IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF DISH NETWORK CORPORATION DERIVATIVE LITIGATION.

JACKSONVILLE POLICE AND FIRE PENSION FUND,

Appellant,

vs.

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

Respondents.

Supreme Court Case No.: 69012

District Court Case No.: A-13-686775-B

Consolidated with:

Supreme Court Case No.: 69729

Appeal from Eighth Judicial District Court, State of Nevada, County of Clark
The Honorable Elizabeth Gonzalez, District Court Judge

RESPONDENT SPECIAL LITIGATION COMMITTEE OF DISH NETWORK CORPORATION'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

The SPECIAL LITIGATION COMMITTEE OF DISH NETWORK CORPORATION (the "SLC") consists of individuals, not corporations, and as such, there is no stock to be held and there is no parent corporation or publicly held company that owns 10% or more of its stock. DISH NETWORK CORPORATION ("DISH") is a Nevada corporation, publicly traded on the NASDAQ stock exchange under the ticker symbol "DISH." DISH has no parent corporation. Based solely on a review of Form 13D and Form13G filings with the Securities Exchange Commission, no entity owns more than 10% of DISH other than Putnam Investments, LLC and JPMorgan Chase & Co.

The law firms whose partners or associates have appeared for the SLC in the case, including the proceedings in the District Court, or are expected to appear in this Court, are:

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INTRODUCTION

Appellant Jacksonville Police and Fire Pension Fund ("Jacksonville"), a single shareholder of DISH Network Corporation ("DISH"), seeks to assert claims derivatively on behalf of DISH, a Nevada corporation. However, a special litigation committee (the "SLC") of the board of directors of DISH (the "Board") that was found to be disinterested and independent by the District Court has determined that pursuing the claims asserted by Jacksonville (the "Claims") are not in the best interest of DISH and its stockholders, including its minority stockholders. When Jacksonville would not voluntarily dismiss the Claims, the SLC moved the District Court to defer to the SLC's business judgment that the Claims should be dismissed (the "Motion to Defer"). The District Court ruled correctly as a matter of fact and law that the SLC's business judgment must be respected under Nevada law.

Under Nevada law, the Board is authorized to decide whether the Claims should be pursued. Also, under Nevada law, the Board is permitted to delegate to the SLC its authority to make this decision, and it did so. Under Nevada's business judgment rule, like the law throughout the country, the District Court was required to defer to the business judgment of the SLC, if the SLC was independent and conducted a good faith, thorough investigation. After permitting Jacksonville extensive discovery, reviewing hundreds of pages of briefs and status reports, and

conducting sixteen hearings and telephonic conferences over two years, the District Court found that the "SLC's business judgment [was] independent" and the "SLC conducted a good faith, thorough investigation." (Vol. 41 Joint Appendix ("JA") 010101, 010103 (Findings of Fact and Conclusions of Law Regarding Motion to Defer ("Decision" or "FFCL")).) Having so concluded, the scope of permissible judicial scrutiny was at an end, and the District Court properly dismissed.

Jacksonville does not even attempt to argue that the District Court's factual findings made on an extensive record were clearly erroneous, and they were not. This conclusion alone requires affirmance here. As summarized below and detailed herein, there was not even a genuine issue of any disputed, material fact as to the independence of the SLC or the good faith, thoroughness of its investigation. The Court should affirm the Decision of the District Court based upon Nevada's business judgment rule and the District Court's well-supported findings concerning the independence of the SLC and the good faith, thoroughness of its investigation.

Jacksonville's appeal barely mentions these dispositive issues. It instead erects various straw man arguments about supposedly incorrect rulings that the District Court never made. Despite Jacksonville's protestations to the contrary, under Nevada law, Jacksonville was required to prove – not merely plead or raise some triable issue of material fact – that the SLC lacked independence or failed to conduct a good faith investigation, and Jacksonville bore the burden of proof on

those issues. Yet, the District Court did not hold Jacksonville to this standard or burden. Instead, giving Jacksonville the benefit of every doubt, the District Court also applied all the lesser standards and burdens that Jacksonville advocated, and ruled Jacksonville failed to meet even them.

For example, Jacksonville argued that the District Court was required to determine only whether Jacksonville had raised a genuine issue sufficient to defeat summary judgment as to the independence of the SLC or the good faith, thoroughness of its investigation. According to Jacksonville, if the SLC failed to demonstrate its entitlement to summary judgment on these issues, the SLC's role was complete and the District Court was required to permit Jacksonville to proceed with its Claims. Although this approach contradicts Nevada law, the District Court, in addition to making factual findings, applied Jacksonville's approach, holding that there was not even a genuine issue as to the independence of the SLC or the good faith, thoroughness of its investigation.

The District Court was correct to determine that there was no genuine issue as to the SLC's independence. The SLC was independent multiple times over. SLC member Charles Lillis was unquestionably independent, and the SLC, by the terms of its governing resolutions, could not act without his approval. Lillis's independence thus ensured the independence of the SLC. Even in the absence of his required approval, the SLC still would have been independent because there

was no genuine issue of material fact as to the independence of the remaining members of the SLC, George Brokaw and Tom Ortolf. Jacksonville does not dispute that neither had a financial interest in the challenged transactions or was beholden, financially or otherwise, to a person who had such an interest. Instead, Jacksonville bases its independence arguments solely upon personal friendship. But, as detailed herein, the law is clear that friendship, even close friendship, does not negate independence.

Jacksonville also argued incorrectly that the District Court was required to place the burden of persuasion and proof only on the SLC. This argument simply rewrites Nevada corporate law. Under NRS 78.138(3), "Directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation." Nonetheless, as detailed herein, the District Court did not hold Jacksonville to its burden under this statutory presumption and, assuming that the burden rested on the SLC, reached the same conclusion.

Jacksonville argued before the District Court that, even if the SLC were independent and conducted a good faith, thorough investigation, the District Court should adopt an oft-criticized and substantial minority Delaware view that permits but does not require the trial court to undertake a discretionary review of the substantive merit of the SLC's determinations. The procedure for which

Jacksonville advocated is inconsistent with Nevada's business judgment rule and the law of the majority of jurisdictions to have addressed special litigation committees. Yet, here again, the District Court addressed Jacksonville's argument and ruled that the minority Delaware approach would lead to the same conclusion. The District Court explained that, even if it were permitted to undertake such a discretionary review, such a review would not be warranted in this case because there was no serious error with the SLC's determinations. Jacksonville does not appeal from this portion of the District Court's Decision. Nor could Jacksonville remotely establish some abuse of discretion on this issue. Thus, despite devoting much of its appeal brief to the merits of its claims, this appeal raises no issue concerning the substantive merit of the SLC's determinations.

Finally, as detailed herein, the District Court did not abuse its discretion in its award of costs to the SLC. There is no merit to Jacksonville's appeal.

STATEMENT OF ISSUES

1. Did Nevada's business judgment rule require the District Court to defer to the business judgement of the SLC, upon finding that the SLC was independent and conducted a good faith, thorough investigation, and if so, were the District Court's findings clearly erroneous?

2. In the alternative, if the District Court could defer to the business judgment of the SLC only upon determining that there was not even a genuine

issue of material fact as to the independence of the SLC or the good faith, thoroughness of its investigation, did the District Court correctly conclude that there was no such genuine issue?

3. Was the District Court required to place the burden of proof on the question of independence on the SLC despite the statutory presumption of independence set forth in NRS 78.138, and did the District Court commit legal error by finding that the SLC was independent regardless of which side had the burden of proof on that issue?

4. Did the District Court abuse its discretion in awarding costs to the SLC?

STATEMENT OF THE CASE

This case concerns personal investments made by DISH's controlling stockholder, Charles Ergen ("Ergen"). From April 2012 through May 2013, Ergen invested approximately $694 million of personal funds to purchase approximately $844 million in face value of secured debt (the "Secured Debt") issued by a spectrum company, LightSquared LP (together with certain affiliates, "LightSquared"). (Vol. 22 JA005425-26 (Bankruptcy Court Post-Trial FFCL).) At the time of all but the first of Ergen's purchases of Secured Debt, LightSquared was in bankruptcy in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). When Ergen's purchases of Secured Debt

closed, neither DISH nor a subsidiary of DISH was permitted to purchase the Secured Debt, by the terms of the applicable credit agreement (the "Credit Agreement").

This case also concerns DISH's short-lived effort to acquire the assets of LightSquared, including its spectrum (the "LightSquared Assets"). On July 23, 2013, DISH submitted a $2.22 billion bid to acquire the LightSquared Assets as part of a bankruptcy plan. (Vol. 17 JA004198 ¶ 182 (Complaint).) Following seriatim delays, months later, on December 23, 2013, the Board authorized the termination of the bid. (Vol. 30 JA007339-40 (Dec. 23, 2013 Board Minutes).)

The Board authorized termination of the bid for multiple reasons, including (a) concerns that technical issues with the LightSquared spectrum [redacted] and (b) delays in the bankruptcy proceeding, which made the LightSquared spectrum less attractive relative to other spectrum that would soon become available at auctions by the Federal Communications Commission ("FCC"). (*Id.*) The Board never reinstated the bid. Instead, DISH went on to acquire other spectrum at the FCC's H Block auction.

Before DISH terminated the bid, on August 9, 2013, Jacksonville commenced this action, alleging, among other allegations, that Ergen's purchases of Secured Debt usurped corporate opportunities belonging to DISH. Jacksonville also alleged that Ergen had pressured DISH to make the bid to ensure that

LightSquared could use the proceeds of the bid to pay off Ergen's Secured Debt at substantial personal profit to Ergen. Jacksonville also alleged that Ergen had interfered with an independent special transaction committee (the "STC") before it recommended the bid to the Board.

On September 18, 2013, the Board established the SLC. In doing so, as detailed herein, it provided plenary powers to the SLC to evaluate the Claims and act for DISH in this action, even by realigning DISH as the plaintiff to pursue the Claims directly, if the SLC deemed appropriate. As detailed below, the SLC consisted of three, well-respected, experienced business professionals.

On July 25, 2014, following the termination of the bid, Jacksonville filed the Second Amended Complaint (the "Complaint"), which was the subject of the SLC's investigation and October 2014 report. In the Complaint, Jacksonville repeated its allegation that, in purchasing the Secured Debt, Ergen usurped a corporate opportunity of DISH. It repeated the allegation even though the Bankruptcy Court had already confirmed that DISH and its subsidiaries were not permitted to purchase the Secured Debt. The Bankruptcy Court made this determination in a bankruptcy adversary proceeding against Ergen and, before it was dismissed, DISH (the "Adversary Proceeding"). The Adversary Proceeding sought to have Ergen's Secured Debt disallowed or subordinated to other bankruptcy claims due primarily to Ergen's affiliation with DISH.

Jacksonville also repeated its allegations concerning alleged improprieties in the processes leading to DISH's bid. Jacksonville made these allegations even though they were essentially moot in view of the termination of the bid.

Finally, Jacksonville diametrically contradicted the allegations from its prior complaints to allege that the bid would have been highly beneficial to DISH and should not have been terminated.

As detailed herein, the SLC conducted an exhaustive investigation of the Claims, ultimately determined that pursuit of the Claims would not be in DISH's best interest and addressed all the Claims in a detailed report of more than 300 pages (the "SLC Report").

By the time the District Court received the SLC Report in October 2014, it had been immersed in this case for over a year. Having considered multiple motions, status reports and status conferences, including a preliminary injunction motion, the District Court had become familiar with DISH's efforts to acquire the LightSquared spectrum, the events in LightSquared's bankruptcy and the Adversary Proceeding, and the questions at issue in this case. On Jacksonville's preliminary injunction motion, the District Court denied Jacksonville's request to enjoin Ergen and the Board from participating in DISH's efforts to acquire the LightSquared Assets, with the exception that the court enjoined Ergen and his

representatives from negotiating a release that might eliminate claims against him in the Adversary Proceeding. (Vol. 14 JA003330 (Nov. 27, 2013 FFCL).)

After reviewing the SLC Report, initial briefing on the Motion to Defer and an initial hearing, the District Court granted Jacksonville extensive discovery concerning the independence of the SLC and the good faith, thoroughness of its investigation. After additional briefing and another hearing based upon the evidence, the District Court granted the Motion to Defer, dismissing the Claims with prejudice.

On the issue of the SLC's independence, the District Court specifically explained as follows:

> There is no evidence that Lillis is beholden to Cullen, Vogel, or any other defendant. . . . Based upon all of the evidence presented, including Lillis's declaration, exhibits provided by Plaintiff, briefing on the subject, and oral argument, the Court finds that there is no genuine issue of material fact as to Lillis'[s] independence. . . .
>
> A special litigation committee is generally independent if the committee cannot lawfully act without the approval of at least one director who is independent. . . . The voting structure of the SLC requires that Lillis vote affirmatively in favor of any resolution of the SLC for it to have effect. The evidence of the independence of Messrs. Brokaw and Ortolf coupled with the unusual voting structure of the SLC demonstrates that the SLC is independent. . . .
>
> Plaintiff makes numerous assertions concerning the independence of the other members of the SLC, Messrs. Brokaw and Ortolf,[] the significance of which the SLC disputes. In all events, after considering the evidence concerning the independence of Messrs. Brokaw and Ortolf, together with the evidence concerning the independence of Mr. Lillis and his voting power, the Court is

> persuaded that the SLC as a whole was independent and acted independently. . . .
>
> Plaintiff's assertions, which follow expansive discovery into the SLC's independence, do not raise any genuine issue of material fact with respect to whether the SCL as a whole acted independently. . . .
>
> > [7] Numerous courts considering facts similar to those raised by Plaintiff have determined that such social relationships, even close friendships, do not render a director lacking independence. . . .

(Vol. 41 JA010100-01 (FFCL).)

On the issue of the SLC's investigation, the District Court explained as follows:

> [T]he Court finds that the SLC conducted a good faith, thorough investigation. . . . The SLC Report addressed each of the significant concerns raised by the Second Amended Complaint. . . .
>
> Although Plaintiff makes numerous assertions concerning supposed deficiencies or bad faith of the SLC's investigation, none of the assertions has merit[.] . . .
>
> Regardless of whether Plaintiff may have preferred that its claims be investigated differently, Plaintiff has not identified a genuine issue of material fact with respect to whether the SLC's investigation of the claims set forth in the Second Amended Complaint was thorough and conducted in good faith.

(Vol. 41 JA010103-04 (FFCL).)

STATEMENT OF FACTS

I. The SLC's Authority

On September 18, 2013, the Board, without Ergen or his wife, Cantey Ergen, established the SLC. (Vol. 6 JA001358-63 (Sept. 18, 2013 Board Resolutions).) The SLC, among other authority, was empowered to:

> (1) [R]eview, investigate and evaluate the claims asserted in the Derivative Litigation; . . . (3) determine whether it is in the best interests of the Corporation and/or to what extent it is advisable for the Corporation to pursue any or all of the claims asserted in the Derivative Litigation taking into consideration all relevant factors as determined by the Special Litigation Committee; [and] (4) prosecute or dismiss on behalf of the Corporation any claims asserted in the Derivative Litigation[.]

(Vol. 6 JA001360 (Sept. 18, 2013 Board Resolutions).)

II. The SLC's Composition

The SLC was composed of three members: Charles Lillis, George Brokaw and Tom Ortolf. (Vol. 23 JA005670 (Dec. 9, 2013 Board Resolutions).) Lillis has extensive financial, managerial and board experience. (Vol. 24 JA005807 ¶ 14 (Lillis Declaration).) He currently serves on the board of SomaLogic, Inc. (*Id.* at JA005805 ¶ 6.) At the appointment of the Governor of Oregon, he also currently serves as the Chair of the Board of Trustees of the University of Oregon. (*Id.*) Lillis was a co-founder and managing member of Castle Pines Capital LLC, a private equity concern and a financial services entity, which was acquired by Wells Fargo in 2011. (*Id.* at JA005806 ¶ 12.) He previously had served as President,

Chairman of the board of directors and Chief Executive Officer of MediaOne Group, Inc. from its inception in 1997 through its acquisition by AT&T Inc. in 2000. (*Id.* ¶ 9.) Lillis has served on the boards of the following companies: Agilera, Inc.; Ascent Entertainment Group, Inc.; Charter Communications, Inc. and various affiliates; Medco Health Solutions, Inc.; MediaOne Group, Inc.; On Command Corporation; SUPERVALU Inc.; Time Warner Entertainment Company, L.P.; Williams Companies, Inc. and Washington Mutual Inc. and affiliated entities. (*Id.* at JA005805 ¶ 7.) Lillis is friends with defendant Thomas A. Cullen, a senior DISH executive. Lillis sees Cullen socially about once per year for a football game and once entertained Cullen and his wife at Lillis's vacation home. (Vol. 27 JA006703 at 23:17-24:14 (Lillis Deposition).)

Under the Board resolutions appointing Lillis to the SLC, the SLC cannot act without his approval. The resolutions provide,

> [A]ny and all actions or determinations of the Special Litigation Committee . . . must include the affirmative vote of Mr. Lillis and at least one (1) other committee member in order to constitute a valid and final action or determination of the Special Litigation Committee[.]

(Vol. 23 JA005670-71 (Dec. 9, 2013 Board Resolutions).)

Brokaw has experience in investment and mergers and acquisitions matters, having recently served as Managing Director of Highbridge Capital Management, LLC, until September 30, 2013. (Vol. 24 JA005817-18 ¶ 8 (Brokaw Declaration).)

Between 2005 and 2012, Brokaw was a Managing Partner and Head of Private Equity at Perry Capital, L.L.C. ("Perry Capital"). (*Id.*) Prior to joining Perry Capital in 2005, Brokaw was Managing Director (Mergers & Acquisitions) of Lazard Frères & Co. LLC. (*Id.*) Brokaw currently is a managing partner of Trafelet Brokaw & Co., LLC. (*Id.* at JA005817 ¶ 6.) He also serves on the board of Alico, Inc. (*Id.*) Brokaw has a primarily business relationship with Ergen, although he may also count him a "friend[]." (*Id.* at JA005820-21 ¶¶ 23, 29.) Furthermore, Brokaw's wife has a friendship with Cantey Ergen based upon a historical relationship between Mrs. Brokaw's mother and Cantey Ergen's mother. (*Id.* at JA005820 ¶¶ 21-22.) One of the three godparents of one of the Brokaws' children is Cantey Ergen. (*Id.* ¶ 22.)

Ortolf has experience in investment and financial matters. For nearly twenty years, Ortolf has been the President of Colorado Meadowlark Corp., a private investment management firm. (Vol. 24 JA005828 ¶¶ 5, 7 (Ortolf Declaration).) After holding prior positions with EchoSphere LLC, which then included the business that became DISH, Ortolf was its president, from 1988 to 1991. (*Id.* ¶ 4.) As is frequently the case for corporate directors, Ortolf has a significant investment in DISH stock.[1] Ortolf and the Ergens are friends.

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[1] Ortolf owns DISH Class A Shares, which at the close of business on April 29, 2014, had a market value of $3,394,076. (*See* Vol. I Answering Appendix ("AA") 0405 (Apr. 29, 2014 DISH Annual Report (Form 10-K/A)).)

Each SLC member satisfies the independence requirements of NASDAQ and the SEC. (Vol. I AA0379-80 (Apr. 29, 2014 DISH Network Corp., Annual Report (Form 10-K/A)).) This allows the SLC members to serve on various committees of the Board.

III. The SLC's Investigation

Over the course of nearly a year, the SLC conducted a thorough investigation and assessment of the Claims in Jacksonville's Complaint. Each member of the SLC invested more than a hundred hours in the investigation. (Vol. 24 JA005814 ¶ 51 (Lillis Declaration), JA005825 ¶ 45 (Brokaw Declaration), JA005836 ¶ 43 (Ortolf Declaration).)

At the outset of its investigation, the SLC hired independent counsel, Young Conaway Stargatt & Taylor, LLP and Holland & Hart LLP, with combined experience in corporate governance, bankruptcy and committee investigations. (Vol. 24 JA005838-42 (C. Barr Flinn, Esq. Declaration), JA005844-47 (J. Stephen Peek, Esq. Declaration).) The SLC received legal advice concerning its fiduciary duties and the law applicable to the Claims. (Vol. 24 JA005840 ¶ 9 (C. Barr Flinn, Esq. Declaration), JA005846 ¶ 9 (J. Stephen Peek, Esq. Declaration).)

The SLC met formally more than seventeen times, in addition to attending multiple less formal meetings and telephone discussions. (Vol. 19 JA004659 (SLC Report).) During these meetings, the SLC evaluated Jacksonville's Claims and

information received during the investigation and directed counsel to obtain additional information and provide additional legal advice. (*See id.* at JA004656-59; Vol. 24 JA005811-12 ¶¶ 37-43 (Lillis Declaration), JA005822-23 ¶¶ 30-36 (Brokaw Declaration), JA005833-34 ¶¶ 28-34 (Ortolf Declaration).) The SLC and its counsel also monitored developments in LightSquared's bankruptcy telephonically or in person. (*See* Vol. 19 JA004657-58 (SLC Report); *see also* Vol. 13 JA003107 (Nov. 20, 2013 SLC Report Regarding Preliminary Injunction Motion).)

The SLC obtained and reviewed personally or through counsel more than 39,000 documents amounting to more than 357,000 pages. (Vol. 19 JA004656 (SLC Report).) The documents included (a) all discovery provided in this litigation on the motion for preliminary injunction, including multiple deposition transcripts, and (b) the relevant filings, deposition transcripts and other discovery, hearing and trial transcripts and decisions in LightSquared's bankruptcy. (Vol. 19 JA004656-57 (SLC Report); Vol. 24 JA005812 ¶ 40 (Lillis Declaration), JA005822-23 ¶ 33 (Brokaw Declaration), JA005833 ¶ 31 (Ortolf Declaration).) The documents also included documents specifically requested and collected from Ergen, SPSO (the entity Ergen used to purchase the Secured Debt of LightSquared), Sound Point Capital Management LP (the investment advisor to SPSO), the members of the Board, DISH, LBAC (the entity through which DISH

bid for LightSquared's Assets) and Willkie Farr & Gallagher LLP (counsel for Ergen, SPSO and LBAC, in connection with bids for the LightSquared Assets). (*See* Vol. 19 JA004656-57 (SLC Report).)

The SLC also interviewed numerous persons (other than Jacksonville and its counsel, who declined to provide the requested interviews). (Vol. 19 JA004656, JA004658-59 (SLC Report).) The persons interviewed included Ergen, Jason Kiser (who assisted Ergen in purchasing the Secured Debt), other members of the Board (Joseph Clayton, James DeFranco, Cantey Ergen, Steven Goodbarn, David Moskowitz and Carl Vogel), members of DISH management (Stanton Dodge (DISH's general counsel), Thomas Cullen (DISH's head of corporate development), Jeffrey Blum (DISH's Senior Vice President and Deputy General Counsel) and Mariam Sorond (DISH's Vice President of Technology Development)) and a representative of Willkie Farr & Gallagher LLP (Rachel Strickland). (*Id.*)[2]

Based upon the information obtained and the legal advice provided by the SLC's counsel, the SLC analyzed and evaluated each of the Claims to assess their potential merit. (*See* Vol. 19 JA004659 (SLC Report); Vol. 24 JA005811-12 ¶¶ 37-43 (Lillis Declaration); JA005822-23 ¶¶ 30-36 (Brokaw Declaration);

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[2] The SLC requested an interview with a representative of LightSquared, but the request was denied. (Vol. 20 JA004906 n.898 (SLC Report).)

JA005833-34 ¶¶ 28-34 (Ortolf Declaration).) The SLC further discussed additional considerations that weighed for or against the assertion of the Claims, including the cost and distraction to DISH of asserting the Claims and the impact of pursuing the Claims on DISH's interests in the Adversary Proceeding and other litigation. (*See* Vol. 19 JA004628, JA004639-40 (SLC Report); Vol. 20 JA004951-56 (same).) The SLC collectively determined whether the pursuit of the Claims would be in DISH's best interest and agreed upon the reasons for such determinations. (*See* Vol. 19 JA004639-40 (SLC Report); Vol. 24 JA005814 ¶¶ 52-54 (Lillis Declaration), JA005825 ¶¶ 46-48 (Brokaw Declaration), JA005836 ¶¶ 44-46 (Ortolf Declaration).) Thereafter, the SLC directed counsel to prepare a draft report consistent with the SLC's determinations. (*See* Vol. 24 JA005814 ¶ 52 (Lillis Declaration), JA005825 ¶ 46 (Brokaw Declaration), JA005836 ¶ 44 (Ortolf Declaration).) The SLC commented upon multiple drafts of the report and ultimately approved the final text of the SLC Report, which carefully detailed in more than 300 pages the SLC's factual findings, analyses and conclusions. (*See* Vol. 24 JA005814 ¶ 52 (Lillis Declaration), JA005825 ¶ 46 (Brokaw Declaration), JA005836 ¶ 44 (Ortolf Declaration).)

IV. The SLC's Determinations

Although none of Jacksonville's appellate arguments concerns the substantive merit of the SLC's determinations, Jacksonville attempts to suggest

that its Claims have merit. Jacksonville, however, merely repeats its allegations and otherwise ignores and misstates the evidence without any effort to connect the evidence to the legal requirements for proving the Claims. The SLC addresses the evidence below in the context of its analyses of the Claims addressed in Jacksonville's brief.

Corporate Opportunity Claims. The Complaint alleges that, by purchasing the Secured Debt, Ergen usurped a corporate opportunity of DISH. (Vol. 17 JA004243 ¶¶ 354 (Complaint); *see also id.* at JA004244-45 ¶¶ 360-61 (same).) The SLC determined that the Secured Debt was not a corporate opportunity for DISH primarily for two reasons: *First*, neither DISH nor a subsidiary of DISH was permitted to purchase the Secured Debt. Under the Credit Agreement, the Secured Debt could be transferred only to an "Eligible Assignee." (*See* Vol. II AA0025 (Credit Agreement).) The Credit Agreement further provided that an "Eligible Assignee . . . shall not include . . . any Disqualified Company." (*Id.*) And, being a competitor of LightSquared, DISH had been designated a "Disqualified Company." (Vol. I AA0218 (May 9, 2012 Notice to Administrative Agent).) As DISH was a "Disqualified Company," so too were its subsidiaries because the Credit Agreement provided that a "Disqualified Company will include any known subsidiary" of a "Disqualified Company." (Vol. II AA0024-25 (Credit Agreement).) The Bankruptcy Court subsequently confirmed (in a litigation

against, among others, DISH) that, as a "Disqualified Compan[y] . . . , DISH . . . [was] not permitted to purchase the LP Debt" and a "'known subsidiary' [of DISH] . . . cannot be an Eligible Assignee." (Vol. 22 JA005488-89 (Bankruptcy Court Post-Trial FFCL).)

As for whether an "affiliate" of DISH could purchase the Secured Debt, the Bankruptcy Court determined that at least one affiliate could not do so due to primarily its affiliation with DISH. The Bankruptcy Court specifically addressed Ergen's investment vehicle for purchasing the Secured Debt, SPSO, which was an affiliate of DISH because both were under Ergen's common control. (*See* Vol. II AA0017-18 (Credit Agreement) (defining "Affiliate").) The Bankruptcy Court specifically held that SPSO breached the Credit Agreement's covenant of good faith and fair dealing, in respect of all purchases of Secured Debt that were made to benefit DISH. (Vol. 23 JA005515 (Bankruptcy Court Post-Trial FFCL).)

Second, Ergen's purchases of Secured Debt were not corporate opportunities for DISH for the additional reason that DISH had disclaimed any such opportunity by its articles of incorporation. The articles disclaim all corporate opportunities, except for those in which, among other requirements, the Board has expressed previously an interest that is documented "by resolutions appearing in the Corporation's minutes." (Vol. I AA0009 (Certificate of Amendment to Articles of

Incorporation).) The Board had not expressed an interest in the Secured Debt, nor documented such an interest in its minutes.

Jacksonville attempts to fabricate a supposed admission by Ergen by leaving out an interstitial clause, without the required ellipsis. (OB 11.) With the omitted material in italics, Ergen's actual testimony was: "[A]s a chairman of DISH, I knew I had a fiduciary responsibility to the company and that first and foremost, *if this was an investment that DISH was interested in,* that first and foremost they should be given the opportunity for that investment." (Vol. 28 JA006903:7-11 (Ergen's Testimony in Adversary Proceeding).) As the SLC determined, DISH did not have an interest in the Secured Debt for multiple reasons, including that DISH was not permitted to purchase the Secured Debt and had disclaimed any such interest. *See supra* at 19-22. For the proposition that "DISH properly could purchase" the Secured Debt, Jacksonville cites primarily its own brief. (OB 11 (citing Vol. 18 JA004469 (Jacksonville's Opposition to Motion to Dismiss)).) Jacksonville's brief references the two issues discussed below, which the SLC fully addressed.

First, it is true that DISH might have opened trades to purchase the Secured Debt that Ergen purchased in his first seven purchases. (*See* Vol. 17 JA004171 (Complaint).) At that time, DISH had not yet been designated a "Disqualified Company." (*See* Vol. 22 JA005406 ¶ 25 (Bankruptcy Court Post-Trial FFCL).)

But DISH could never have closed the trades because, by the time the trades closed, DISH had been designated a "Disqualified Company." (*See id.*; Vol. 17 JA004171 (Complaint).)

Second, DISH might theoretically have devised a complex affiliate structure to invest in the Secured Debt. Jacksonville never explains how such a structure could avoid (even in hindsight) the Bankruptcy Court's rulings that a trade by a DISH affiliate entered into for DISH's benefit would breach the Credit Agreement. But, even so, the opportunity still would have been disclaimed by DISH's articles of incorporation. Jacksonville simply quibbles with the SLC's additional determination, after its extensive investigation, that DISH would not have had any interest in pursuing such a risky structure, among other reasons, because it would not have allowed DISH to control the investments in the Secured Debt, leaving DISH at the mercy of whoever controlled the affiliate.[3] (*See* OB 32 (referring to Vol. 19 JA004715-16); Vol. 20 JA004922-25 (SLC Report)).)

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[3] Contrary to Jacksonville's assertion, the SLC never has mentioned the notion that "the opportunity came to Ergen personally" as a basis for its determination that the Secured Debt purchases were not corporate opportunities for DISH. (OB 30.) Also, contrary to Jacksonville's assertion, the Bankruptcy Court did not find "facts that established that Ergen had used his massive influence over the Board to take the corporate opportunity from DISH." (OB 7.) As Jacksonville concedes repeatedly, the Board was completely uninvolved in, and unaware of, Ergen's purchases of the Secured Debt. (*See, e.g.*, OB 5, 11-12, 18-19, 68.)

Corporate Resources Claim. The Complaint alleges that Ergen breached his fiduciary duties by using DISH's corporate resources to purchase the Secured Debt, referring to his use of DISH's treasurer, Jason Kiser, and outside counsel, Scott Miller. (*See* Vol. 17 JA004243-44 ¶¶ 357, 359 (Complaint); *see also id.* at JA004168 ¶ 79 (same).) The SLC determined that such uses were minimal and costless to DISH and that it is customary at DISH and other similar corporations for members of senior management to make limited use of staff and, if the corporation is not charged, outside counsel. (Vol. 20 JA004943-45 (SLC Report).) For these reasons, the SLC concluded that the uses constituted *de minimis* perquisites, which do not amount to breaches of fiduciary duty under well-established law. (*Id.*) Jacksonville addresses Ergen's uses of corporate resources and the Bankruptcy Court's references to them, but does not address the well-established law. (*See* OB 7, 11-12, 17-18, 33, 67.)

Unjust Enrichment Claims. The Complaint alleges that Ergen was unjustly enriched in the amount of his profit from his Secured Debt. (Vol. 17 JA004224 ¶ 2758, JA004251 ¶¶ 394-96 (Complaint).) To prevail on a claim for unjust enrichment, DISH would need to establish that Ergen's enrichment was unjust. (Vol. 20 JA004925-26 (SLC Report); *see also id.* at JA004936 (quoting *In re Amerco Derivative Litig.*, 127 Nev. 196, 252 P.3d 681, 703 (2011)).) The SLC therefore evaluated each of the Complaint's alleged bases for contending that

Ergen's enrichment was unjust. The SLC determined that each alleged basis lacked merit. (Vol. 20 JA004925-26, JA004936-37, JA004945-46, JA004948-49 (SLC Report).)

Disclosure Claim. The Complaint alleges that Ergen breached his fiduciary duty by not disclosing his purchases of the Secured Debt to the Board prior to his May 2, 2013 disclosure. (*See* Vol. 17 JA004243 ¶ 356 (Complaint); *see also id.* at JA004175-76 ¶¶ 106-07 (same).) The SLC determined that Ergen was not required to disclose personal information to the Board unless and until it became relevant to a decision to be made by the Board. (Vol. 20 JA004756, JA004938-41 (SLC Report).) When, in April 2013, DISH began to consider the possibility of acquiring the LightSquared Assets, Ergen's purchases of Secured Debt became relevant to the Board's deliberations, and Ergen disclosed them on May 2, 2013, before the Board's deliberations began. (Vol. II AA0239-40 (May 2, 2013 Board Minutes).) Neither Jacksonville nor the Bankruptcy Court (addressing a breach of contract claim), in criticizing Ergen's non-disclosure, addresses the well-established law concerning a director's fiduciary disclosure duties. (*See* OB 12; Vol. 22 JA005418, JA005441 n.21, JA005468-69 (Bankruptcy Court Post-Trial FFCL).)

Director STC Claim. The Complaint alleges that the Board breached fiduciary duties in terminating the STC, which recommended DISH's bid for the

LightSquared Assets. (Vol. 17 JA004193 ¶ 170, JA004246 ¶ 370 (Complaint).)[4] The Complaint alleges that, after making its recommendation, the STC was still needed to protect DISH from conflicts of interest in DISH's efforts to acquire the LightSquared Assets. (Vol. 17 JA004194 ¶ 173 (Complaint).)[5] As DISH's efforts to acquire the LightSquared Assets had ceased before the Complaint was filed, the claim was moot, at least as a standalone claim. The Complaint theorizes that the absence of the STC hypothetically permitted the Board to commit subsequent breaches of fiduciary duty in the negotiation of a release and the termination of the bid. (*See* Vol. 17 JA004197-98 ¶ 181, JA004214-15 ¶¶ 239-41, JA004227 ¶ 287 (Complaint).) However, the SLC found that there were no such subsequent breaches, as detailed below.

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[4] After accepting the STC's recommendation, the Board terminated the STC because future increases in the bid could not benefit Ergen and the conflict between Ergen and DISH that the STC had been established to address no longer existed. (Vol. 34 JA008350-52 (July 21, 2013 Board Minutes).) As Jacksonville repeatedly acknowledges in its opening brief, if the bid had been successful, the proceeds to LightSquared would have ensured that Ergen's Secured Debt would be fully repaid. (*See, e.g.*, OB 11-12, 14.) Ergen therefore could not benefit from future increases in the bid, whether by DISH or some other party.

[5] Jacksonville made the same argument, in moving the District Court for a preliminary injunction reestablishing the STC. The District Court denied the motion, explaining, "Plaintiff's requested relief is likely to harm DISH by depriving it of having directors most experienced and knowledgeable of the issues related to the LightSquared transaction . . . ." (Vol. 14 JA003329 ¶ 15 (Nov. 27, 2013 FFCL).)

Auction Cancellation Claim. The Complaint addresses a proposed, boilerplate release of DISH and its affiliates in the draft purchase agreement submitted with DISH's bid. (*See, e.g.*, Vol. 17 JA004197-98 ¶ 181 (Complaint).) As Ergen was an affiliate of DISH, the release would have released the claims asserted against him in the Adversary Proceeding ("Adversary Claims"), although they were not asserted until after the release was proposed. The Complaint alleges that the existence of the proposed release caused LightSquared to cancel an auction, at which, according to Jacksonville, DISH's bid would have been accepted, and thereby caused DISH to lose the opportunity to acquire the LightSquared Assets. (Vol. 17 JA004214-15 ¶ 241 (Complaint).) The SLC determined that the release did not produce the posited harm as it did not cause the cancellation of the auction. (Vol. 19 JA004634-36 (SLC Report); Vol. 20 JA004907-08, JA004910-14 (same).) LightSquared cancelled the auction because it deemed DISH's bid to be inadequate.[6] In all events, the cancellation of the auction did not cause DISH to lose the opportunity to acquire the LightSquared Assets: As Jacksonville acknowledges, after the cancellation of the auction, DISH's bid remained outstanding. (OB 17.) DISH did not acquire the LightSquared Assets simply because the Board subsequently determined that it

[6] Upon questioning by the Bankruptcy Court, counsel for LightSquared conceded that the auction was cancelled for several reasons, including the purchase price that DISH proposed to pay, which LightSquared contended was inadequate. (*See* Vol. I AA0312-16 (Jan. 22, 2014 Bankruptcy Hearing Transcript).)

was no longer in DISH's best interest for it to do so and authorized the termination of the bid. (*See* Vol. 30 JA007339-40 (Dec. 23, 2013 Board Minutes).)

The SLC also found that there was no evidence to suggest that the Board approved the proposed release to benefit Ergen, as the Complaint alleges. (*See* Vol. 20 JA004908, JA004913 & n.916 (SLC Report).) The Board's termination of the DISH bid made clear that the Board was not seeking to benefit Ergen because the termination made it impossible for Ergen to obtain the release. The SLC also found that Ergen did not threaten to terminate DISH's bid if the release were not provided. (*See* Vol. 20 JA004907, JA004909-10) (SLC Report at 283, 285-86).) In the statements referenced by Jacksonville, Ergen's counsel, who was also counsel for the DISH entity making the bid, merely explained the obvious in response to the Bankruptcy Court's questions about the scope of the release: If the release remained in its then-existing form (i.e., there was no further negotiation of the scope of the release) and DISH's bid was accepted, the Adversary Claims would fall within the scope of the release and could no longer prevent the full payment of Ergen's Secured Debt from the proceeds of the bid. (*See* Vol. 30 JA007264:3-7 (Nov. 25, 2013 Bankruptcy Hearing Transcript); Vol. 21 JA005146-55 (Dec. 10, 2013 Bankruptcy Hearing Transcript).)

Bid Termination Claim. The Complaint alleges that Board terminated DISH's bid "to serve Ergen's personal and selfish interests." (Vol. 17 JA004242

¶ 347 (Complaint).) As previously explained, the Board terminated the bid for multiple reasons having nothing to do with Ergen's personal interests. *See supra* at 7. Although the Bankruptcy Court was skeptical of one of the Board's reasons for terminating the bid, the technical issue, the Bankruptcy Court acknowledged the possibility that the termination might nonetheless have served DISH's best interest. (Vol. 23 JA005630 (Bankruptcy Court Confirmation Decision).) Put simply, by Jacksonville's theory, the bid termination (a) damaged DISH, which damaged Ergen more than anyone as DISH's majority stockholder, (b) put Ergen's Secured Debt investment at substantial risk, and (c) eliminated any possibility that the Adversary Claims against Ergen would be released. As the termination did not benefit Ergen personally, there was no conflict in the Board's decision, and the decision is therefore protected by the business judgment rule.

Other Factors Affecting Analysis. The Complaint emphasized the "hundreds of millions of dollars" in profits that Ergen stood to make on his investments in the Secured Debt. (Vol. 17 JA004141 ¶ 1.) Jacksonville now suggests that the potential for DISH to be awarded such profits provided ample reason for the SLC to pursue the Claims, no matter their merit. Jacksonville's single-minded focus on the amount of potential damages only underscores the need for the business judgment of a special litigation committee. The SLC properly took into account the substantial distraction to the Board and management that

would have resulted from the pursuit of the Claims. (*See* Vol. 19 JA004639 (SLC Report); Vol. 20 JA004955-56 (same).) Jacksonville simply ignores the detriment to stockholder value that would inevitably have resulted from embroiling DISH in an internecine dispute, which would have lasted for at least months and probably years and been unwarranted due to the meritless nature of the Claims. The SLC also properly took into account the probability that DISH's pursuit of the claims would undermine DISH's interests in other related lawsuits. (*See* Vol. 19 JA004639-40 (SLC Report); Vol. 20 JA004952-55 (same).) Although the lawsuits that the SLC was considering when its Report was finalized have now terminated, allegations have been made against DISH concerning the FCC's AWS-3 spectrum auction that at least Jacksonville contends raises issues similar to those raised by the Claims. (*See* Vol. 35 JA008617-19 (cited at OB 32 and discussing AWS-3 spectrum auction).)

SUMMARY OF ARGUMENT

As detailed below, under Nevada law, the District Court was required to defer to the SLC's business judgment upon finding that the SLC was independent and conducted a good faith, thorough investigation. The District Court's Decision, therefore, must be affirmed unless these findings were clearly erroneous, and they were not. Jacksonville does not even attempt to argue that they were clearly erroneous. As summarized below and detailed herein, there was not even a

genuine issue of material fact as to the independence of the SLC or the good faith, thoroughness of its investigation.

In the alternative, if the SLC was entitled to deference only if the District Court determined that there was no genuine issue of material fact concerning the independence of the SLC or the good faith, thoroughness of its investigation, the District Court also made this determination, and it was correct.

There is no merit to Jacksonville's contentions that the District Court erred by presuming the independence of the SLC, placing the burden on the issue of independence on Jacksonville or failing to determine whether there was a genuine issue of material fact concerning the independence of the SLC or the good faith, thoroughness of its investigation. If the District Court had done any of these things, it would have been correct under Nevada law. But the District Court did not do any of these things. Nor did the District Court equate independence with financial independence.

Finally, the District Court did not abuse its discretion in taxing costs for electronic discovery, photocopying and scanning and teleconferences.

ARGUMENT

I. Under the Business Judgment Rule, the District Court's Decision Should Be Affirmed Based Upon Its Factual Findings That the SLC Was Independent and Conducted a Good Faith, Thorough Investigation.

"[U]nder Nevada's corporations laws, a corporation's 'board of directors has full control over the affairs of the corporation.'" *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 632, 137 P.3d 1171, 1178 (2006) (quoting NRS 78.120(1)). The board therefore may decide whether to terminate claims asserted on behalf of the corporation. *Id.* ("In managing the corporation's affairs, the board of directors may generally decide whether to take legal action on the corporation's behalf."); *see also In re Amerco Derivative Litig.*, 127 Nev. 196, 232, 252 P.3d 681, 705 (2011) (Pickering, J., concurring in part, dissenting in part) ("Among the matters entrusted to a corporation's directors is the decision to litigate—or not to litigate—a claim by the corporation against third parties."). The board may delegate its authority to make this decision to a committee of the board, such as a special litigation committee. *See* NRS 78.125.

Under Nevada's business judgment rule, a court must defer to a committee's business judgment, if the committee was independent, acted in good faith and was adequately informed, such as by conducting a thorough investigation. *See* NRS 78.138; *La. Mun. Police Emps. Ret. Sys. v. Wynn*, No. 14-15695, 2016 WL 3878228, at *5 (9th Cir. July 18, 2016) (applying Nevada law) ("'[A]bsent

sufficient reason to doubt the directors' ability to make disinterested and independent decisions about litigation, the board is not only empowered but optimally positioned to make decisions on behalf of the corporation and, if appropriate, pursue litigation.'") (citations omitted); *Shoen*, 122 Nev. at 632, 644-45, 137 P.3d at 1179, 1187 (The business judgment rule provides a board of directors "protection in conducting the corporation's affairs[,]" and therefore protects a board's decision as to whether the company should assert claims, unless a plaintiff can establish that the board was interested, lacked independence or was not adequately informed.); *Horwitz v. Sw. Forest Indus., Inc.*, 604 F. Supp. 1130, 1134 (D. Nev. 1985) (applying Nevada law) (same); *Campbell v. Yu*, 25 F. Supp. 3d 472, 485 (S.D.N.Y. 2014) (applying Nevada law) ("'It is the essence of the business judgment rule that a court will not apply 20/20 hindsight to second guess a board's decision[.]'") (citation omitted).

The decision whether to initiate litigation by or on behalf of the company is committed to the sound business judgment of the board of directors. *Shoen*, 122 Nev. at 632, 137 P.3d at 1178. As with any decision by a board of directors or a duly appointed committee thereof, the decision by the board (or, here, the SLC), to initiate, prosecute or terminate litigation in the name of the company is within the business judgment of the board, and not subject to judicial second-guessing unless the SLC has been shown to have breached its fiduciary duties in making that

decision. So long as the SLC complied with its duty of loyalty by acting independently and in good faith, and met its duty of care by acting in an informed manner, its decision is entitled to deference.[7]

For example, in the seminal case concerning special litigation committees, *Auerbach v. Bennett*, 393 N.E.2d 994 (N.Y. 1979), the New York Court of Appeals explained,

> [T]he *substantive aspects of a decision to terminate* a shareholders' derivative action against defendant corporate directors made by a committee of disinterested directors appointed by the corporation's board of directors *are beyond judicial scrutiny under the business judgment doctrine*[.] [T]he court may inquire as to the disinterested *independence of the members* of that committee and as to the *appropriateness and sufficiency of the investigative procedures* chosen and pursued by the committee.

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[7] Delaware and a small minority of jurisdictions depart from the business judgment rule by permitting the court to engage in a discretionary review of the substantive merit of the special litigation committee's decision. *See, e.g., Zapata Corp. v. Maldonado*, 430 A.2d 779, 789 (Del. 1981). This minority rule is inconsistent with Nevada's business judgment rule and, as explained in the text, the law of the substantial majority of jurisdictions to have addressed the standard of review applicable to a special litigation committee's determination that claims should be dismissed. It also has been resoundingly criticized. Dennis J. Block & Adam Prussin, *The Business Judgment Rule and Shareholder Derivative Actions: Viva Zapata?*, 37 Bus. Law. 27, 62-63 (1981) ("There can be no escaping the conclusion that step 2 of the *Zapata* rule implicates everything the business judgment rule was created to avoid. The very concept that courts have independent business judgment is, in fact, a contradiction of over 250 years of legal development."). In all events, the District Court determined that, even if such a discretionary review were permitted, it was not necessary because there was nothing to suggest any serious error with the SLC's conclusion. (Vol. 41 JA10098:9-12 (FFCL).)

393 N.E.2d at 996 (emphasis added). The Alabama Supreme Court similarly explained in *Roberts v. Alabama Power Co.*, 404 So. 2d 629, 636 (Ala. 1981),

> There would be no purpose served by allowing a shareholder to bring a derivative suit after a thorough and good faith determination that such a suit would not be in the best interest of the corporation. To allow a suit under these circumstances would be to substitute the judgment of the court and the shareholder for that of the board of directors when it is obvious that the directors are best situated to make such a determination.

404 So. 2d at 636; *see also In re UnitedHealth Grp. Inc. S'holder Derivative Litig.*, 754 N.W.2d 544, 557 (Minn. 2008) ("[A]llowing courts to second-guess the decision of an SLC undermines the SLC process itself, denying corporations a vital means of avoiding strike suits and other abusive derivative litigation.").[8] Put simply, "the good faith exercise of business judgment by a special litigation committee of disinterested directors is immune to attack by shareholders or the courts." *Lewis v. Anderson*, 615 F.2d 778, 783 (9th Cir. 1979). Under the business judgment rule, the District Court therefore was required to defer to the SLC's business judgment upon finding that the SLC was independent and conducted a good faith, thorough investigation.

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[8] *See also TP Orthodontics, Inc. v. Kesling*, 15 N.E.3d 985, 991 (Ind. 2014); *Hirsch v. Jones Intercable, Inc.*, 984 P.2d 629, 637-38 (Colo. 1999); *Cuker v. Mikalauskas*, 692 A.2d 1042, 1048 (Pa. 1997); *Miller v. Bargaheiser*, 591 N.E.2d 1339, 1343 (Ohio Ct. App. 1990).

Its decision to defer to the SLC's business judgment should therefore be upheld unless these findings were clearly erroneous, and they were not. *See, e.g.*, *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009) ("The district court's factual findings . . . are given deference and will be upheld if not clearly erroneous and if supported by substantial evidence.") (citation omitted).[9]

The District Court found that there was not even a genuine dispute, much less proof by a preponderance of the evidence, to support Jacksonville's challenge to the SLC's independence. The District Court concluded that the SLC as a whole was independent. The District Court also concluded that Lillis was "clearly independent," and that his independence, "coupled with the unusual voting structure of the SLC demonstrates that the SLC is independent." (Vol. 41 JA010100:15-101:6 (FFCL).) The District Court found that the SLC "conducted a good faith, thorough investigation." (Vol. 41 JA010103-04 (FFCL).) Jacksonville alleges no error, much less clear error, in any one of these factual conclusions.

Jacksonville incorrectly suggests that the District Court was not permitted to make factual findings as to the independence of the SLC and the good faith, thoroughness of its investigation. (OB 37-38.) According to Jacksonville, the

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[9] For cases applying the clearly erroneous standard or an even more deferential standard of review to factual findings concerning the independence and good faith thoroughness of a special litigation committee, please see *Allied Ready Mix*, *Burgess*, and *Miller*, cited *infra* at 37-38 & n.10.

District Court should have determined only whether there was a genuine issue of material fact on these points and, if there were such an issue, permitted Jacksonville to proceed with its Claims. (*Id.*)

Jacksonville's position is incorrect, for at least three reasons: *First*, Jacksonville's position is inconsistent with this Court's treatment of the substantially identical issue in *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 645, 137 P.3d 1171, 1187 (2006) and *In re Amerco Derivative Litigation*, 127 Nev. 196, 252 P.3d 681 (2011). In both decisions in the same case, the Court held that a plaintiff, having not made a pre-suit demand upon a corporation's board, could not proceed with derivative claims on behalf of a corporation. *Shoen* 122 Nev. at 644-45, 137 P.3d at 1186-87; *Amerco*, 127 Nev. 196, 222, 252 P.3d 681, 700. It held that the plaintiff could not proceed unless and until the District Court held an evidentiary hearing and *found* on the evidence presented that the board lacked independence or did not act in good faith, such that the demand on the board would have been futile. *Shoen*, 122 Nev. at 645, 137 P.3d at 1187 ("If the district court should find the pleadings provide sufficient particularized facts to show demand futility, it must later conduct an evidentiary hearing to determine, as a matter of law, whether the demand requirement nevertheless deprives the shareholder of his or her standing to sue."); *see also Amerco*, 252 P.3d at 700 (same). As factual

findings were required in *Shoen* and *Amerco* before the plaintiff could proceed with its case, the same should apply here.

Second, Jacksonville's position is inconsistent with the law of many other jurisdictions to have specifically addressed special litigation committees. In such jurisdictions, a plaintiff may not proceed with derivative claims absent factual findings that the special litigation committee lacked independence or did not conduct a good faith, thorough investigation. *See, e.g.*, *Madvig v. Gaither*, 461 F. Supp. 2d 398, 403-04, 407-11 (W.D.N.C. 2006) (dismissing action based on SLC's determination upon finding that "both [SLC members] acted independently" and that the plaintiff had failed to show "a lack of 'good faith'"); *Miller v. Bargaheiser*, 591 N.E.2d 1339, 1343-45 (Ohio Ct. App. 1990) (affirming trial court's dismissal of derivative suit based on SLC recommendation and holding that "courts will defer" to an SLC recommendation where the SLC is independent, "the SLC conducts its inquiry in good faith" and the SLC's "recommendation is the product of a thorough investigation"); *Wylie ex rel. W Holdings Co. v. Stipes*, 797 F. Supp. 2d 193, 204 (D.P.R. 2011) (granting SLC motion to terminate derivative suit based on the court's "find[ing] that the SLC acted rationally and with a good faith belief that its decision was in the best interest of [the corporation]"); *Johnson ex rel. MAII Holdings, Inc. v. Jackson Walker, L.L.P.*, 247 S.W.3d 765, 776 (Tex. App. 2008) (upholding findings "regarding the good faith and reasonable inquiry as to

the determination to dismiss" because the "evidence [was] legally and factually sufficient to support" such findings).[10] If a genuine dispute of material fact is shown, the court resolves it at an evidentiary hearing. *Day v. Stascavage*, 251 P.3d 1225, 1229 (Colo. Ct. App. 2010) (holding that genuine issues of fact as to the SLC's independence and thoroughness "must be resolved by a court after an evidentiary hearing"); *Houle v. Low*, 556 N.E.2d 51, 59 (Mass. 1990) (same).[11]

Third, Jacksonville's position is inconsistent with Nevada's business judgment rule. Under Jacksonville's position, the District Court would be required to ignore the business judgment of the SLC, based upon the mere raising of a

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[10] *See also Allied Ready Mix Co. ex rel. Mattingly v. Allen*, 994 S.W.2d 4, 7-9 (Ky. Ct. App. 1998) (upholding the trial court's findings of "good faith and reasonableness on the part of the special litigation committees" because they were "supported by evidence presented in the record and . . . not clearly erroneous"); *Ankerson v. Epik Corp.*, 690 N.W.2d 885 (TABLE), 2004 WL 2434571, at *1 (Wis. Ct. App. 2004) (affirming trial court's dismissal of derivative claims "[b]ecause the trial court's findings of fact [that SLC was independent] are not clearly erroneous"); *Burgess v. Patterson*, 188 So. 3d 537, 547 (Miss. 2016) ("[W]e hold that appellate review of a dismissal of a shareholder derivative suit [upon an SLC's recommendation] is a mixed question of law and fact[,]" and "the trial court's factual findings [are] reviewed for clear error . . . ."") (internal quotation marks and citation omitted); Model Business Corporation Act § 7.44(d) (2013) (discussing the "burden of *proving*" a lack of independence and good faith) (emphasis added); Official Comment to Model Business Corporation Act § 7.44 (2013) (discussing the "burden of convincing the court" regarding good faith).

[11] Only in a minority of jurisdictions may a plaintiff proceed with derivative claims upon the mere raising of an issue. *See, e.g.*, *Johnson v. Hui*, 811 F. Supp. 479, 485 (N.D. Cal. 1991).

genuine issue of material fact, even if the Court would find on the full evidentiary record that the SLC was independent and conducted a good faith, thorough investigation. Under Jacksonville's proposal, the paramount role of the board in managing the business and affairs of the corporation would be severely compromised. No court would ever rule on the merits of the SLC's right to act on behalf of the corporation, because once a conclusion is made that a board or committee was not entitled to summary judgment on their good faith and independence, these issues are unreviewable and the derivative plaintiff may proceed.

Contrary to Jacksonville's assertion, the SLC did not agree that the District Court should not make factual findings. Before Jacksonville had requested or obtained discovery concerning the independence of the SLC and the good faith, thoroughness of its investigation, the SLC argued that, if Jacksonville "comes forward with evidence sufficient to create a genuine issue of material fact, the court should resolve the factual dispute . . . ." (Vol. 24 JA005785 n.25 (SLC's Opening Brief in Support of Motion to Defer).) Jacksonville thereafter obtained discovery and presented its evidence, and the District Court addressed, in the same

hearing and Decision, both whether there was a genuine issue and whether the SLC was independent and conducted a good faith, thorough investigation.[12]

II. In the Alternative, the District Court's Decision Should Be Affirmed Based Upon Its Determinations that There Were No Genuine Issues.

Even if Jacksonville is correct that this appeal is governed by the standard applicable to summary judgment motions — and it is not — the District Court's Decision should nonetheless be affirmed because the District Court's determination that there were no genuine issues of material fact was correct.

A. There Was No Genuine Issue As to the Independence of the SLC.

The District Court correctly determined that there was no genuine issue of material fact as to the independence of the SLC. Jacksonville offers no colorable argument to challenge the District Court's conclusion that there was no genuine issue as to the independence of Lillis. As the SLC undisputedly could not act without his approval, Lillis's independence ensured the independence of the SLC. Even in the absence of Lillis's required approval, there would have been no genuine issue as to the independence of the SLC because there was no genuine

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[12] Although all three members of the SLC were present for the hearing, Jacksonville did not call them to testify, relying instead upon their deposition transcripts. Also, there were no genuine disputes as to the underlying facts that formed the basis for the District Court's ultimate findings on independence and good faith, thoroughness. Under similar circumstances, courts frequently find such ultimate facts without relying upon live testimony. *See Madvig*, *Miller*, and *Wylie*, cited *supra* at 37.

issue as to the independence of Brokaw and therefore a majority of the SLC. Nor was there a genuine issue as to the independence of Ortolf and therefore all members of the SLC.

1. There Was No Genuine Issue As to Lillis's Independence.

The District Court correctly held that "there is no genuine issue of material fact as to Lillis's independence." (Vol. 41 JA10100:21-22 (FFCL).) Contrary to Jacksonville's assertion, Lillis's casual friendship with one of twelve individual defendants, Cullen, is irrelevant. (OB 24-25, 53-54.) As detailed below in the sections concerning Brokaw and Ortolf, not even a close friendship with Cullen could undermine Lillis's independence, *see infra* at 47-54, and Lillis's relationship with Cullen could hardly be described as close.[13]

In the case cited by Jacksonville, *Booth Family Trust v. Jeffries*, 640 F.3d 134 (6th Cir. 2011), the court determined that the special litigation committee member lacked independence due to his "decision to recuse himself from considering the allegations" against the defendant, which "effectively admitted that he was not independent." 640 F.3d at 143-44 (cited at OB 53). The court

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[13] Lillis and Cullen see each other socially "typically once a year" at a "football game at the University of Oregon" and "may have a dinner or some other social engagement . . . once a year," including a single instance in which Lillis invited Cullen to his vacation home in Idaho. (Vol. 27 JA006703 at 23:17-24:14 (Lillis Deposition).)

explained that, if the special litigation committee member had "not recused himself . . . , we might agree with the district court's conclusion that he was independent." *Id.* at 144. As there was no recusal by Lillis, the case is wholly inapplicable.[14]

2. Lillis's Independence Ensured the Independence of the SLC.

It is undisputed, and the District Court expressly found, that the SLC, by its governing resolutions, could not act without Lillis's approval. (Vol. 41 JA10101 ¶ 15 (FFCL).) Jacksonville does not even attempt to address this principal basis for the District Court's determination as to the independence of the SLC.[15] (Vol. 41 JA010087, JA10101 (FFCL).) As Lillis was unquestionably independent, the SLC could not act *except* in a manner that was independently determined to be in the best interest of DISH and its minority stockholders.

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[14] To the extent that *Booth Family Trust* suggests, in dicta, that the test for independence of a special litigation committee member might differ from the test for other directors, it is inconsistent with the weight of authority. *See In re ITT Derivative Litig.*, 932 N.E.2d 664, 666 (Ind. 2010) ("[T]he same standard [applies] for showing 'lack of disinterestedness' both as to the composition of special board committees . . . and to the requirement that a shareholder must make a demand[.]"); *St. Clair Shores Gen. Emps. Ret. Sys. v. Eibeler*, No. 06 Civ. 688(SWK), 2008 WL 2941174, at *8 n.7 (S.D.N.Y. July 30, 2008). Even the *Booth Family Trust* court acknowledges that courts "consistently look to demand futility cases in addressing the issue of SLC independence." 640 F.3d at 149 n.2.

[15] In its 80-page brief, Jacksonville mentions the Lillis approval requirement only once in quoting the District Court and never addresses its significance. (OB 58.)

Not surprisingly, in the most analogous cases, involving two-person special litigation committees, the courts have held special litigation committees to be independent. Two-person committees generally cannot act without the approval of both members because one member does not constitute the majority required for the committee to act. If one member of such a committee is unquestionably independent, the committee, like the SLC in this case, cannot act without the approval of an unquestionably independent member. In such cases, the courts have consistently held that the independence of the unquestionably independent member sufficed to establish the independence of the committee.

They have done so without regard to the independence of the other member and even when there has been reason to doubt the independence of the other member. *See Johnson v. Hui*, 811 F. Supp. 479, 486-87 (N.D. Cal. 1991) (Special litigation committee "was independent[,]" "even if the evidence suggest[ed] that [one member was] tainted to some degree," because the other member's independence was clear.); *Strougo ex rel. The Brazil Fund, Inc. v. Padegs*, 27 F. Supp. 2d 442, 450-51 & n.3 (S.D.N.Y. 1998) (Even if one member of a special litigation committee "did lack some degree of independence," such a "finding would not deprive the SLC as a whole of its independence" because of the other member's unquestionable independence.); *In re Oracle Sec. Litig.*, 852 F. Supp. 1437, 1442 (N.D. Cal. 1994) (Special litigation committee "exhibited independent

judgment," even if one member's "background suggested some alleged interest," because the other member was clearly independent.).

Jacksonville makes no relevant argument to the contrary. It argues that a special litigation committee cannot be independent "if a Majority of its Members is Not." (OB 58.) The argument is irrelevant because it addresses only the usual special litigation committee, the actions of which must be approved by *any* majority, including possibly a majority consisting of only non-independent members. It therefore ignores Lillis's special voting power.

Jacksonville attempts to distinguish the two-person committee cases on the ground that they somehow did not involve "multi-person" special litigation committees. (OB 60.) If Jacksonville means that they involved two-person committees rather than three-person committees, like the SLC, Jacksonville does not even attempt to explain why this matters, and there is no reason that it should. In both cases, the unquestionably independent member did not constitute a majority of the committee. In both cases, the committee could not act without the approval of the unquestionably independent member. Finally, in both the two-person committee cases and this case, the independence of the unquestionably independent member might potentially have been overborne by the other member or members, but there was no evidence that it was. *Oracle*, 852 F. Supp. at 1442 (No evidence that the independent member's "objectivity was affected by [a

potentially-interested member's] participation."); *Hui*, 811 F. Supp. at 486-87. As the District Court found in this case, "Such was not this case here." (Vol. 41 JA010100-01 ¶ 14 n.6 (FFCL).)

Jacksonville also attempts to distinguish these cases on the ground that the courts in the cases made no "findings" that the potentially non-independent members lacked independence. (*See* OB 60-61.) But Jacksonville does not explain why this matters, and it does not. In the cited cases, the courts held that, due to the independence of the independent member, the special litigation committee was independent, *regardless of whether the other member was independent*. *Hui*, 811 F. Supp. at 486-87 (Special litigation committee "was independent" "even if the evidence suggest[ed] that [one member was] tainted to some degree[.]"); *Strougo*, 27 F. Supp. 2d at 450 n.3 (Special litigation committee "as a whole" was independent "[e]ven if [one member] did lack some degree of independence[.]"); *Oracle*, 852 F. Supp. at 1442 (Special litigation committee was independent even "if [one member's] background suggested some alleged interest[.]").

Finally, Jacksonville cites *Booth Family Trust v. Jeffries*, but it is irrelevant. Jacksonville cites it for the proposition that a two-person special litigation committee cannot act if one of its members has recused himself. (OB 59.) Although correct, the proposition is both unremarkable and irrelevant. It is

unremarkable because committees generally cannot act without a majority. The proposition is irrelevant because no member of the SLC recused himself.

On the issue of independence, *Booth Family Trust* stands only for the proposition that (a) by proceeding "with less than its full complement of members[,]" a special litigation committee "runs contrary to the resolutions" that govern the committee and "casts doubt on the legitimacy" of the "committee's conclusions" and (b) as the illegitimacy arose from the potentially non-independent member's recusal for a potential lack of independence, "it seems proper to treat it as an independence issue." *Id.* at 145-46. The case is irrelevant because the SLC always operated with the full complement of its members.

The District Court's conclusion that this SLC was independent based upon the totality of the record does not, as Jacksonville argues derisively, mean that the "Board could have appointed an SLC comprising of Charles Ergen, his wife Cantey Ergen, and Lillis." (OB 61.) The District Court did not pronounce some universal rule, but issued a careful decision on this record that "[t]he evidence of the independence of Messrs. Brokaw and Ortolf coupled with the unusual voting structure of the SLC demonstrates that the SLC is independent." (Vol. 41 JA010101 ¶ 15 (FFCL).) Whether the result might be different if the SLC was comprised of some other directors presents no ground for not affirming on this record.

3. There Also Was No Genuine Issue As to Brokaw's Independence.

There was no genuine issue of material fact as to Brokaw's independence. Jacksonville predicates its contention that Brokaw lacked independence solely upon Brokaw's family's friendship with the Ergens. But, contrary to Jacksonville's assertion, even good friendship does not negate independence under the well-established law. *See, e.g.*, *La. Mun. Police Emps. Ret. Sys. v. Wynn*, No. 14-15695, 2016 WL 3878228, at *7-8 & n.5 (9th Cir. July 18, 2016) (applying Nevada law) (Allegations that a director and a defendant had been friends since childhood were "not enough to plead a lack of independence."); *id.* at *6-7 (Allegations that another director and a defendant had been friends for decades insufficient to doubt independence.); *La. Mun. Police Emps. Ret. Sys. v. Wynn*, 2:12-CV-509 JCM GWF, 2014 WL 994616, at *6 (D. Nev. Mar. 13, 2014), *aff'd*, 2016 WL 3878228 (applying Nevada law) ("Allegations of a lengthy friendship are not enough" to raise doubts about independence.); *In re Amerco Derivative Litig.*, 127 Nev. 196, 231, 252 P.3d 681, 706 (2011) (Pickering, J., concurring in part, dissenting in part) ("[B]usiness, social, and more remote family relationships are not disqualifying, without more."); *Beam v. Stewart*, 845 A.2d 1040, 1051-52 (Del. 2004) (A "characterization that [a director and interested person] are close friends[] is not enough to negate independence[.]"); *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 178-79 (Del. Ch. 2005), *aff'd*, 906 A.2d 114 (Del. 2006)

(Evidence that a director and the interested person were "close friend[s] for 40-45 years" and "met every ten to fourteen days" was "insufficient to raise a reasonable doubt about [the] director's independence.").[16]

There are good reasons for this law: *First*, directors have "motivations such as professional and personal reputation" that serve to "temper the desire to terminate litigation solely to protect friends and associates." Rocky Dallum, *The Oracle that Wasn't: Why Financial Ties Have Remained the Standard for Assessing the Independence of Corporate Directors*, 46 Willamette L. Rev. 99, 133

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[16] *See also Strougo ex rel. Brazil Fund v. Padegs*, 27 F. Supp. 2d 442, 450 (S.D.N.Y. 1998) (That a special litigation committee member and a defendant were "good friends" was "neither inappropriate nor d[id it] suggest that [the committee member] would not faithfully discharge his obligations[.]") (citation omitted); *Zimmerman v. Crothall*, C.A. 6001-VCP, 2012 WL 707238, at *13 (Del. Ch. Mar. 5, 2012), *as revised* (Mar. 27, 2012) (Allegations that a director and an allegedly interested party "were good friends[] [and] that their families socialized" did "not provide a sufficient basis for questioning the independence" of the director.); *Marcoux v. Prim*, No. 04 CVS 920, 2004 WL 830393, at *16 (N.C. Super. Apr. 16, 2004) (Allegations that directors "belong to the same club[,] socialize frequently[,]" and "often vacation together with their families" did not cast doube on independence.); *In re MFW S'holders Litig.*, 67 A.3d 496, 511 (Del. Ch. 2013), *aff'd sub nom. Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014); *Shapiro v. Kennedy*, No. G042017, 2011 WL 3567415, at *10 (Cal. App. Aug. 15, 2011), *as modified* (Sept. 9, 2011); *Khanna v. McMinn*, C.A. No. 20545-NC, 2006 WL 1388744, at *19 (Del. Ch. May 9, 2006); *Freedman v. Redstone*, CV 12-1052-SLR, 2013 WL 3753426, at *6, *8 (D. Del. July 16, 2013), *aff'd*, 753 F.3d 416 (3d Cir. 2014); *In re Bidz.com, Inc. Derivative Litig.*, CV 09-4984 PSG (Ex), 2010 WL 1727703, at *7 (C.D. Cal. Apr. 27, 2010); *Eos Partners SBIC, L.P. v. Levine*, 42 A.D.3d 309, 309-10 (N.Y. App. Div. 2007).

(2009). Such motivations include "personal integrity, honesty, concern about their business reputations, and the threat of liability to shareholders[.]" *See Beam*, 845 A.2d at 1052 & n.32 (citation omitted). *Also*, such friendships are so prevalent among directors that, if they "destroyed a board member's independence, few boards [or special committees] would have any independent members." *McSparran v. Larson*, Nos. 04 C 0041, 04 C 4778, 2007 WL 684123, at *4 (N.D. Ill. Feb. 28, 2007); *see also In re Am. Italian Pasta Co. Sec. Litig.*, No. 05-0725-CV-W-ODS, 2006 WL 1715168, at *9 (W.D. Mo. June 19, 2006).

Contrary to Jacksonville's assertion, the Delaware court in *Delaware County Employees Retirement Fund v. Sanchez*, 124 A.3d 1017 (Del. 2015), did not depart from the well-established authority. (*See* OB 47.) It addresses a different issue and therefore is wholly irrelevant. Although the Delaware Supreme Court reversed an independence determination by the Delaware Court of Chancery, it did *not* criticize the Court of Chancery's determination that good friendship standing alone does not negate independence. The Supreme Court indeed praised the Court of Chancery for following precedent in that regard. *Sanchez*, 124 A.3d at 1021 ("[T]he Court of Chancery diligently grappled with this close question and justified its decision . . . in terms of relevant precedent."). It rather reversed the independence determination on the ground that, in considering independence, the Court of Chancery improperly treated "the facts the plaintiffs pled about [the

director]'s personal friendship with [the interested person] and the facts they pled regarding his business relationships as entirely separate issues." *Id.* The Supreme Court held that the plaintiffs had satisfied Delaware's liberal pleading requirements by pleading both the good friendship and facts giving rise to a reasonably conceivable inference that the director whose independence was at issue "might feel strongly beholden to [the interested person] as the source of his primary job, and that of his brother." *Id.* at 1023 n.25. The case has no application to Brokaw's independence because Brokaw is not employed by Ergen or any entity with which he is involved.

In citing the second case, *Boylan v. Boston Sand & Gravel Co.*, Case No. 022296BLS1, 2009 WL 765404 (Mass. Super. Ct. Jan. 23, 2009), Jacksonville asks this Court to follow the only reported decision of which the SLC is aware in which any court has determined that a director lacked independence based primarily upon a director's good friendship with an interested person. (OB 48.) For multiple reasons, the Court should not follow *Boylan*: *First*, the case is irrelevant to the Court's decision because Nevada law is to the contrary, as shown by the authorities cited above. *Second*, even outside Nevada, the overwhelming weight of authority is to the contrary, as shown by the authorities cited above. *Finally*, the decision is not strong precedent even within Massachusetts, as it was

decided by the Superior Court, not one of the State's two levels of appellate courts.[17]

Jacksonville contends that the godparent relationship between Brokaw's son and Cantey Ergen means that Brokaw has a "family-like" relationship with the Ergens, but that is not so.[18] As the Committee on Codes of Conduct explained in an advisory opinion concerning the Code of Conduct for United States Judges, a godparent relationship may reflect a "relationship [that] is like that of a close relative" or it may simply be "of historical significance," with the godparent "merely within the wide circle of the [parent's] friends." *See* Fed. Advisory Op. 11, 2009 WL 8484525, at *1 (June 2009). As Brokaw's uncontroverted declaration establishes, his relationship with the Ergens was of the latter type. (Vol. 24 JA005820-21 ¶¶ 22, 25, 29 (Brokaw Declaration).) There is no evidence to rebut Brokaw's declaration statement that "Mrs. Ergen falls within my and my

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[17] The case appears to have been wrongly decided for an additional reason: In the case, the court inexplicably held that the rule that good friendships do not negate independence applied only in determining whether a director was "interested" and not to whether a director was "independent." *Boylan*, 2009 WL 765404, at *5-6. The court did not cite any authority for this determination, and the SLC is not aware of any such authority, even in Massachusetts.

[18] Jacksonville's contention that Brokaw did not disclose to the District Court his relationship with the Ergens is nonsense. (OB 23.) The substance of Brokaw's declaration accurately disclosed his relationship with the Ergens. There was no requirement that he describe the specifics of each or even any contact with the Ergens. (*See* Vol. 27 JA006692 at 364:23-365:8 (Brokaw Deposition); Vol. 27 JA006693 at 366:20-367:10 (same); Vol. 24 JA005820-21 (Brokaw Declaration).)

family's wide general social circle." (*Id.* at JA005820 ¶ 23.) Although Jacksonville's other misstatements and overstatements concerning Brokaw's relationship with the Ergens do not matter, they are nonetheless corrected in a separate table attached hereto as Exhibit A.[19]

4. There Also Was No Genuine Issue As to Ortolf's Independence.

There also was no genuine issue of material fact as to Ortolf's independence. Jacksonville predicates its contrary contention solely upon Ortolf's friendship with the Ergens, and as previously explained, friendship, even good friendship, does not negate independence. *See supra* at 47-49. As a significant stockholder of DISH, Ortolf's personal interest was well aligned with DISH and its minority stockholders whom Jacksonville purports to represent.[20] *See supra* at 14 n.1.[21]

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[19] All the evidence cited by Jacksonville is consistent with Brokaw's declaration that, to his "knowledge, Mrs. Ergen has never visited New York specifically to see [his] family" but that "when Mrs. Ergen is in New York, she will sometimes visit our family in the course of her trip" and that such visits occur "about once or twice a year." (Vol. 24 JA005820 ¶ 23 (Brokaw Declaration).)

[20] *See La. Mun. Police Emps. Ret. Sys. v. Wynn*, No. 14-15695, 2016 WL 3878228, at *7 (9th Cir. July 18, 2016) (applying Nevada law) (Director's "interest in the financial health of [the corporation] would incline him to pursue *its* interests rather than subordinate them to [a defendant's] personal interests."); *In re Walt Disney Co. Derivative Litig.*, 731 A.2d 342, 356 (Del. Ch. 1998) (Director was an "economically rational individual whose priority [was] to protect the value of his . . . shares[.]"), *aff'd in part, rev'd in part on other grounds sub nom. Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); *Marcoux,* 2004 WL 830393, at *17 ("That [directors] would sacrifice their own financial interests, their board seats and tens of millions of shareholder dollars so [an interested party] could sell property he did

The cases cited by Jacksonville stand for the irrelevant proposition that close familial[22] and financially-dependent relationships, none of which are present here, may give rise to a lack of independence. *See Harbor Fin. Partners v. Huizenga,* 751 A.2d 879, 887-89 (Del. Ch. 1999) (brother-in-law); *Amerco*, 252 P.3d at 698-99 (nephew); *London v. Tyrrell*, C.A. 3321-CC, 2010 WL 877528, at *13-14 (Del. Ch. Mar. 11, 2010) (wife's cousin); *Grace Bros., Ltd. v. Uniholding Corp.*, C.A.

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not want to sell at greater than fair market value defies all logic and common sense.").

[21] Contrary to Jacksonville's assertion, the SLC did not mislead the Court by not disclosing Ortolf's personal friendship with the Ergens in the SLC's independence disclosure concerning Ortolf. (OB 20-21.) The disclosure was intended to address only professional and financial dealings with the Ergens. It did not purport to address social relationships, which are not relevant to the independence inquiry under Nevada law. (Vol. 6 JA001342 (Oct. 3, 2013 SLC Status Report).) In the testimony cited by Jacksonville, Ortolf merely acknowledged that his declaration did not include every specific example of his friendship with the Ergens that Jacksonville cited in its briefing. (OB 22 (referring to Vol. 27 JA006543 at 97:3-10 (Ortolf Deposition)).)

The District Court, which had all the evidence that Jacksonville cited and was in the best position to know whether any of that evidence had been improperly withheld earlier, found that Jacksonville failed to identify "any genuine issue of material fact with respect to whether the issues that it raises with respect to Brokaw and Ortolf were disclosed." (Vol. 41 JA010101 ¶ 17 n.9 (FFCL).)

[22] That the Ergens' daughter referred to Ortolf as "Uncle Tom" in an email, (OB 21), does not mean that Ortolf and the Ergens are family, or even that they have a relationship as close as that of family. The term "Uncle" is often used for an "unrelated older male friend, especially of a child." Uncle, *Oxford Dictionary of English* (3d ed. 2010); *see also* Uncle, *The American Heritage Dictionary* (2d. Coll. Ed. 1982) ("A form of respectful address to an older man, used esp. by children."). The use of the term does not suggest anything more than a friendship between Ortolf and the Ergens.

No. 17612, 2000 WL 982401, at *10 (Del. Ch. July 12, 2000) (brother-in-law); *CALPERS v. Coulter*, No. Civ. 19191, 2002 WL 31888343, at *9 (Del. Ch. Dec. 18, 2002) (Director lacked independence to investigate a challenged transaction from which he personally benefitted.).

There is no merit to Jacksonville's suggestion that the Bankruptcy Court found Ortolf lacking independence. (OB 48-49.) The Bankruptcy Court did not address Ortolf specifically. To the extent that its dicta addressed Ergen's relationship with the Board generally, it was addressing primarily Ergen's *attitude*. (Vol. 23 JA005522 (Bankruptcy Court Post-Trial FFCL) ("[N]o one crosses or even questions the actions of the Chairman[]" and Ergen exercised his control as controlling stockholder "as he sees fit.").) As Jacksonville cannot reasonably dispute, the Bankruptcy Court did not mean that no member of the Board was independent. Jacksonville agrees that, regardless of the Bankruptcy Court's statement, two other members of the same Board addressed by the Bankruptcy Court, Messrs. Goodbarn and Howard, were independent. (OB 13.) If the Bankruptcy Court's statement did not mean that they lacked independence, it could not mean that Ortolf lacked independence.[23]

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[23] The fact that one of Ortolf's children worked for DISH in a non-management role during the relevant time period and that another had worked for DISH prior to the SLC's investigation has no bearing on Ortolf's independence. *See In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 823 (Del. Ch.

Jacksonville's multiple misstatements and overstatements regarding Ortolf are addressed in the table attached hereto as Exhibit B.

5. The SLC Members Did Not Face a Substantial Risk of Material Liability.

Jacksonville is wrong to contend that the members of the SLC lack independence because they participated in challenged Board decisions. Lillis and Brokaw–thus a majority of the SLC–were not even on the DISH Board at the time of all the challenged decisions, other than the termination of DISH's $2.22 billion bid. Moreover, Nevada law is clear that directors can impartially consider claims asserted against them except in those "rare case[s]" where their actions were "so egregious" that they face a "substantial likelihood" of material liability. *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 640, 137 P.3d 1171, 1184 (2006); *Jacobi v. Ergen*, No. 2:12-CV-2075-JAD-GWF, 2015 WL 1442223, at *4 (D. Nev. Mar. 30, 2015). And there is no evidence that any member faces a substantial likelihood of material liability. Even if the Board decisions could be successfully challenged, no SLC member could be held personally liable unless he engaged in "intentional misconduct, fraud, or a knowing violation of the law." *Shoen*, 122 Nev. at 640, 137 P.3d at 1184; *see also* NRS 78.138(7)(b). And there is no evidence this was the case as to any member of the SLC.

2005), *aff'd*, 906 A.2d 766 (Del. 2006) (Director's independence was unaffected by his son's employment with the corporation in a non-management role.).

B. There Was No Genuine Issue As to the Good Faith, Thoroughness of the SLC's Investigation.

The District Court correctly determined that there was "no genuine issue of material fact as to the thoroughness or good faith of the SLC's extensive investigation." (Vol. 41 JA010104 ¶ 30 (FFCL); OB 65-66.) As the District Court correctly explained, "Although Plaintiff makes numerous assertions concerning supposed deficiencies or bad faith of the SLC's investigation, none of the assertions has merit[.]" (Vol. 41 JA010103 ¶ 25 (FFCL); *see also id.* ¶¶ 26-29.)

Even if there were any merit to one or more of Jacksonville's assertions, there is no requirement that a special litigation committee investigation be perfect. *See Litton Indus., Inc. by Wildflower P'ship v. Hoch*, No. 91-56528, 1993 WL 241549, at *3 (9th Cir. July 2, 1993) ("[T]he directors need not show that they performed a perfect investigation."); *Niesar v. Zantaz, Inc.*, No. A111448, 2007 WL 2330789, at *10 (Cal. App. 1 Dist. Aug. 16, 2007) ("In determining whether there exists a material issue of disputed fact with respect to the adequacy of an investigation, the question is not whether the investigation was perfect or could have been conducted in a different or even more thorough manner.").

1. There Was No Prejudgment.

Contrary to Jacksonville's assertion, the SLC did not act "on behalf of Ergen and the Board" in opposing the preliminary injunction motion. (OB 26.) It acted

in the best interest of DISH and its minority stockholders. The District Court largely agreed with the SLC. *See supra* at 25 n.5. The SLC did not oppose the motion for preliminary injunction "before even investigating the facts[.]" (OB 26.) To the contrary, as the SLC's November 20, 2013 report makes clear, before opposing the motion, the SLC investigated the facts relevant to the motion. (*See generally* Vol. 13 JA003098-3142 (Nov. 20, 2013 SLC Report).)

The SLC did not prejudge any issue by stating that Ergen "no longer has any material personal interest in DISH's decisions that diverges from those of DISH's remaining stockholders." (Vol. 6 JA001347 (Oct. 3, 2013 SLC Status Report); OB 26-27.) As the surrounding text makes clear, the SLC was making the obvious point that, at the *then existing bidding level*, Ergen's Secured Debt would already be paid in full and therefore Ergen would not have a conflict as to any future increases in DISH's bid. (Vol. 6 JA001346-48 (Oct. 3, 2013 SLC Status Report).) Jacksonville's complaint alleged that even a prior, lower $2 billion bid "effectively ensured that Ergen would be made whole on his LightSquared debt holdings." (Vol. 6 JA001347 (Oct. 3, 2013 SLC Status Report) (quoting Vol. 1 JA000067 ¶ 66) (Jacksonville Amended Complaint).)

Nor did the SLC prejudge an issue by stating, "If the transaction is consummated on the basis of its current terms, the transaction will be fair. No party, including the Plaintiff, contends that the current terms are unfair." (Vol. 13

JA003103 (Nov. 20, 2013 SLC Report); OB 27.) Again, there was nothing to prejudge because the matter was *undisputed.* For purposes of the motion for preliminary injunction, Jacksonville was seeking only to prevent any unfairness in the future bidding process.[24]

Nor did counsel for the SLC prejudge any issue in suggesting that the board processes could not have amounted to a breach of fiduciary duty if all agreed that the resulting $2.22 billion was fair. (OB 27 (quoting Vol. 13 JA003244); *id.* at 64 (same).) Counsel was only stating the obvious, and as the bid was later terminated, the processes leading to the bid were not at issue on the subsequently asserted Claims that the SLC investigated. *See supra* at 9, 24-25. Counsel also was only stating the obvious in stating that the Board's termination of the STC would not amount to a claim for breach of fiduciary duty unless and until a conflict arose and the absence of the committee resulted in harm to DISH.[25]

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[24] As the October 3, 2013 status report makes clear, the SLC's statement that "Ergen's Participation Does Not Threaten to Impair DISH's Efforts to Acquire LightSquared" concerned a limited bankruptcy issue relevant only to Jacksonville's request for interim relief. (Vol. 6 JA1348-51 (Oct. 3, 2013 SLC Status Report).)

[25] If the termination of the STC did not produce harm to DISH, and did not warrant injunctive relief, as the District Court found, it could not have amounted to a claim for breach of fiduciary duty. *See Klein v. Freedom Strategic Partners, LLC*, 595 F. Supp. 2d 1152, 1162 (D. Nev. 2009) ("In Nevada, a claim for breach of fiduciary duty has three elements: (1) existence of a fiduciary duty; (2) breach of the duty; and (3) the breach proximately caused the damages."); *Brown v. Kinross*

Of course, the SLC did not prejudge any issue by moving to dismiss the Complaint for failure to plead demand futility adequately. (OB 28 (citing (Vol. 18 JA004351 (SLC's Motion to Dismiss for Failure to Plead Demand Futility)); *id.* at 65.) The well-established law is to the contrary. *See, e.g.*, *Mills v. Esmark, Inc.*, 544 F. Supp. 1275, 1283 n.5 (N.D. Ill. 1982) (The "independence and good faith" of special litigation committee members were "unimpaired by their earlier motions" seeking dismissal for failure to make an adequate demand under Rule 23.1.); *Sarnacki v. Golden*, 4 F. Supp. 3d 317, 324 (D. Mass. 2014).

The cases cited by Jacksonville are irrelevant because they either did not find prejudgment at all[26] or found prejudgment based upon conduct in which the SLC did not engage. *See, e.g.*, *Taneja v. Familymeds Grp., Inc.*, No. HHDCV094045755S, 2012 WL 3934279, at *1-2, *5 (Conn. Sup. Ct. Aug. 21, 2012) (committee delegated investigation to conflicted counsel); *In re Galena Biopharma, Inc. Derivative Litig.*, No. 3:14-CV- 20 382-SI LEAD, 2014 WL 5410831, at *8 (D. Or. Oct. 22, 2014) (before committee member was appointed to committee, he had "reached a conclusion regarding the very issue that he, as the

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Gold U.S.A., Inc., 531 F. Supp. 2d 1234, 1245 (D. Nev. 2008) ("A breach of fiduciary duty claim requires Plaintiffs to show the existence of a fiduciary duty, the breach of that duty, and that the breach proximately caused the damages.").

[26] *See Auerbach*, 393 N.E.2d at 1003; *In re Consumers Power Co. Derivative Litig.*, 132 F.R.D. 455, 478-79 (E.D. Mich. 1990).

sole member of the SLC, [was later] tasked to investigate."); *Biondi v. Scrushy*, 820 A.2d 1148, 1157-58 (Del. Ch. 2003) (before completing the investigation, committee member issued a press-release announcing that the charges lacked merit); *Kaufman v. Comput. Assocs. Int'l, Inc.*, C.A. No. 699-N, 2005 WL 3470589, at *4 n.19 (Del. Ch. Dec. 13, 2005) (before concluding its investigation, a committee moved to dismiss the claims for failure to state a claim); *London v. Tyrell*, 2010 WL 877528, at *16 (Del. Ch. Mar. 11, 2010) (committee members' repeated use of the word "attack" in reference to their treatment of plaintiffs' allegations suggested prejudgment).

2. There Were No Deficiencies in the SLC's Investigation.

Contrary to Jacksonville's assertion, the SLC did not fail to investigate a "core theory of recovery" in the manner in which it addressed the Complaint's allegations concerning the termination of the STC. (OB 67-68; *see also id.* at 32-33.) The SLC investigated the only conceivable theory of recovery, which was as alleged in the Complaint: that the absence of the STC permitted subsequent breaches of fiduciary duty to occur, which produced harm to DISH. (Vol. 20 JA004949-50 (SLC Report).) The SLC concluded that no such subsequent breaches occurred and therefore that DISH was not harmed. (Vol. 20 JA004949-51 (SLC Report).)

Nor is Jacksonville correct to contend that the SLC "took no position" on the "claim that Ergen was unjustly enriched." (OB 34; *see also id.* at 72.) As discussed *supra* at 23-24, the SLC concluded that each of the Complaint's alleged bases for contending that Ergen was unjustly enriched lacked merit. (Vol. 20 JA004925-26, JA004936-37, JA004945-46, JA004948-49 (SLC Report).) The District Court correctly explained, "the SLC addressed Plaintiff's claim for unjust enrichment in connection with the SLC's consideration of Plaintiff's other claims as set forth at pages 301-02, 312-13, 321-22 and 324-25 of the SLC Report." (Vol. 41 JA10104 (FFCL).) As there was no unjust enrichment or other wrong by Ergen, there was no basis for disgorgement of profits.

Contrary to Jacksonville's assertion, the SLC did not "ignore[] the personal profit Ergen made on his LightSquared debt purchases." (OB 33; *see also id.* at 67.) The majority of the SLC's investigation and Report was directed at determining whether DISH could be awarded that profit. The SLC Report sets forth, for each tranche of Secured Debt, the prices at which Ergen acquired it and its face amount. (Vol. 19 JA004722, JA004727, JA004737 (SLC Report at 98, 103, 113).) It was obvious that, if the Secured Debt were repaid in full, Ergen stood to profit by hundreds of millions of dollars.

Finally, Jacksonville merely quibbles with the manner in which the SLC conducted aspects of its investigation. During its interviews, the SLC need not

have confronted Ergen, Kiser or DISH's outside counsel concerning the [redacted]. (OB 31, 69.)[27] Contrary to Jacksonville's assertion, the [redacted] is not inconsistent with the SLC's determination that "[n]o one at DISH investigated whether DISH could purchase the Secured Debt through an affiliate." (Vol. 19 JA004715 (SLC Report).) [redacted]

(*See* Vol 29 JA007170 ([redacted]).)[28]

Nor was the SLC required to interview DISH's outside counsel or the STC's former counsel as to whether "DISH could have bought the LightSquared debt[.]" (OB 69.) There was no need for such interviews because, no matter how many times Jacksonville asserts the contrary, it was a judicially determined fact that

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[27] Jacksonville implies that the *Peller* court rejected a litigation committee's determination based on a failure to "actually press witnesses" and misleadingly quotes *Peller* to suggest that the court found that such interview conduct was "not good faith." (OB 70 (quoting *Peller v. Southern Co.*, 707 F. Supp. 525, 529 (N.D. Ga. 1988)).) Jacksonville ignores, however, that the *Peller* court expressly found "that the investigation undertaken was thorough," and the conduct it criticized as "not good faith" was the committee's effort to prevent the plaintiffs from evaluating the interview conduct under the guise of privilege – not the interview conduct itself. *Peller*, 707 F. Supp. at 529.

[28] The SLC's finding was well-supported by a substantially similar finding by the Bankruptcy Court: "No evidence was submitted demonstrating any exploration of the possibility of DISH . . . purchasing the LP debt through an 'affiliate' . . . ." (Vol. 22 JA005415 (Bankruptcy Court Post-Trial FFCL).)

DISH could not have purchased the Secured Debt.[29] This was clear enough from the Credit Agreement and was later confirmed by the Bankruptcy Court. *See supra* at 19-20.

Contrary to Jacksonville's assertion, there was no requirement that the SLC transcribe its interviews. *See Strougo ex rel. The Brazil Fund, Inc. v. Padegs*, 27 F. Supp. 2d 442, 452 (S.D.N.Y. 1998) ("In the majority of cases in which derivative actions have been terminated by special litigation committees, the interviews were not taken under oath or before a stenographer."); Gregory V. Varallo, Srinivas M. Raju & Michael D. Allen, *Special Committees: Law and Practice* 137-38 (2011) ("[I]t is rarely a good idea to record interviews . . . or conduct them before a court reporter. Doing so tends to hinder a free flow of information."). Jacksonville's argument that the SLC should have manufactured such evidence while DISH was defending a host of third-party litigations on similar subjects demonstrates that Jacksonville acts here for selfish interests, not DISH's interests.

The case cited by Jacksonville, *Weiser v. Grace*, 683 N.Y.S2d 781, 786 (N.Y. Sup. Ct. 1998), is not to the contrary. (OB 70.) It stands only for the

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[29] Also, the SLC reviewed email correspondence from the STC's former counsel, Cadwalader, Wickersham & Taft LLP, showing that they agreed with the conclusion that DISH could not have purchased the Secured Debt. (Vol. 20 JA004774 (SLC Report) (quoting Vol. II AA0244 (May 28, 2013 Email from R. Hopkinson).)

proposition that, if special litigation committee members are not present for the interviews and the "only written record of the interviews are counsel's notes, outlines and summaries[,]" such materials might be discoverable despite a claim of work production protection. *Id.* at 786. Here, in almost all cases, all members of the SLC were present for the interviews and summaries of all of the interviews were produced to Jacksonville. (*See, e.g.*, Vol. 39 JA009561 (Clayton Summary), JA009576 (DeFranco Summary), JA009589 (Cullen Summary), JA009612 (Sorond Summary).).

3. There Was No Misrepresentation or Concealment.

The SLC has already addressed the incorrect assertion that the SLC somehow misled the District Court in its disclosures concerning the independence of Brokaw and Ortolf. (OB 73-74.) *See supra* at 51 n.18, 52-53 n.21.

Contrary to Jacksonville's assertion, the SLC did not "conceal[]" that the Credit Agreement "could have allowed any affiliate of an 'Excluded Party' to buy the debt[.]" (OB 74.) The SLC expressly stated, in its Report, that at least under the express terms of the Credit Agreement, an affiliate that was not a subsidiary of DISH could have purchased the Secured Debt.[30] (Vol. 19 JA004636 (SLC Report

[30] As explained previously, whether an affiliate of DISH could purchase the Secured Debt without breaching the Credit Agreement's implied covenant of good faith and fair dealing was another matter entirely. *See supra* at 20, 22.

at 12), Vol. 20 JA004917, JA004922 (SLC Report).) As the point was disclosed, it hardly matters that the SLC did not cite, in its Report, the [redacted] to the same effect. To the extent that there might have been significance to the fact that Kiser was consulting with Miller, that too was disclosed. (Vol. 19 JA004718 (SLC Report) ("Kiser asked DISH's outside counsel whether Ergen could invest in the LightSquared Secured Debt.").) As explained to the District Court, the SLC did not refer expressly to the email exchange in its Report only because, at the time, no agreement had been reached to preserve privileges. (*See* Vol. 39 JA009531 (Supp. Reply In Support of Motion to Defer).) After such an agreement was reached, the email was produced. (*See* Vol. I AA0444-49 (Mar. 30, 2013 Stipulation and Protective Order).)

Nor was there anything misleading about the SLC's conclusion that DISH would not have been interested in investing in the Secured Debt through a non-controlled affiliate. (OB 32.) For the alternative proposition, Jacksonville cites a transaction that was completely different from an investment in Secured Debt and that was not undertaken until months after the SLC's Report was submitted.

Contrary to Jacksonville's assertion, the SLC did not "conceal" from the District Court that DISH's bid "was conditioned on Ergen getting paid in full on his LightSquared debt." (OB 74; *see also id.* at 16.) In its Report, the SLC fully disclosed that, if the bid were accepted and the release remained in its then-existing

form (i.e., there were no further negotiations of the scope of the release), the Adversary Claims would be released. (Vol. 20 JA004835-40 (SLC Report).) As the SLC also indicated, under the then existing bankruptcy plan, this would mean that Ergen's Secured Debt would be paid in full. (*Id.*)

The SLC did not inform the District Court that the Board "gave Ergen discretion to use DISH's bid for LightSquared's assets to protect his personal interests . . . ." because it would not have been true. (OB 75.) For the multiple reasons detailed previously, *see supra* at 7, the Board authorized management to terminate the bid if certain concessions could not be obtained from LightSquared. When they could not be obtained, management carried out the Board's intent and terminated the bid.

III. The Other Assertions of Error by Jacksonville Have No Merit.

A. The District Court Did Not Err by Presuming That the SLC Was Independent and Placing the Burden on Jacksonville.

There is no merit to Jacksonville's contention that the District Court erred by presuming that the SLC was independent and placing the burden on Jacksonville to rebut this presumption. (OB 43-45.) As detailed below, the District Court did neither. Nevertheless, Nevada law is clear that the SLC members are presumed independent. NRS 78.138(3) provides that "[d]irectors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis

and with a view to the interests of the corporation." The statute does not carve out any exception for decisions made by directors in their capacities as members of a special litigation committee. It therefore would have been proper for the District Court to presume the independence of the SLC and to place the burden on Jacksonville.

As the District Court made perfectly clear, however, it did not apply any such presumption; rather, it *was persuaded* that the SLC was independent based upon the evidence. The District Court explained:

> *[A]fter considering the evidence* concerning the independence of Messrs. Brokaw and Ortolf, together with the evidence concerning the independence of Mr. Lillis and his voting power, the Court is *persuaded* that the SLC as a whole was independent and acted independently.

(Vol. 41 JA10101 ¶ 16 (emphasis added).)

Nor did the District Court cite the "demand futility" cases as support for any presumption, as Jacksonville contends. (OB 39 n.8, 44.) It cited them only for the "substantive test for special litigation committee independence" because most cases concerning the test arise in the "demand futility" context and, as the District Court expressly stated, the substantive test for special litigation committee independence "is no different from the substantive test for director independence generally." (Vol. 41 JA010099 n.5 (FFCL).) *See supra* at 42 n.14. Even Jacksonville cites "demand futility" cases for the substantive test for special

litigation committee independence. (OB 46.) In doing so, *Jacksonville* surely does not mean to suggest that the SLC should be presumed independent.

Jacksonville's citation to remarks of the District Court at oral argument is irrelevant. (OB 43-45 (citing Vol. 41 JA010069).) They are hardly different from the District Court's final Decision. Although at the oral argument, the District Court referred to its determination as to the SLC's independence as a "presumption," it made clear that it reached the determination "given all the evidence it has been presented." (Vol. 41 JA010069 at 21:13-18 (Motion to Defer Hearing).) In all events, to the extent that the remarks at oral argument differ from the Court's final Decision, the final Decision governs. As this Court has held, a "[c]ourt's oral pronouncement from the bench, the clerk's minute order, and even an unfiled written order are ineffective for any purpose." *Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987).

Finally, the District Court did not place the burden on Jacksonville. It rather concluded that the SLC was independent, while assuming that the burden was on the SLC:

> The Court need not address this issue because it concludes that the SLC was independent and conducted a good faith, thorough investigation and that the motion should be granted, *irrespective of which party bears the burden.*

(Vol. 41 JA010099 n.4 (FFCL) (emphasis added).)

B. The District Court Did Not Apply the Wrong Standard of Review.

There also is no merit to Jacksonville's contention that the District Court erred by applying the wrong standard of review. Jacksonville contends that the District Court "failed to recognize" that Jacksonville "had only to present evidence that a reasonable trier of fact could rely on to conclude that the SLC was not independent." (OB 46.) As explained above, under Nevada law, the District Court was required to determine not just whether there was a genuine issue, but whether the SLC actually was independent and actually conducted a good faith, thorough investigation, which the District Court determined. *See supra* at 29, 33-39. Nonetheless, the District Court also applied the summary-judgment-like standard advocated by Jacksonville and found that Jacksonville failed to meet it: "The Court thus concludes that there is no genuine issue of material fact with respect to whether the SLC's business judgment is independent as a matter of Nevada law." (Vol. 41 JA010101 ¶ 18 (FFCL); *see also id.* at JA010101 ¶ 17 ("Plaintiff's assertions, which follow expansive discovery into the SLC's independence, do not raise any genuine issue of material fact with respect to whether the SLC as a whole acted independently."); *id.* at JA010100 ¶ 13; *id.* at JA010102 ¶ 21; *id.* at JA010102 ¶ 22.)

C. The District Court Did Not Hold That Financial Independence Is the Sole Criteria for Determining Independence.

According to Jacksonville, "[t]he District Court concluded that the *sole criteria* for determining independence was the SLC members' financial independence." (OB 55 (emphasis added).) This is not correct. In the statement to which Jacksonville points, the District Court stated only that "[b]eholdenness is *generally* shown through financial dependence." (Vol. 41 JA010099 ¶ 10 (FFCL) (emphasis added).) As it expressly used the term "generally," the statement cannot possibly be construed as ruling out other means of demonstrating a lack of independence, such as by the family relationships and non-financial beholdenness provided by Jacksonville as examples. (OB 56.) Jacksonville does not contend that either example is relevant to this case, and it was hardly error for the District Court not to have expressly mentioned them.

IV. The District Court Did Not Abuse Its Discretion in Awarding Costs.

There is no merit to Jacksonville's appeal from the District Court's Order Granting in Part and Denying in Part Plaintiff's Motion to Retax ("Cost Order") (Vol. 43 JA010712-15). (*See* OB 75-80.) As the prevailing party, the SLC is presumptively entitled to recover all of its statutorily authorized, reasonably and necessarily incurred costs. *See* NRS 18.020; *see also* NRS 18.005.

A. The SLC's Electronic Discovery Costs Are Taxable.

Contrary to Jacksonville's contention, the District Court did not abuse its discretion in awarding the SLC the $151,178.32 in costs it incurred in utilizing electronic discovery vendors. Jacksonville's contention that these costs are not expressly included within the categories of recoverable costs enumerated in NRS 18.005 (OB 76-77) ignores NRS 18.005(17), which unambiguously grants the District Court discretion to award "[a]ny other reasonable and necessary expense incurred in connection with the action . . . ." Jacksonville's unduly restrictive analysis would render the residual subsection of the statute superfluous and nullify the District Court's discretion in awarding a cost that was reasonably and necessarily incurred.

Here, the record clearly supports the District Court's findings that the electronic discovery costs were both reasonable and necessary and therefore, recoverable under NRS 18.005(17). The SLC incurred substantial electronic discovery costs in searching, collecting and hosting the documents of the SLC members (including web-based email accounts) in order to identify, review and produce documents responsive to Jacksonville's expansive discovery requests.[31]

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[31] To be clear, the award of electronic discovery costs was limited to those costs incurred by the SLC to respond to the NRCP 56(f) discovery requests that Jacksonville first made during the hearing on the SLC's Motion to Defer on January 12, 2015. (*See* Vol. I AA0428-30 (Affidavit of B. Boschee Making Discovery Requests); Vol. 43 JA010622:12-15 (E. Burton, Esq. Declaration).)

(*See* Vol. 41 JA010197:13-198:14 (SLC Memorandum of Costs); *see also* Vol. 43 JA010528-68 (Electronic Discovery Invoices); Vol. 43 JA010621:7-622:15 (E. Burton, Esq. Declaration).) Jacksonville's document production demands, which were made pursuant to NRCP 56(f) in response to the SLC's Motion to Defer, necessitated collecting documents from thirteen custodians, dating back to 2008, that were stored on DISH's servers, other company servers, and web-based email and other storage locations, resulting in the production of more than 60,000 pages of documents. (*See, e.g.*, Vol. 43 JA010530, JA010539 (Electronic Discovery Invoices).) The SLC could not have responded to Jacksonville's broad electronic discovery demands without employing the assistance of electronic discovery vendors. (*See* Vol. 43 JA010621:16-19, JA010622:12-15 (E. Burton, Esq. Declaration).) As a result, the District Court found that the electronic discovery costs "*in this case* were a reasonable and necessary expense incurred in connection with the action as a method by which to acquire and process the information that was required to be produced in response to the Plaintiff's NRCP 56(f) discovery requests . . . ." (Vol. 43 JA010722:11-15 (Cost Order) (emphasis added).)

Thus the costs awarded were incurred solely because of Jacksonville's broad NRCP 56(f) discovery requests. (*See* Vol. 43 JA010622:12-15 (E. Burton, Esq. Declaration).) The SLC did not request, and the Cost Order *did not include*, any of the electronic discovery costs that the SLC incurred in connection with its investigation of Jacksonville's Claims. (Vol. 43 JA010713 ¶ 1 (Cost Order).)

Jacksonville further argues that the District Court's award of electronic discovery costs was an abuse of discretion because "doing so was tantamount to taxing part of the SLC's legal fees to Appellant." (OB 78.) Jacksonville cites *Bergmann v. Boyce*, 109 Nev. 670, 856 P.2d 560 (1993), for the proposition that "taxation of electronic discovery costs violate[s] the well-established rule against treating counsel's fees as a form of recoverable costs." (OB 78.) However, in *Bergmann*, this Court addressed word processing and document preparation costs (as opposed to electronic discovery costs) and noted that courts *will* award such costs where, as here, they are "not routine office overhead." 109 Nev. at 681, 856 P.2d at 567 (citing *Hasbrouck v. Texaco, Inc.*, 631 F. Supp. 258, 268 (E.D. Wash. 1986)). *Bergmann* ultimately rejected an award for document preparation costs because the party seeking costs failed to show that the costs were not routine office overhead; the party "ha[d] not presented any circumstances indicating that his counsel was required to hire additional workers, or indicating that counsel's current staff was required to perform extraordinary services." *Id.* The Court did not reject document preparation costs on the basis that they were not statutorily allowed.

In contrast to the facts in *Bergmann* and as demonstrated by the uncontroverted Declaration of Emily V. Burton, the electronic discovery costs incurred by and awarded to the SLC here were not mere overhead. (Vol. 43

JA010621:7-622:15 (E. Burton, Esq. Declaration).) The SLC's Memorandum of Costs did not seek any costs for work performed by counsel in connection with the collection, processing, hosting, storage and production of the SLC members' electronically stored information. (*See* Vol. 41 JA010197:13-198:14 (Memorandum of Costs); *see also* Vol. 43 JA010528-68 (Electronic Discovery Invoices).) The SLC's counsel reasonably and necessarily engaged the services of electronic discovery vendors to assist in the search for and production of documents responsive to Jacksonville's NRCP 56(f) discovery requests. (*See* Vol. 43 JA010621:7-622:15 (E. Burton, Esq. Declaration).)

Although this Court has not specifically addressed the recoverability of electronic discovery costs under NRS 18.005, many federal courts have considered the issue and have permitted the recovery of electronic discovery costs.[32] As these cases recognize, such electronic discovery costs are necessarily incurred as part of fulfilling the parties' discovery obligations under the rules in complex cases, such as this.

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[32] *See, e.g., In re Aspartame Antitrust Litig.*, 817 F. Supp. 2d 608, 614-15 (E.D. Pa. 2011); *Tibble v. Edison Int'l*, No. CV 07–5359 SVW AGRX, 2011 WL 3759927, at *6-8 (C.D. Cal. Aug. 22, 2011) (concluding "Defendants' [electronic discovery] costs are reasonable"); *Parrish v. Manatt, Phelps & Phillips, LLP*, No. C 10–03200 WHA, 2011 WL 1362112, at *2-3 (N.D. Cal. Apr. 11, 2011); *CBT Flint Partners, LLC v. Return Path, Inc.*, 676 F. Supp. 2d 1376, 1381 (N.D. Ga. 2009), *vacated on other grounds*, 654 F.3d 1353, 1355 (Fed. Cir. 2011).

Because the costs incurred to comply with Jacksonville's discovery requests were reasonable and necessary and did not constitute routine office overhead, the District Court did not abuse its discretion in awarding said costs.

B. The District Court Did Not Abuse Its Discretion in Awarding the SLC Its Photocopying and Scanning Costs and Teleconference Costs.

Also contrary to Jacksonville's contention, the District Court did not abuse its discretion in determining that the $18,820.08 in photocopying and scanning costs and $708.02 in teleconference costs incurred by the SLC were reasonable and necessary under NRS 18.005(12) and (13). Jacksonville contends that the SLC's proffer was somehow insufficient. (*Compare* OB 78-80, *with* Vol. 41 JA010190:22-191:15, JA010191:16-26 (Memorandum of Costs); *see also* Vol. 42 JA010287-371 (Photocopying & Scanning Charges), JA010372-91 (Teleconference Invoices); Vol. 43 JA010622:15-623:11 (E. Burton, Esq. Declaration).)

The District Court correctly found that the costs for photocopies were "better documented than those discussed in *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. Adv. Op. 15, 345 P.3d 1049 (2015)." (Vol. 43 JA010722:20-22 (Cost Order).) It also explained that, "given the use of electronically stored information" in this case, the photocopying costs were "much less than one would have anticipated in a case like this." (Vol. 43 JA010685:11-15 (Motion to Retax

Hearing).) Similarly, the District Court found that "[t]he costs related to long distance telephone calls were adequately supported and are reasonable and necessary . . . ." (Vol. 43 JA010722:28-723:1 (Cost Order).)

Jacksonville almost completely ignores the Declaration of Emily V. Burton, which further supports the reasonableness, necessity and purpose of the aforementioned costs.[33] (*See* Vol. 43 JA010622:15-623:11.) Ms. Burton declared that every time counsel for the SLC prints a document that is five pages or longer or photocopies a document for the purpose of facilitating legal services to the SLC, counsel must affirmatively charge the printing or photocopying job to the SLC by entering a billing number associated with the SLC into counsel's computer system before the system will allow the job to proceed. (*See* Vol. 43 JA010622:24-623:6.) Ms. Burton further declared that the costs identified in the Memorandum of Costs served three main purposes: (1) to facilitate the SLC's briefing on its Motion to Defer and related filings, (2) to facilitate deposition preparation for the SLC members, and (3) to facilitate preparation for both hearings on the SLC's Motion

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[33] Jacksonville argues that the District Court erred by considering Ms. Burton's Declaration because it was not submitted at the time of the filing of the Memorandum of Costs. (*See* OB 78-79.) The District Court, however, may properly consider matters submitted in response to a motion to retax costs. *See Gibellini v. Klindt*, 110 Nev. 1201, 1203, 1205-09, 1205885 P.2d 540, 541-45 (1994) (Although this Court reversed portions of the district court's cost award, it did not disallow any costs on the basis that additional support for costs sought was provided in response to a motion to retax.).

to Defer. (*See* Vol. 43 JA010622:17-21.) The District Court did not abuse its discretion.[34]

CONCLUSION

For the foregoing reasons, the SLC respectfully requests that this Court affirm the District Court's Decision and Cost Order.

DATED this 28th day of July, 2016.

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[34] Jacksonville's reliance on *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 971 P.2d 383 (1998), to overturn the costs awarded to the SLC for long distance telephone calls is also misplaced. (OB 79.) In *Berosini*, the party seeking costs "failed to provide *any* itemization with respect to its request for long distance telephone costs." 114 Nev. at 1353, 971 P.2d at 386 (emphasis added). Here, the SLC provided itemized invoices for each teleconference. (Vol. 42 JA010372-391 (Teleconference Invoices).)

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 14.0.7153.5000 in Times New Roman 14 point font double spaced.

Because this brief exceeds the page and word limitations for answering briefs set forth in NRAP 32(a)(7)(A), I certify that the SLC has complied with the requirements of NRAP 32(a)(7)(D), addressing permission to exceed the page limit or type-volume limitation, by filing a *Motion for Leave to Exceed the Page and Type-Volume Limitations in the Answering Brief* on June 13, 2016 before this Court. The motion is accompanied by a declaration stating in detail the reasons for the additional pages and words and certifying, pursuant to NRAP 32(a)(7)(C), that the brief shall consist of no more than 21,000 words or 45 pages. I hereby certify that this brief consists of 20,225 words and 78 pages, which exceeds the type-volume and page limitation.

Finally, I hereby certify that I have read this answering brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies will applicable Nevada Rules of Appellant Procedure, in particular NRAP 28(e)(1), which requires every

assertion in this brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 28th day of July, 2016

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 28th day of July, 2016, a true and correct copy of **RESPONDENT SPECIAL LITIGATION COMMITTEE OF DISH NETWORK CORPORATION'S ANSWERING BRIEF** was electronically filed with the Nevada Supreme Court by using the Nevada Supreme Court's E-filing system.

I further certify that all participants in this case are registered with the Supreme Court of Nevada's E-filing system, and that service has been accomplished to the following individuals through the Court's E-filing System:

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EXHIBIT A

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JACKSONVILLE'S MISCHARACTERIZATIONS OF THE EVIDENCE CONCERNING BROKAW'S INDEPENDENCE

JACKSONVILLE'S DEPICTION OF THE EVIDENCE	CITATION	THE EVIDENCE
"Brokaw admitted that he and his wife are close to the Ergens." (OB 23.)	Vol. 27 JA006689 at 350:16-351:2, 351:9-10.	Brokaw did not testify that he and his wife Alison are "close to the Ergens." He acknowledged that his wife's family historically had a friendship with Cantey Ergen, (Vol. 27 JA006688 at 347:20-348:13 (Brokaw Deposition)), but his uncontroverted statement about his own family's relationship with the Ergens was that his "relationship with Mr. Ergen is almost entirely focused on business" and that Cantey Ergen "falls within [the Brokaw] family's wide general social circle." (Vol. 24 JA005820 at ¶ 23 (Brokaw Declaration).)
The "Brokaws routinely express their love for the Ergens and their children, and *vice versa*." (OB 22.)	Vol. 30 JA007448-55; Vol. 27 JA006689 at 350:16-17, 350:19-351:2.	None of the evidence suggests that Brokaw or Ergen have ever expressed love for each other or each other's families. (*See* Vol. 27 JA 006692 at 363:5-9 (Brokaw Deposition) ("I did not say I love these people.").). The evidence cited by Jacksonville consists of a few emails to Mrs. Brokaw in which Cantey Ergen signed off with phrases like "love you guys" and "xxoo" and an email to Cantey in which Mrs. Brokaw closed with, "Love to Chase and Luna." (Vol. 30 JA007448-55.)

"Cantey Ergen visits her godson as often as possible, doting on him with loving, familial photographs, giving thoughtful and hard-to-find gifts, and expressing genuine concern about grades on her godson's report card." (OB 23.)	Vol. 30 JA007448-49, JA007470, JA007480-85, JA007493-98, JA007455.	The cited evidence does not suggest that Cantey Ergen visits her godson "as often as possible." *See infra* Answering Brief at 52 n.19. The Brokaws (primarily Mrs. Brokaw) have sporadically sent Cantey Ergen and others photos of the Brokaw's children. (Vol. 30 JA007448-49, JA007470, JA007480-82, JA007493-98.) In 2011, Cantey sent the Brokaws "a book on Santa Mouse" of which she had multiple copies. (Vol. 30 JA007455.) In 2014, Brokaw sent his son's first school report card to Cantey Ergen and others; Cantey did not thereafter express "genuine concern" about the report. (Vol. 30 JA007483-85.)
The "Brokaw and Ergen families regularly stay at each other's homes[.]" (OB 52.)	Vol. 26 JA006475; Vol. 30 JA007468.	The Brokaws and Ergens do not "regularly" stay at each other's homes. Jacksonville cites a single 2013 email in which Cantey Ergen indicates that she will be visiting the New York area with a child and grandchild and asks if they can sleep at the Brokaws on an air mattress or couch. (Vol. 30 JA007468.) Brokaw explained the "parsimoniousness" of the Ergens and that it is "famous and . . . well understood[.]" (Vol. 27 JA006690 at 355:16-356:4 (Brokaw Deposition).).

"The Brokaws and Ergens plan 'family dinners,' celebrate birthdays together, and actively seek out time together." (OB 22.) The "Brokaws have the Ergens to their vacation home in the Hamptons, and the Ergens go out of their way to see the Brokaws, even on one-day trips from Denver to the New York area." (OB 22.) "The Ergens' children visit the Brokaws without their parents, and sleep at the Brokaws' home when they are in New York." (OB 23.)	Vol. 30 JA007451-53, JA007455-57, JA007457-63, JA007466-70, JA007478.	Jacksonville's "evidence" suggests only that the Brokaws (primarily Mrs. Brokaw) and the Ergens (primarily Cantey) get together socially once or twice a year, usually for dinner. Brokaw explained that while Cantey will "sometimes visit [the Brokaw] family in the course of [a] trip" to New York, she has "never visited New York specifically to see" the Brokaws. (Vol. 24 JA005820 at ¶ 23 (Brokaw Declaration).) He stated that such visits occur "about once or twice a year" and that "[d]ue to his schedule, Mr. Ergen is rarely involved in these visits." (*Id.*) The evidence cited by Jacksonville confirms Brokaw's statements. In 2010, Mrs. Brokaw invited Cantey Ergen to the Brokaws' vacation home in the Hamptons when Cantey was visiting New York, alone, for other purposes. (Vol. 30 JA007451-53.) In September 2011, Cantey asked Mrs. Brokaw if she would be joining her husband on a trip to Vail and invited the Brokaws to dinner the next time the Ergens would be in the New York area. (Vol. 30 JA007465-66) In December 2011, the Ergens' daughter emailed Mrs. Brokaw that she was going to be in the Brokaws' area and hoped to stop by and "see you guys[.]" (Vol. 30 JA007478.) In January 2012, Alison Brokaw invited the Ergens' son to "family dinner" when he was in the area. (Vol. 30 JA007456-58.) Brokaw explained that "family dinner" was a "tradition of every week having dinner where I actually show up" and "neighbors, friends, anyone that is in town . . . are invited to what we colloquially term 'family dinner.'" (Vol. 27 JA006688-89 at 348:20-350:9.) Later in 2012, Cantey and Alison made arrangements to meet together when Cantey would be in New York for other reasons, and in early 2013, Cantey noted that her daughter would be in the New York area and would try to "be in touch[.]" (Vol. 30 JA007462-63, JA007455.) In May 2014, the Ergens were in the New York area and Cantey invited the Brokaws and others to dinner to celebrate their daughter's 24th birthday. (Vol. 30 JA007459-61.) In October 2014, Cantey invited the Brokaws to meet for dinner when the Ergens would next be in the area. (Vol. 30 JA007469-70.)

EXHIBIT B

EXHIBIT B

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JACKSONVILLE'S MISCHARACTERIZATIONS OF THE EVIDENCE CONCERNING ORTOLF'S INDEPENDENCE

JACKSONVILLE'S DEPICTION OF THE EVIDENCE	CITATION	THE EVIDENCE
"Over several decades, Ortolf and Ergen worked and invested together." (OB 21.)	Vol. 19 JA004532	Ortolf's only business history with Ergen, other than as a director of DISH and EchoStar, has been (1) working with Ergen at Frito-Lay in 1977, (2) employment as an officer of EchoSphere, a predecessor of DISH, from 1988 until 1991; and (3) participation as a minority member and employee of Titan Satellite Systems Corp., a partnership between Ortolf, Titan Corp. and EchoSphere, from 1991-1992, resulting in a material financial loss. (*See* Vol. 24 JA005828-30 at ¶¶ 4, 6, 10, 18 (Ortolf Declaration); Vol. 27 JA006535 at 62:22-63:4 (Ortolf Deposition).)
"Ortolf testified about numerous vacations over the years that the Ortolfs and Ergens have taken together as part of a small 'favorite group of friends,' including to Switzerland, Peru, Taiwan, Japan, Nepal, Spain, Italy and France." (OB 21.)	Vol. 27 JA006536 at 66:15-24; JA006538 at 74:22-75:5; Vol. 30 JA007344-55	Ortolf is part of a group of nearly twenty individuals, including the Ergens, that gets together approximately once a year for a hiking trip. (*See* Vol. 27 JA006536 at 66:13-24 (Ortolf Deposition); Vol. 30 JA007344-55.) Another member of the group, Doug Lindauer, once described it as his "favorite group of friends." (Vol. 30 JA007344.)

"Four of the 17 people invited to Ortolf's son's bachelor party were Ergen family members. (OB 21.)	Vol. 27 JA006540 at 84:5-19, Vol. 30 JA007359-61	None of the Ergens actually showed up to the party. (Vol. 27 JA006542 at 90:14-25 (Ortolf Deposition).)
"[F]or nearly 40 years, Ortolf and his family shared a deep and loving personal friendship with the entire Ergen family." (OB 21.)	Vol. 26 JA006473-74, JA006499-500	There is no evidence to suggest that the relationship between Ortolf and the Ergen family is more than a friendship. This was demonstrated when Ortolf was told by Cantey Ergen that he could not attend the funeral for Charlie Ergen's mother because it was limited to "family." (Vol. 39 JA009559.)
"Ortolf testified that he personally told Ergen, Ergen's wife, and Ergen's kids that he loves them, and the Ergens return the sentiment." (OB 21.)	Vol. 27 JA006538 at 75:24-76:11; JA006539 at 79:5-12, 80:5-12; JA006543 at 96:21-23	There is no evidence that Ergen has expressed love for Ortolf or his family. There also is no evidence that Ortolf regularly expresses love for Charlie Ergen. In 2011, when told Ergen had gotten him tickets to the Super Bowl, Ortolf enthusiastically responded "I love you man!!" (Vol. 30 JA007357; Vol. 27 JA006538 at 75:24-76:11 (Ortolf Deposition).). The other expressions of affinity cited by Jacksonville similarly demonstrate nothing more than friendship between Ortolf and the Ergens. In 2010, Katie Ergen closed an email to her family, on which Ortolf and others were copied, with the phrase "lots of love from [C]ambodia," and Ortolf signed off his response with "Love you guys." (Vol. 28 JA006758; Vol. 27 JA006539 at 79:5-12, 80:5-12 (Ortolf Deposition).) In a 2014 email to Cantey Ergen thanking her for offering support to his wife during a difficult time, Ortolf closed with "Love you." (Vol. 28 JA006756; Vol. 27 JA006543 at 96:21-23 (Ortolf Deposition).)