of the Company's stock by employees and directors.[154] The only exception to the policy was that an

[152] *See Garvey v. Arkoosh*, 354 F. Supp. 2d 73, 83 (D.Mass. 2005) (footnote omitted).
[153] *Id.*
[154] Ex. 60. Email from Ryan Dunlap to Lynn Sutton dated November 2, 2012; Interview of Mark Ahn dated May 8, 2014; Interview of Ryan Dunlap dated May 15, 2014; Ex. 171. Insider Trading Policy.

employee or director could trade his/her shares with the preapproval of Mr. Ahn.[155] As the Company grew in size, the officers decided that a more sophisticated insider trading policy around window periods would be more appropriate.[156]

In the summer of 2013, Mr. Dunlap began drafting an insider trading policy with open trading windows triggered by the Company's earnings releases and subject to the lack of material nonpublic information.[157] Under the draft policy, employees and directors could only trade the Company's stock between the close of trading on the second day following the Company's release of quarterly or annual earnings and the close of trading on the 15th day of the last month of the fiscal quarter in which the earnings were released.[158] Mr. Dunlap submitted the draft policy to the Nominating and Governance Committee of the Board for its consideration at its October 7, 2013 meeting.[159] At the meeting, the committee resolved that it would recommend to the Board that the Board adopt the draft policy at its January 16, 2014 meeting.[160] Until the Board adopted the draft policy, the permanent blackout on trades subject to the preapproval of Mr. Ahn should have remained the Company's effective insider trading policy. The officers and directors of the Company, however, had competing understandings of the operative insider trading policy between the summer of 2013 and January 16, 2014.

The officers believed that the draft policy with trading windows had become effective in the summer or fall of 2013.[161] This was illustrated by an August 17, 2013 email to Company employees and a December 2, 2013 email from Mr. Dunlap to the Company's Section 16 officers and predetermined insiders reminding them that a blackout on trading was in effect as of

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[155] *Id.* The Insider Trading Policy required preclearance of sales by the Chief Financial Officer, but that office was vacant until 2014. Therefore, Mark Ahn as Chief Executive Officer, served as the preclearance officer for purposes of the original insider trading policy. In practice, however, Mr. Dunlap also had a *de facto* role in that regard.
[156] Interview of Mark Ahn dated May 8, 2014; Interview of Ryan Dunlap dated May 15, 2014.
[157] Interview of Ryan Dunlap dated May 15, 2014.
[158] Ex. 18. Document titled "Galena Biopharma, Inc. Policy Against Disclosure of Confidential Information and Insider Trading" dated July 31, 2013; Ex. 19. Document titled "Galena Biopharma, Inc. Policy Against Disclosure of Confidential Information and Insider Trading" dated August 15, 2013.
[159] Ex. 20. Minutes of the Nominating and Governance Committee Meeting dated October 7, 2013.
[160] *Id.*
[161] Interview of Remy Bernarda dated May 20, 2014; Interview of Mark Schwartz dated May 14, 2014; Interview of John Burns dated May 21, 2014.

that date until March 13, 2014 under the revised insider trading policy.[162] Similarly, when Mr. Kriegsman first expressed his desire to exercise and sell some of his shares of Company stock in December of 2013, Mr. Ahn stated that the Company had a blackout on trading under the Company's revised insider trading policy.[163]

The selling directors, on the other hand, fell into two camps. The first believed that there was a permanent blackout on trades subject to the preapproval of trades by Mark Ahn.[164] The second believed that there was no blackout on trades and no insider trading policy at all.[165] None of the selling directors, however, believed that the draft insider trading policy had taken effect because it had not been considered or approved by the full Board.[166] We found that the selling directors' position was consistent with the minutes of the Nominating and Governance Committee and the Board.[167] The Board had not approved the draft policy (with revisions) until its April 18, 2014 Board meeting, and was therefore not enforceable as Company policy before that date.[168]

The confusion as to the applicable insider trading policy led to a sequence of events that further confused the situation. On or about December 19, 2013, Mr. Kriegsman expressed to senior management and certain directors his desire to sell 200,000 shares of Company stock for estate planning purposes.[169] The Company initially blocked Mr. Kriegsman's request. Mr. Dunlap expressed concern that the Company had not yet announced its acquisition of Mills Pharmaceuticals LLC or its strategic partnership with Dr. Reddy's Laboratories, transactions of

[162] Ex. 93. Email from Ryan Dunlap to Mark Ahn, Mark Schwartz, Brian Hamilton, Remy Bernarda, Lynn Sutton, Hana Moran, Chris Lento, John Burns, and Travis Cook dated December 2, 2013; see also Ex. 96. Email from Ryan Dunlap to Mark Ahn dated December 11, 2013; Ex. 74. Email from Ryan Dunlap to Galena Company dated August 17, 2013; Ex. 103. Email from Ryan Dunlap to Galena Company dated January 3, 2014.
[163] Ex. 101. Email from Mark Ahn to Steven Kriegsman, Ryan Dunlap, and Dale Short dated December 21, 2013. Exercises of options, however, were permitted under the Company's insider trading policy.
[164] Interview of Sandy Hillsberg dated May 28, 2014; Interview of Steven Galliker dated May 21, 2014.
[165] Interview of Steven Kriegsman dated June 3, 2014; Interview of Richard Chin dated June 16, 2014; Interview of Rudolph Nisi dated June 4, 2014.
[166] Interview of Steven Kriegsman dated June 3, 2014; Interview of Richard Chin dated June 16, 2014; Interview of Rudolph Nisi dated June 4, 2014; Interview of Sandy Hillsberg dated May 28, 2014; Interview of Steven Galliker dated May 21, 2014.
[167] Exs. 20-21; 23-26. Minutes of the Nominating and Governance Committee and Board dated variously.
[168] Ex. 26. Minutes of the Board of Directors meeting dated April 18, 2014.
[169] Ex. 100. Email from Dale Short to Ryan Dunlap dated December 19, 2013; Interview of Rudolph Nisi dated June 4, 2014; Interview of Sanford Hillsberg dated May 28, 2014.

which Mr. Kriegsman had knowledge.[170] He further expressed concern that permitting Mr. Kriegsman to sell his shares would send an "odd message" to officers who had been prohibited from selling their shares by Mr. Ahn.[171] Specifically, Mr. Ahn had denied Mr. Schwartz's request to sell shares because Mr. Schwartz had knowledge of the same undisclosed transactions.[172] Mr. Ahn shared Mr. Dunlap's concern and, on December 21, 2013, informed Mr. Kriegsman that, in addition to the Company's insider trading policy, the pending Mills Pharmaceuticals LLC acquisition and Dr. Reddy's Laboratories partnership were material nonpublic transactions that prohibited Mr. Kriegsman from trading in the Company's stock.[173] Mr. Kriegsman responded that he disagreed with Mr. Ahn's assessment stating that the Board had not approved the draft insider trading policy and that the pending transactions were immaterial.[174] Mr. Ahn and Mr. Kriegsman tabled the issue until the January 16, 2014 Board meeting, although there was a strong signal by Mr. Ahn that Mr. Kriegsman would be permitted to sell his shares by January 18, 2014.[175]

On January 13th and 14th of 2014, the Company announced its acquisition of Mills Pharmaceuticals LLC and its partnership with Dr. Reddy's Laboratories to the public.[176] On January 16, 2014, the Board held a meeting where Mr. Ahn stated that since the transactions had been announced, employees and directors no longer possessed material nonpublic information, and therefore could trade in the Company' stock.[177] The minutes of the January 16, 2014 Board meeting reflect that there was a subsequent discussion among the Board and that the Board lifted the blackout on trading.[178] The selling directors, however, did not recall an interactive

[170] Ex. 100. Email from Ryan Dunlap to Dale Short dated December 19, 2013.
[171] Ex. 100. Email from Ryan Dunlap to Dale Short, Mark Ahn and Remy Bernarda dated December 19, 2013.
[172] Interview of Mark Schwartz dated May 14, 2014; Interview of Ryan Dunlap dated May 15, 2014.
[173] Ex. 101. Email from Mark Ahn to Steven Kriegsman, Ryan Dunlap, and Dale Short dated December 21, 2013.
[174] Ex. 102. Email from Steven Kriegsman to Mark Ahn, Ryan Dunlap, and Dale Short dated December 22, 2013.
[175] Ex. 102. Email from Mark Ahn to Steven Kriegsman dated December 28, 2013.
[176] Ex. 116. Press release dated January 13, 2014 titled "Galena Biopharma Acquires Mills Pharmaceuticals LLC"; Ex. 117. Press release dated January 14, 2014 titled "Galena Biopharma and Dr. Reddy's Announce Strategic Partnership for NeuVax (TM) in India."
[177] Ex. 23. Minutes of the Board dated January 16, 2014; Interview of Ryan Dunlap dated May 15, 2014; Ex. 105. Email from Ryan Dunlap to unknown recipients dated January 17, 2014.
[178] *Id.*

discussion on the subject or a vote to lift a blackout in their interviews.[179] The directors' varying positions as to whether there was a blackout at all, a permanent blackout subject to preapproval of trades by Mr. Ahn, or a blackout subject to open trading windows, are all inconsistent with the Board minutes. If there was no blackout in place, then there was no need to lift a blackout; if there was a permanent blackout subject to preapproval of trades by Mr. Ahn, then Board action was not required; and if there was a blackout subject to an open trading window, then the window was never closed. What is clear, however, is that the Company opened a trading window seemingly for the sole purpose of allowing insiders to sell substantial shares of their Company stock. This was an opening of convenience. There was no other discernable motivation for opening a trading window at that time.

B. The Sales By Insiders

In January of 2014, the Board consisted of seven members: Sanford Hillsberg, Mark Ahn, William Ashton, Richard Chin, Stephen Galliker, Steven Kriegsman, and Rudolph Nisi. With the exception of Mr. Ashton, all of the directors sold a significant amount of their vested beneficial interest (shares and vested options owned) in the first quarter of 2014.

Mr. Kriegsman sold shares on January 17th, 22nd, and February 3rd of 2014 in the amounts of 200,000, 250,000, and 150,000, which represented approximately 22%, 36%, and 34% of his vested beneficial interest at the time of sales. Mr. Nisi sold shares on January 17th and 29th of 2014 in the amounts of 200,000 and 250,000, which represented approximately 27% and 71% of his vested beneficial interest at the time of sales. Mr. Hillsberg sold 200,000 shares from his family trust on January 17, 2014, which represented approximately 64% of the trust's vested beneficial interest at the time of sale.[180] He individually sold 250,000 shares on January 30, 2014, which represented approximately 32% of his vested beneficial interest at the time of sale. Mr. Ahn sold 796,765 shares on January 27, 2014, which represented approximately 67%

[179] Interview of Steven Kriegsman dated June 3, 2014; Interview of Richard Chin dated June 16, 2014; Interview of Rudolph Nisi dated June 4, 2014; Interview of Sandy Hillsberg dated May 28, 2014; Interview of Steven Galliker dated May 21, 2014.

[180] Mr. Hillsberg exercised 200,000 options through his family trust on January 14, 2014, but non-broker assisted exercises were not violative of the insider trading policy. Mr. Hillsberg apparently paid the options exercise price by delivering to Galena 24,426 shares of Company stock.

of his vested beneficial interest at the time of sale. Mr. Chin sold shares on January 30th and February 12th of 2014, in the amounts of 75,000 and 187,500, which represented approximately 20% and 63% of his vested beneficial interest at the time of sales. Mr. Galliker sold 300,000 shares on February 3, 2014, which represented approximately 59% of his vested beneficial interested at the time of sale.[181] Mr. Schwartz, the only officer who sold shares of Company stock in the first quarter of 2014, sold 94,344 shares on January 30, 2014, which represented approximately 10% of his vested beneficial interest at the time of the sale.

While the volume of shares sold was *de minimis* compared to the total volume of shares outstanding, the sales were highly significant when considering that the selling directors were visible captains of the Company. This fact was not lost on the officers who openly discussed the timing and method of filing the Form 4s to reflect both employee purchases of stock and the directors' sales in order to lessen the negative impact of the sales.[182]

Once the directors became aware that other directors were selling shares, it became what Mr. Hillsberg likened to a domino effect where each tranche of sales spurred the next tranche.[183] Some directors felt that once Mr. Ahn's sales became public, the damage was done and that any subsequent sales by directors would add little to the certain public blowback.[184]

Each selling director claimed to have a reasonable and sound basis for selling his shares, including estate planning, diversification, and compensation for steering the Company for many years.[185] The primary motivation, however, appears to have been to sell shares because other insiders were selling. Individually the sales may have been justifiable, but collectively, the sales reflected a lack of good judgment, which was demonstrated by the subsequent negative publicity

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[181] Exs. 29-35. Form 4s for the directors listed and dated variously. Ex. 160. Summary of Insider Sales.

[182] Ex. 107. Email from Ryan Dunlap to Mark Ahn and Remy Bernarda dated January 22, 2014; Ex. 109. Emails between Ryan Dunlap, John Burns, Mark Ahn and Remy Bernarda dated January 22, 2014; Interview of Ryan Dunlap dated May 15, 2014.

[183] Interview of Sanford Hillsberg dated May 28, 2014.

[184] Interview of Sanford Hillsberg dated May 28, 2014; Interview of Rudolph Nisi dated June 4, 2014

[185] Interview of Steven Kriegsman dated June 3, 2014; Interview of Richard Chin dated June 16, 2014; Interview of Rudolph Nisi dated June 4, 2014; Interview of Sandy Hillsberg dated May 28, 2014; Interview of Steven Galliker dated May 21, 2014; Interview of Mark Ahn dated May 8, 2014.

precipitated by the Feuerstein and Pearson articles. The sales also had the unintended but not surprising consequence of demoralizing the staff.[186]

C. Possession Of Material Nonpublic Information

Before trading, the selling directors possessed knowledge of two facts that could be construed as material nonpublic information.

First, the selling directors were aware of the preliminary annual revenue for 2013, which was provided to them at the January 16, 2014 Board meeting and estimated to be $3.1 million.[187] Earnings have historically been considered material nonpublic information.[188] However, we have determined that the preliminary annual revenue for 2013 was not material nonpublic information in this case because the Company was not revenue driven when the directors made their sales. The analyst reports we reviewed from 2012 to 2014 reflect this fact. For example, on November 13, 2012, Roth Capital Partners reported that the Company had released its third quarter revenue, but that the revenue had no impact on their buy rating or their target share price of $5.00.[189] Similarly, on August 9, 2013, JMP Securities reported a target share price of $5.00, even though the Company reported no revenue in the second quarter.[190] Later, Maxim Group gave the Company a buy rating with a target share price of $6.00 while stating in bold "we believe NeuVax is still the main supporter of GALE's valuation long term."[191] Even after the commercial launch of Abstral, the Company's first approved product for sale, in October of 2013, Needham & Company and Oppenheimer & Company both reported that NeuVax, which is still in Phase III trials, remained the key driver of their valuations.[192] Indeed, on January 13, 2014, Oppenheimer & Company acknowledged that some investors see the company primarily as a NeuVax development-stage company, but that it anticipated that, with time, the sentiment

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[186] Interview of Remy Bernarda dated May 20, 2014; Interview of Mark Schwartz dated May 14, 2014; Interview of Ryan Dunlap dated May 15, 2014.
[187] Ex. 28. Board presentation materials dated January 16, 2014.
[188] SEC Final Rule: Selective Disclosure and Insider Trading; 17 CFR Parts 240, 243, and 249; Release Nos. 33-7881, 34-43154, IC-24599, File No. S7-31-99.
[189] Ex. 118. Analyst report by Roth Capital Partners dated November 13, 2012.
[190] Ex. 126. Analyst report by JMP Securities dated August 9, 2013.
[191] Ex. 130. Analyst report by Maxim Group dated September 11, 2013.
[192] Ex. 136. Analyst report by Needham and Company dated November 7, 2013; Ex. 143. Analyst report by Oppenheimer & Company dated November 26, 2013.

would include the specialty oncology sales element of the Company.[193] Oppenheimer & Company raised its target share price to $8.00 in that report.[194]

Another factor in our determination was that the preliminary annual revenue was in line with the guidance the Company had provided to the public, which was reflected in analyst projections of between $2.6 million to $3.2 million in annual revenue.[195] Thus, the preliminary revenue did not change the total mix of information available to the public. There is recognition by the Company, however, that revenue driven by Abstral sales will become material in the near term.[196]

Second, on December 24, 2013, the FDA informed the Company that it had denied the Company's request for Breakthrough Therapy designation for NeuVax.[197] "Breakthrough Therapy designation is a process designed to expedite the development and review of drugs that are intended to treat a serious condition and preliminary clinical evidence indicates that the drug may demonstrate substantial improvement over available therapy on a clinically significant endpoint(s)."[198] The Company requested the designation for NeuVax on December 3, 2013, but did not disclose that it had made the request in any press releases or SEC filings. The FDA, on the other hand, did not disclose the request as a matter of practice.[199] Breakthrough Therapy designations have been available since July 9, 2012, but since that time, one designation out of eleven requests was granted in 2013, and three designations out of twenty requests were granted in 2014.[200] Since the Company did not disclose its request for Breakthrough Therapy designation for NeuVax and the likelihood of obtaining the designation was exceedingly low, we did not find the denial of the request to be material nonpublic information.

Accordingly, while the concurrent sale of stock by directors in the first quarter of 2014 was not in the best interest of the Company, we found no violation of Company policy or law.

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193 Ex. 149. Analyst report by Oppenheimer & Company dated January 13, 2014.
194 *Id.*
195 Exs. 145-147; 149; 151-152. Analyst reports dated variously.
196 Ex. 26. Minutes of April 18, 2014 Board Meeting, Annex 1; Interview of Sanford Hillsberg dated May 28, 2014.
197 Ex. 39. Letter from Celia Witten to Hana Moran dated December 23, 2013.
198 www.fda.gov.
199 Ex. 40. Frequently Asked Questions: Breakthrough Therapies as of May 31, 2014.
200 *Id.*

V. RECOMMENDATIONS

Based on our investigation, we provide the following recommendations to the Company:

First, we recommend more Board oversight of the utilization of all investor/public relations firms. The Board and the Company should closely monitor how these firms operate and their activities. The Company should insist on seeing copies of any investor/pubic relations work product (i.e., email blasts, articles, blog posts, etc.), and remain informed on the manner in which the work product is produced, including the name of the author and the extent to which third party authors were paid. The Company should also limit the number of investor/public firms operating concurrently for it. Moreover, the Company should centralize investor, public, and analyst activities to a single executive office.

Second, we recommend more Board oversight of Company expenditures and Company execution of high value contracts. The Chief Executive Officer is currently permitted to unilaterally execute contracts valued up to $1 million so long as they are accounted for in the Board approved annual budget. That limit should be reduced to $200,000, exclusive of options value.

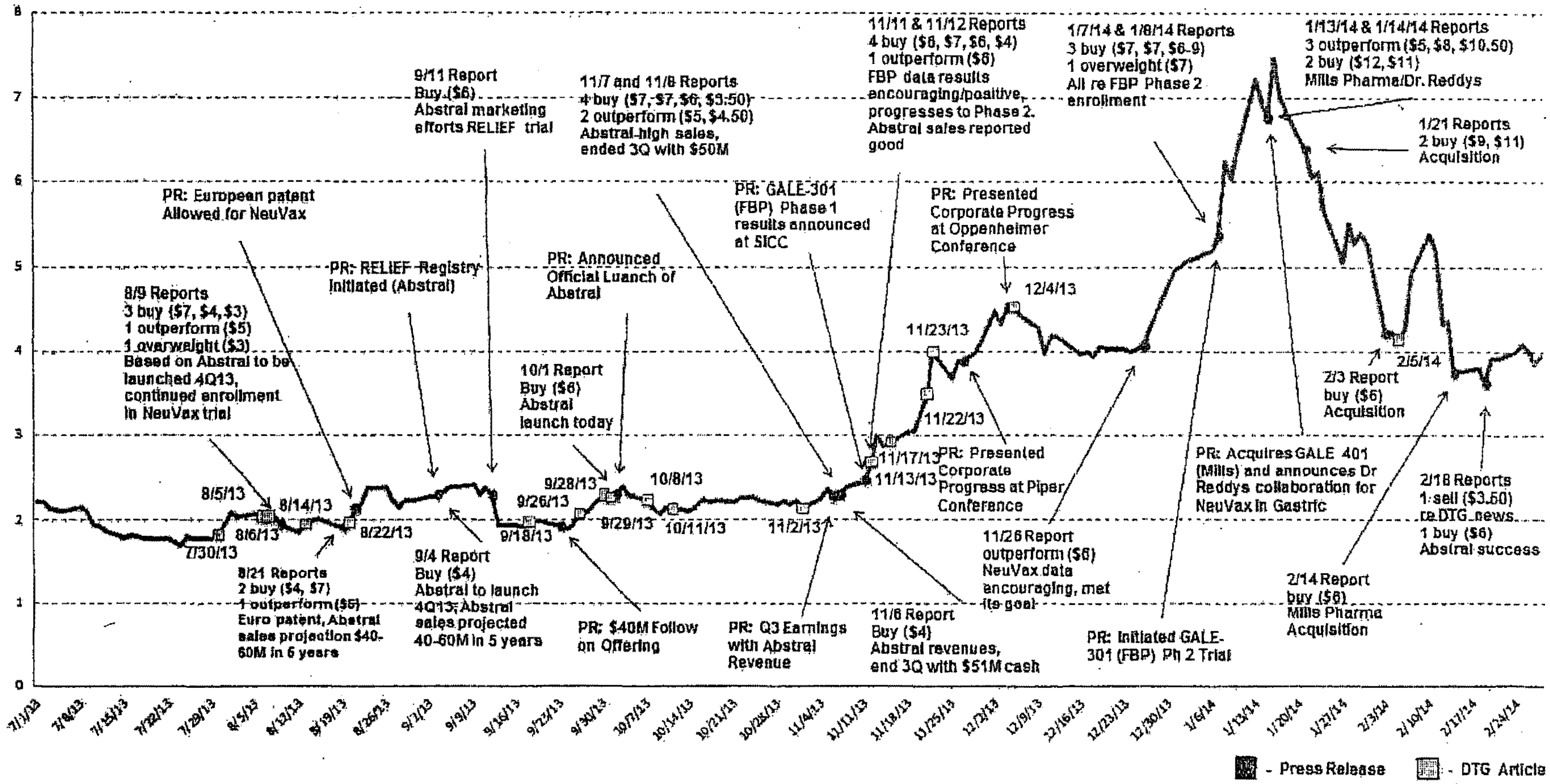
Third, we recommend that the Company should enact practices and procedure that would prevent a reoccurrence of large scale sales by insiders within a compressed time frame. Examples of such policies are mandatory 10b5-1 plans or limited and counseled coordination of insider sales subject to state and federal securities laws during open trading periods.

The Special Committee may have additional recommendations that are beyond the scope of this report, which it will make to the Board directly when appropriate.

Appendix

Appendix I

GALE Stock Price v. Key Press Releases and Analyst Reports (July 2013 – February 2014)



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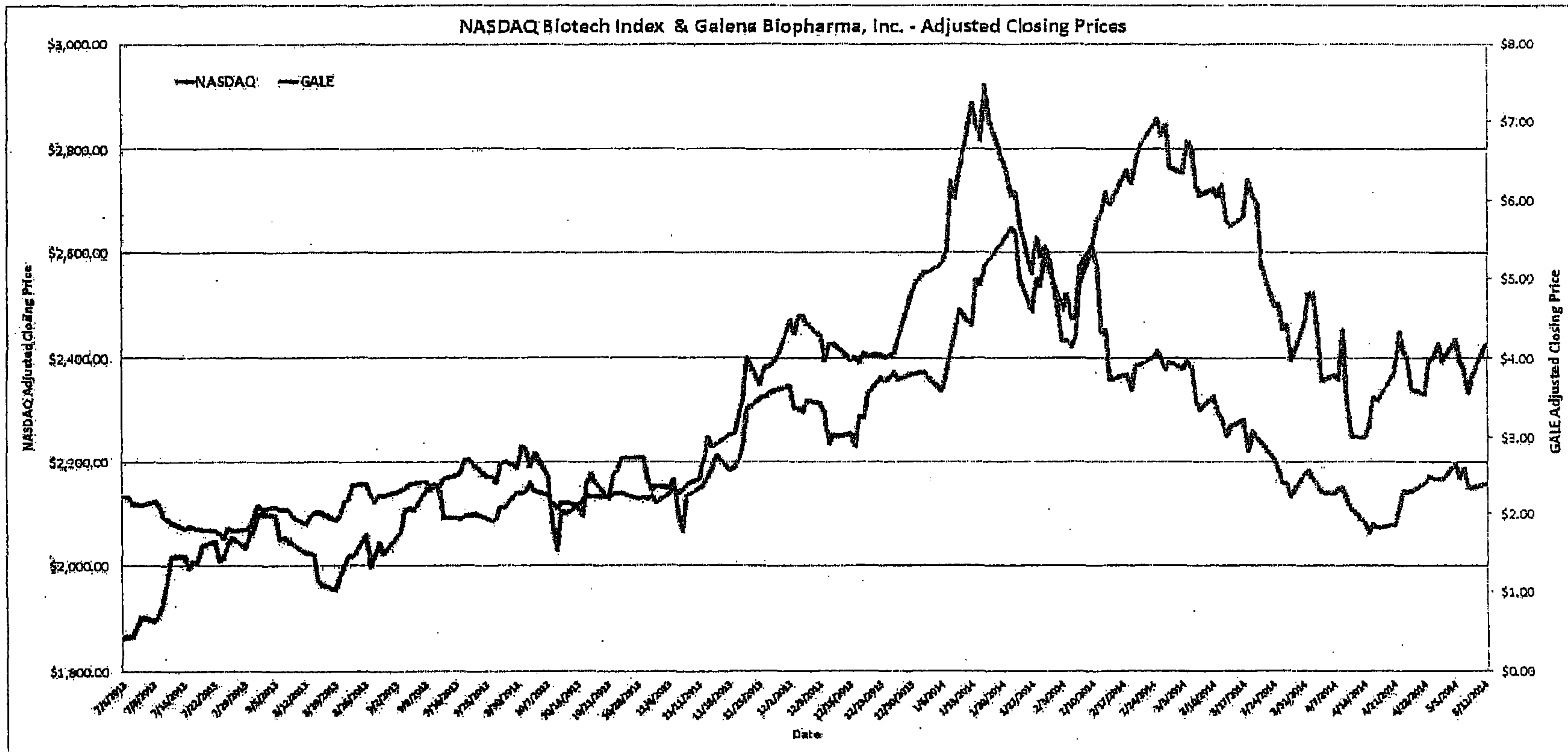
Appendix II

BioTech Index

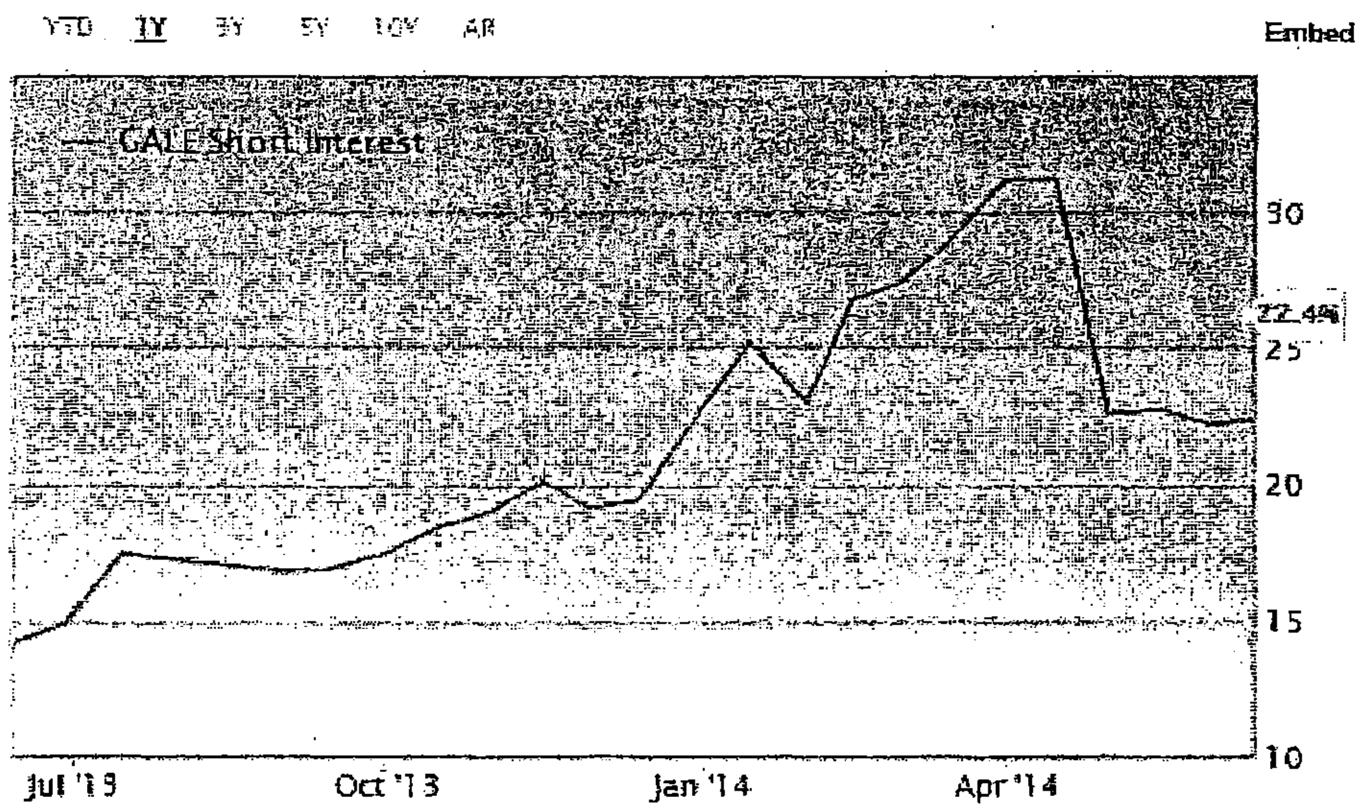


Appendix III

Short Interest History (1 Year)

Short Interest History (%)

This is the historical short interest of Galena Biopharma Inc, as measured by the short interest of float.



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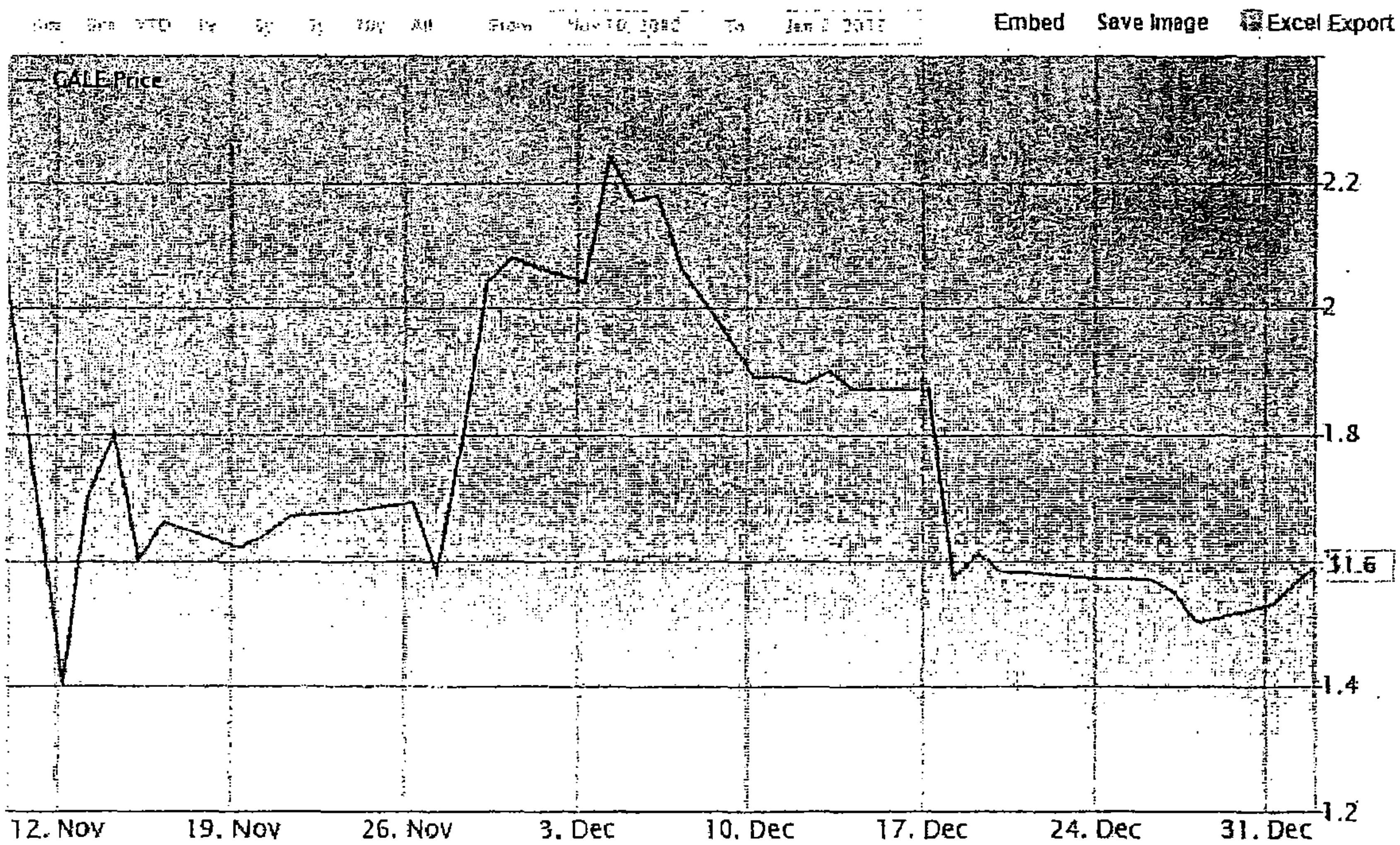
Appendix IV

GALE Stock Price (November 9, 2012 – January 2, 2013)

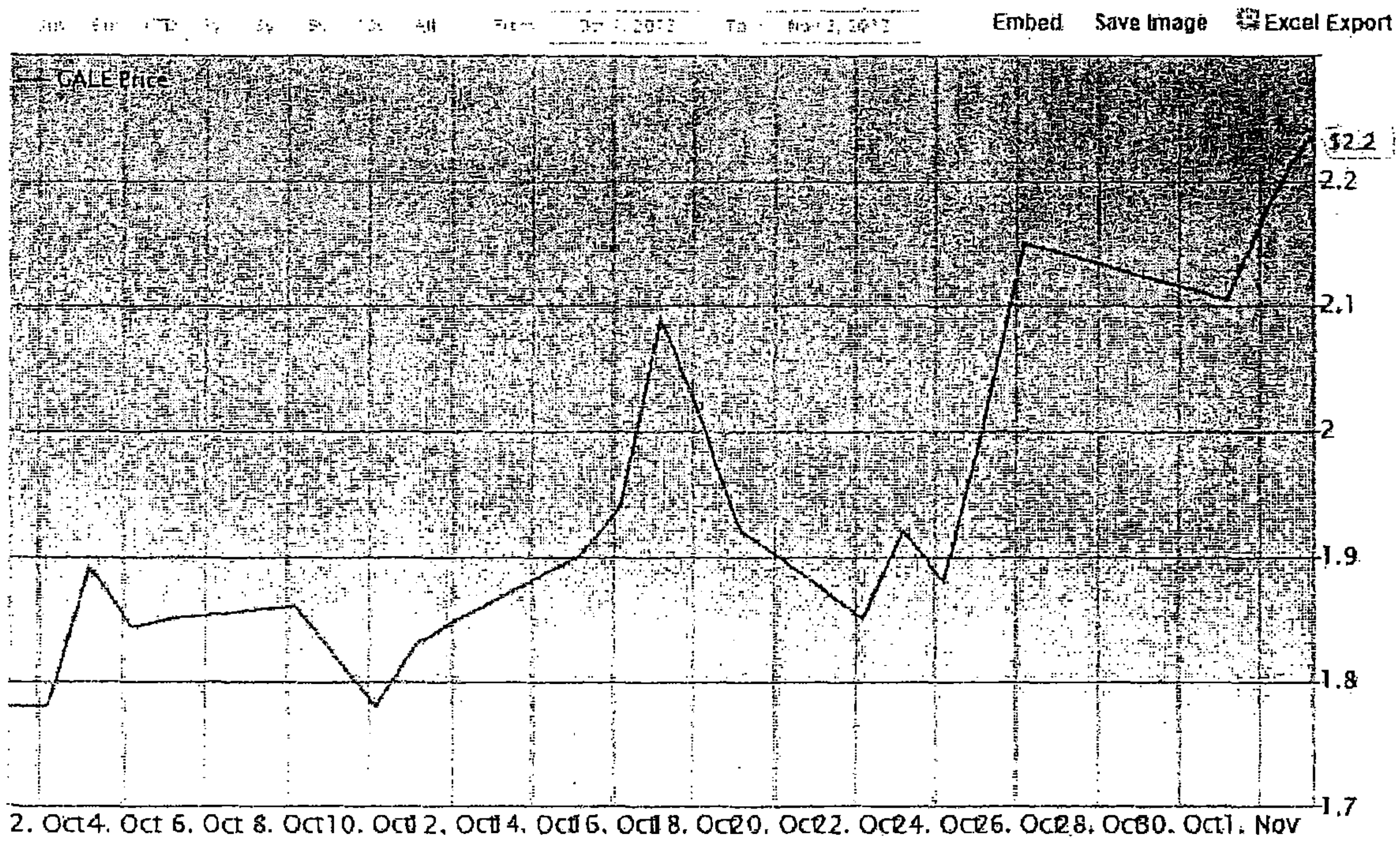


Date	Open	High	Low	Close	Volume
1/2/2013	1.6	1.6	1.55	1.59	1660300
12/31/2012	1.57	1.57	1.51	1.53	1480000
12/28/2012	1.56	1.56	1.48	1.5	1607300
12/27/2012	1.58	1.58	1.51	1.55	2168700
12/26/2012	1.58	1.63	1.55	1.57	1179200
12/24/2012	1.57	1.58	1.56	1.57	506900
12/21/2012	1.56	1.58	1.54	1.58	1019200
12/20/2012	1.64	1.64	1.55	1.58	1848800
12/19/2012	1.58	1.63	1.57	1.61	4053000
12/18/2012	1.5	1.58	1.48	1.57	18876100
12/17/2012	1.85	1.9	1.85	1.87	1558000
12/14/2012	1.89	1.9	1.84	1.87	786000
12/13/2012	1.92	1.93	1.88	1.9	825100
12/12/2012	1.9	1.94	1.88	1.88	923700
12/11/2012	1.95	1.95	1.83	1.89	1544300
12/10/2012	2.03	2.03	1.87	1.89	2144400
12/7/2012	2.33	2.35	1.82	2.06	6748100
12/6/2012	2.27	2.27	2.15	2.18	1148800
12/5/2012	2.28	2.3	2.07	2.17	2048100

12/4/2012	2.25	2.43	2.22	2.24	7812500
12/3/2012	2.09	2.11	1.97	2.04	1196800
11/30/2012	2.03	2.12	1.92	2.08	2217100
11/29/2012	1.88	2.1	1.87	2.04	4522900
11/28/2012	1.72	1.84	1.65	1.79	3449500
11/27/2012	1.67	1.69	1.48	1.58	1219000
11/26/2012	1.69	1.69	1.63	1.69	540000
11/23/2012	1.68	1.68	1.62	1.68	250800
11/21/2012	1.66	1.69	1.64	1.67	404600
11/20/2012	1.62	1.68	1.62	1.64	546500
11/19/2012	1.66	1.74	1.6	1.62	675600
11/16/2012	1.6	1.68	1.58	1.66	675900
11/15/2012	1.7	1.74	1.43	1.6	3091800
11/14/2012	1.68	1.86	1.68	1.8	3015300
11/13/2012	1.55	1.78	1.53	1.7	5293200
11/12/2012	1.98	1.99	1.23	1.4	11918900
11/9/2012	2.02	2.09	2.02	2.03	682,000

Appendix V

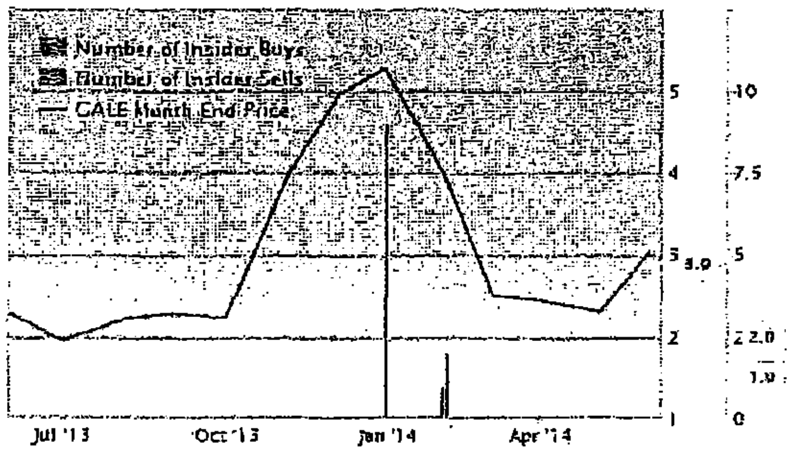
GALE Stock Price (October 1, 2012 – November 2, 2012)

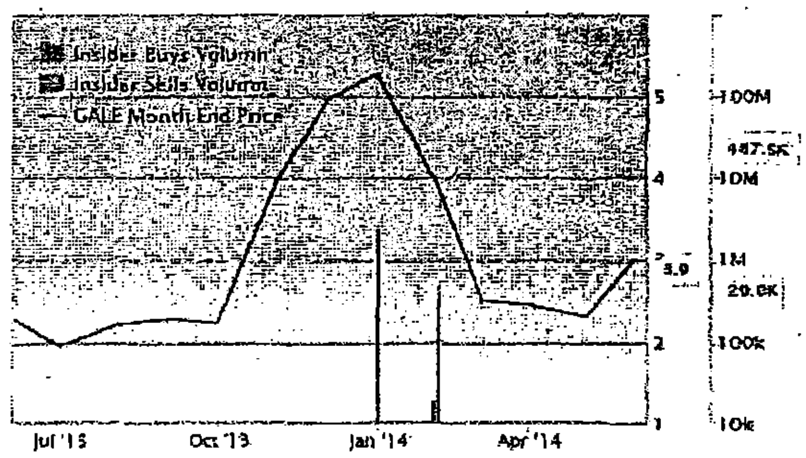


Date	Open	High	Low	Close	Volume
11/2/2012	2.21	2.32	2.2	2.23	2473300
11/1/2012	2.15	2.19	2.12	2.18	1048200
10/31/2012	2.15	2.19	2.1	2.11	1407600
10/26/2012	2.12	2.15	2	2.15	3381000
10/25/2012	1.95	2.07	1.95	2.01	2355600
10/24/2012	1.93	1.95	1.86	1.88	502100
10/23/2012	1.85	1.92	1.81	1.92	612600
10/22/2012	1.88	1.91	1.83	1.85	1012900
10/19/2012	2	2.01	1.89	1.92	1289000
10/18/2012	2.08	2.19	1.99	2.01	2412000
10/17/2012	1.94	2.15	1.92	2.09	3916400
10/16/2012	1.94	1.94	1.87	1.94	894300
10/15/2012	1.88	1.9	1.84	1.9	645200
10/12/2012	1.86	1.88	1.83	1.85	454200
10/11/2012	1.81	1.89	1.81	1.83	871600
10/10/2012	1.82	1.86	1.76	1.78	676500
10/9/2012	1.88	1.88	1.82	1.82	446400
10/8/2012	1.88	1.88	1.82	1.86	513700
10/5/2012	1.87	1.91	1.81	1.85	867500
10/4/2012	1.91	1.98	1.83	1.84	2054500
10/3/2012	1.77	1.91	1.77	1.89	1754200
10/2/2012	1.81	1.83	1.77	1.78	600100
10/1/2012	1.8	1.82	1.75	1.78	478200

Appendix VI

Insider Sales History (1 Year)





Total Records: 65 Page: 1 2 3 4

Insider	Position	Date	Buy/Sell	Shares	Shares Owned Following This	Trade Price ($)	Cost ($1000)	Price Change Since Trade (%)	Details
Chin Richard	Director	[illegible]	Sell	187,500	0	$4.33	811.9	-29.1	Link
Nisi Rudolph	Director	[illegible]	Buy	20,000	23,500	$4.94	98.8	-37.85	Link
GALLIKER STEPHEN S	Director	[illegible]	Sell	300,000	10,000	$4.18	1254	-26.56	Link
Chin Richard	Director	[illegible]	Sell	75,000	0	$5.58	418.5	-44.99	Link
SCHWARTZ MARK W.	EVP & COO	[illegible]	Sell	100,000	409,565	$5.57	557	-44.93	Link
Hillsberg Sanford	Director	[illegible]	Sell	250,000	113,421	$5.41	1352.5	-43.25	Link
Nisi Rudolph	Director	[illegible]	Sell	250,000	3,500	$5.28	1320	-41.65	Link
Ahn Mark J	President & CEO	[illegible]	Sell	795,765	113,764	$4.83	3848.4	-36.44	Link
KRIEGSMAN STEVEN A	Director	[illegible]	Sell	150,000	5,000	$5.92	888	-48.14	Link
KRIEGSMAN STEVEN A	Director	[illegible]	Sell	450,000	5,000	$6.52	2934	-52.91	Link
Hillsberg Sanford	Director	[illegible]	Sell	200,000	128,421	$6.93	1386	-55.7	Link
Nisi Rudolph	Director	[illegible]	Sell	200,000	3,500	$6.9	1380	-55.51	Link
Ahn Mark J	President & CEO	[illegible]	Buy	10,000	20,000	$0.66	6.6	365.15	Link
Lee Kwang	Principal Accounting Officer	[illegible]	Buy	5,000	5,000	$0.6	3	411.67	Link
Ahn Mark J	President and CEO	[illegible]	Buy	10,000	10,000	$0.95	9.5	223.16	Link
CYTRX CORP	10% Owner	[illegible]	Sell	2,593,881	0	$2.2	5706.5	39.55	Link
CYTRX CORP	10% Owner	[illegible]	Sell	500,000	2,593,881	$2.65	1325	15.85	Link
Varanasi Ramani	VP Business Development	[illegible]	Sell	5,000	11,158	$2.05	10.3	49.76	Link

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Filed in Case Number: A-13-686755-C

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Case Name:	Discover Bank, Plaintiff(s) vs. Sandra Barnum, Defendant(s)
Filing Title:	Status Report
Filing Type:	EFS
Filer's Name:	Timora A. Cereghino
Filer's Email:	TCereghino@nevadafirm.com
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Review Comments:	
Reviewer:	
File Stamped Copy:	
	Cover Document:
Documents:	Lead Document: DISH Status Report.1.pdf 229490 bytes
	Attachment # 1: DISH Ex 1.pdf 3477093 bytes
Data Reference ID:	
Credit Card Response:	System Response: VLCCB707C317 Reference:

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DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE DISH NETWORK CORPORATION DERIVATIVE LITIGATION	Case No. A-13-686775-B Dept. No. XI **MOTION TO DEFER TO THE SLC's DETERMINATION THAT THE CLAIMS SHOULD BE DISMISSED** Date of Hearing: Dec. 15, 2014 Time of Hearing: 8:00 a.m.

The Special Litigation Committee (the "SLC"), on behalf of DISH Network Corporation ("DISH"), moves for judgment dismissing the Verified Second Amended Shareholder Derivative Complaint (the "Complaint") with prejudice on the ground that the

SLC has determined that pursuing the claims asserted in the Complaint would not be in DISH's best interest.

This Motion is supported by the following Memorandum of Points and Authorities, the supporting declarations, the DISH Network Corporation Report of the Special Litigation Committee, October 24, 2014, the papers and pleadings on file herein, and any oral argument the Court may allow.

DATED this 17th day of November, 2014

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