IN THE SUPREME COURT OF THE STATE OF NEVADA

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

FILED

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DEPUTY CLERK

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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.

Appellant Jacksonville Police and Fire Pension Fund is a single-employer contributing defined benefit pension plan covering all full-time police officers and firefighters of the Consolidated City of Jacksonville, Florida. Appellant is structured as an independent agency of the City of Jacksonville, and is administered by a five-member board of trustees. Appellant has no parent corporation and no stock, and therefore no publicly held company owns 10% or more of Appellant's stock.

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RESPECTFULLY SUBMITTED this 26th day of May, 2016.

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I. JURISDICTIONAL STATEMENT

The Court has jurisdiction over this consolidated appeal pursuant to Rules 3A(b)(1) and (b)(8) of the Nevada Rules of Appellate Procedure because the District Court entered a final judgment in this action, and entered a special order after final judgment.

This consolidated appeal is timely. The District Court issued its written judgment on September 18, 2015 and Appellant was served with written notice of entry of judgment on October 2, 2015. Appellant filed its Notice of Appeal in Case No. 69012 on October 12, 2015.

The District Court issued its special order on January 8, 2016 and Appellant was served with written notice of the special order on January 12, 2016. Appellant filed its Notice of Appeal in Case No. 69729 on February 2, 2016.

II. ROUTING STATEMENT

Pursuant to Rule 17(a)(10) of the Nevada Rules of Appellate Procedure, this matter is presumptively retained by the Nevada Supreme Court because this matter originated in business court.

III. STATEMENT OF ISSUES

1. Did the District Court err in providing the Special Litigation Committee ("SLC") with a presumption that it was independent and conducted a good faith and thorough investigation?

2. Did the District Court err in failing to properly apply the governing legal standards used in determining whether an SLC is independent and conducted a good faith and through investigation?

3. Did the District Court err in improperly disregarding evidence relevant to the questions before the District Court concerning the SLC's independence and the thoroughness and good faith of its investigation?

4. Did the District Court err in holding that electronic discovery costs are taxable under NRS 18.005, since the statute does not list such costs as properly taxable and controlling precedent states that NRS 18.005 is to be strictly construed?

5. Did the District Court err in finding that the SLC's submitted support for expenses in its Memorandum of Costs, including over $150,000 in electronic discovery costs, established that the SLC's costs were reasonable and necessary?

IV. STATEMENT OF THE CASE

Appellant filed a derivative suit challenging certain conduct of Charlie Ergen, the Chairman and Chief Executive Officer of DISH Network, Inc. ("DISH" or the "Company"). In response, DISH's Board of Directors (the "Board") created the SLC to investigate the derivative claims. After concluding that it was not in DISH's best interest to pursue the derivative claims, the SLC filed a motion in the District Court to defer to the SLC's decision to not pursue the claims and to

dismiss the Complaint. The District Court granted the SLC's motion and dismissed the Complaint. The District Court also awarded costs in favor of the SLC and against Appellant, including over $150,000 in electronic discovery costs.

V. SUMMARY OF FACTS

As explained in the legal argument, the District Court was operating under a summary judgment standard in making its decision to defer to the SLC's conclusion. As such, the case is fact-specific and Appellant offers this summary of facts to provide a short explanation of the more detailed facts that follow.[1]

Beginning in 2012, Ergen, the Chairman, Chief Executive Officer, and controlling shareholder of DISH, a satellite television service provider, abused his power to usurp a significant DISH corporate opportunity to acquire the debt of a satellite spectrum firm called LightSquared Inc. ("LightSquared"). Notably, Ergen admitted in U.S. federal court that (1) he had a fiduciary duty to DISH and (2) should have given DISH the option to make the investment. Regardless, Ergen chose to personally purchase the LightSquared debt and to conceal his actions from the DISH Board until after his buying spree ended. And in his effort to protect himself from a personal lawsuit arising from how he concealed the debt purchases

[1] All facts in the summary are set forth in full in the statement of facts with record cites to support each such statement. *See* NRAP 28(e). Because this summary is intended only as an aid to this Court to better understand the following statement of facts – and not as actual support for the legal argument – no record cites are included in this summary.

from LightSquared, Ergen also cost DISH the chance to buy LightSquared's valuable spectrum assets at a fraction of their market value.

When Ergen finally disclosed his purchases to the Board, he pressured DISH to bid $2 billion to acquire LightSquared's spectrum out of bankruptcy, thus assuring repayment of LightSquared's debt at par value and generating a personal profit of $800 million.

The Board formed a "Special Transaction Committee" (the "STC") consisting of the only two independent directors on the DISH Board to assess whether DISH should follow Ergen's bidding recommendation. The STC conditioned its support of DISH's bid on the STC: (1) continuing to investigate whether DISH had viable claims to some or all of Ergen's investment profits, and (2) remaining involved in the bidding process to protect DISH against Ergen's conflicting interests due to his massive debt purchases and his potential personal exposure to LightSquared. In response to the STC's conditions, the Board, which was loyal to Ergen, disbanded the STC.

With the STC out of the process, Ergen's Board conditioned DISH's bid for LightSquared (which was threatening to sue Ergen) on Ergen receiving a *personal* release of any claims that LightSquared, other parties to LightSquared's bankruptcy and the U.S. Bankruptcy Trustee may have had against Ergen. Ergen then promptly caused the Board to give him unfettered discretion to withdraw

DISH's bid for the LightSquared spectrum assets entirely so that he could further increase the pressure on LightSquared to drop its claims against him and pay him the full par value of the LightSquared debt.

After a full trial with extensive live testimony and documentary evidence, and citing a "troubling pattern of non-credible testimony" by Ergen, the Bankruptcy Court entered facts that established that Ergen had used his massive influence over the Board to take the corporate opportunity from DISH and to protect his personal investment in LightSquared. Among other things, the Bankruptcy Court found that Ergen used DISH resources and his position as DISH's Chairman to purchase LightSquared debt for his personal profit; Ergen used his control over DISH's Board to protect his personal investment in LightSquared debt; and the Board and the Officer Defendants consciously favored Ergen's interest over the interests of DISH and DISH's public shareholders.

LightSquared ultimately sold its spectrum to JPMorgan and other Wall Street firms for a price billions more than the $2.2 billion for which DISH could have owned the assets, and paid Ergen approximately $1.5 billion for his personal debt. ***Ergen ultimately made an $800 million profit while DISH failed to acquire extremely valuable spectrum at a fraction of its market cost.***

National financial columnists, writing for sources like Reuters, the *New York Times*, and the *Wall Street Journal*, described Ergen's actions as a "master class in

corporate governance bullying," highlighting the need for judicial review to provide "an assurance of integrity for the public markets."[2] Sophisticated columnists questioned whether Ergen's "very nice friends" should be "representing shareholders on Dish's board."[3]

Appellant filed the instant derivative suit challenging Ergen's misconduct, and the DISH Board formed the SLC to investigate and evaluate whether pursuing the derivative claims was in DISH's best interest. The SLC concluded that it was not and filed a motion to defer to its decision and dismiss the case (the "Motion to Defer").

The question the District Court should have decided in determining whether to grant the Motion to Defer is whether the SLC carried ***its burden*** to show no genuine issues of material fact existed regarding the SLC's independence and the good faith and thoroughness of its investigation into Appellant's derivative claims.

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[2] Alison Frankel, *Charlie Ergen's master class in corporate governance bullying*, Reuters, Nov. 18, 2013, *available at* http://blogs.reuters.com/alison-frankel/2013/11/18/charlie-ergens-master-class-in-corporate-governance-bullying; *see also* Sharon Terlep, *Dish Director Quit Amid Flap*, Wall St. J., Sept. 10, 2013, *available at* http://www.wsj.com/articles/SB10001424127887323864604579065130544679594.

[3] Gretchen Morgenson, *Dish Suit Shows Close Ties Between Executive and Board Members*, N.Y. Times, July 10, 2015, *available at* http://www.nytimes.com/2015/07/12/business/dish-suit-shows-close-ties-between-executive-and-board-members.html.

Thus, the standard the District Court should have applied was akin to a summary judgment standard.

Following limited discovery, Appellant presented extensive evidence creating material issues of disputed fact regarding both the SLC's independence and the good faith and thoroughness of its investigation. Appellant presented evidence that the members of DISH's initial two-person Special Litigation Committee – Tom Ortolf ("Ortolf") and George Brokaw ("Brokaw") – both had deep, close, personal, familial, and loving relationships and connections to Ergen and his family, including Ergen's wife and fellow DISH director Cantey Ergen. Appellant also showed that the Board's decision to belatedly add a third member to the SLC, Charles Lillis ("Lillis"), changed nothing, as Lillis also shared a very long, close, deep, and personal relationship with Ergen's "right-hand man" at DISH. Finally, Appellant presented evidence that the SLC's handling of its investigation confirmed its lack of independence and was not thorough or done in good faith. The SLC: (1) prejudged the outcome of its investigation and affirmatively advocated against Appellant on behalf of Ergen and DISH despite the fact that both Ergen and DISH had their own counsel; (2) concealed a wide range of information damaging to Ergen; (3) refused to interview anyone hostile to Ergen; and (4) purposely took no position on certain claims and issues that the SLC had no way to dispute on the merits. Notwithstanding the evidence presented

by Appellant, as reflected in the Findings of Fact and Conclusions of Law at the heart of this appeal (the "Order"), the District Court granted the Motion to Defer and dismissed the case. The District Court also awarded costs in favor of the SLC.

VI. STATEMENT OF FACTS[4]

A. Ergen Usurps a DISH Opportunity and Front-Runs a DISH Bid.

Ergen has controlled and dominated DISH since he co-founded the Company in 1980. (Vol. 2 JA000286; JA000288). Ergen is the Company's Chairman and CEO, owns more than 85% of DISH's voting power, and determines DISH's business strategy. (Vol. 2 JA000286, JA000288). For years, DISH has sought to acquire wireless spectrum (including through acquiring companies that already own spectrum), in order to offset weakness in DISH's satellite-TV business. (Vol. 2 JA000344-55).

In January 2011, the FCC authorized LightSquared, a wireless spectrum company, to develop a nationwide wireless broadband network. (Vol. 18 JA004467). Technical concerns emerged, however, that prevented LightSquared from using its spectrum and, by the fall of 2011, the market price of LightSquared

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[4] Throughout this brief, citations to the record regarding the legal issues on appeal – *i.e.*, whether the SLC was independent and conducted its investigation in good faith – are to record evidence developed in discovery and presented to the District Court on the SLC's Motion to Defer. Because the District Court dismissed Appellants' underlying claims without a discovery record, citations concerning Appellants' underlying factual allegations are to record evidence where available, and otherwise to portions of the record discussing those allegations.

debt had declined drastically. (Vol. 2 JA000360-61; Vol. 18 JA004468.) LightSquared's spectrum was particularly valuable to DISH, and buying LightSquared debt at depressed prices furthered DISH's long-term strategy. (Vol. 18 JA004467-68.) Ergen admitted under oath that, "as chairman of DISH, I knew I had a fiduciary responsibility to the company and that first and foremost, they should be given the opportunity for that investment." (Vol. 28 JA006903 at 33:7-1.) Ergen asked DISH's Treasurer, defendant Jason Kiser ("Kiser"), to determine whether DISH could buy LightSquared debt. (Vol. 28 JA006895:10-18.)

[redacted] DISH properly could purchase the debt – at first directly and, even when later listed as an "Excluded Purchaser" on LightSquared's credit agreement, indirectly through an affiliate. (Vol. 18 JA004469; Vol. 26 JA006480; Vol. 29 JA007170-71.) Ergen decided, however, to acquire LightSquared debt personally, surreptitiously keeping for himself the opportunity to reap massive profits. (Vol. 18 JA004469; Vol. 2 JA000363-64.) Ergen knew that his investment in LightSquared debt was virtually risk-free, because he could use his control over DISH to make it bid for LightSquared's spectrum at a price that would make Ergen whole (and, if someone else topped DISH's bid, Ergen would still be paid in full). (Vol. 2 JA000363-64.)

Misusing corporate resources, Ergen told Kiser to create a wholly owned entity, SP Special Opportunities LLC ("SPSO"), to purchase LightSquared debt for

Ergen's personal account. (Vol. 2 JA000363-64.) On May 14, 2012, LightSquared filed for Chapter 11 bankruptcy. (Vol. 19 JA004725.) Between April 13, 2012 and April 26, 2013, Ergen, through SPSO, bought $844,323,097 in face value of LightSquared secured debt, for $693,559,018. (Vol. 22 JA005425-26.)

B. Ergen Undermines the STC in Retaliation For Questioning His Debt Purchases.

On May 2, 2013, Ergen finally disclosed to the DISH Board that he had purchased LightSquared debt. (Vol. 8 JA001942.) Seeking to lock in his investment profits, Ergen proposed that DISH bid $2 billion for LightSquared's spectrum, and that DISH submit an offer "now" and "require prompt acceptance (e.g. by May 15)"; the bid ensured that LightSquared could repay Ergen's secured debt and generate a huge profit for Ergen. (Vol. 20 JA004755; Vol. 18 JA004471; Vol. 22 JA005425-26.) Ergen did not disclose the amount he spent to acquire the debt, the dates of his purchases, or his expected profit if DISH were to purchase LightSquared's spectrum out of bankruptcy. (Vol. 9 JA002031-35.) Nor did Ergen disclose that DISH could have purchased LightSquared debt itself, either directly or through an affiliate. (Vol. 18 JA004471.)

Ergen admitted that his LightSquared debt purchases created a conflict of interest with DISH and recognized that the Board needed an independent committee "to make sure that [a personal profit to Ergen resulting from DISH's

bid] would be fair to the shareholders." (Vol. 7 JA001648-49.) On May 8, 2013, the Board created the STC to "independently vet" any DISH purchase of LightSquared spectrum. (Vol. 9 JA002003-08.) The STC comprised DISH's only two independent directors, non-parties Gary Howard ("Howard") and Steven Goodbarn ("Goodbarn"). (Vol. 9 JA002005.) The Board delegated to the STC "all the powers and authority of the Board to accomplish the purposes and to carry out the intent of the resolutions herein," including (1) reviewing and evaluating (including any potential conflicts of interest arising out of, or in connection with, the Ergen LightSquared Transaction) the terms and conditions of the Ergen LightSquared Transaction; (2) rejecting any proposal from Mr. Ergen relating to the Ergen LightSquared Transaction; (3) negotiating definitive agreements; and (4) determining whether such terms and conditions (if any) of the Ergen LightSquared Transaction are fair to the Corporation. (Vol. 9 JA002005.)

To protect the STC from Ergen's admitted power over the Board, the STC's enabling resolution made clear that the STC could be terminated ***only*** upon one of two events: "(i) . . . the withdrawal or other abandonment of any proposal for the Ergen LightSquared Transaction; or (ii) the Ergen LightSquared Transaction Committee's determination, ***in its sole and absolute discretion***, as set forth in its written notice to the Chairman of the Board of Directors." (Vol. 9 JA002007 (emphasis added).)

C. The Board Terminates the STC to Protect Ergen.

On May 15, 2013 – one week after the STC was formed – Ergen personally offered to pay $2 billion for LightSquared through his wholly owned special purpose vehicle, L-Band Acquisition Corporation LLC ("LBAC"). (Vol. 9 JA002040-48.) Ergen's bid hamstrung the STC because he set a "floor" for the price of LightSquared's assets – including any bid by DISH or any alternative bid – and thus assured that LightSquared could repay Ergen's secured debt at par. (Vol. 8 JA001685 at 300:5-11.) Indeed, STC member-Goodbarn testified that Ergen's personal bid left no viable way for DISH to propose any lower bid for LightSquared. (Vol. 8 JA001806 at 100:16-101:5.)

On or about July 18, 2013, Ergen raised the stakes again and informed the STC that he planned to increase his personal bid for LightSquared spectrum to $2.2 billion. (Vol. 10 JA002436- 42; Vol. 18 JA004476.) Ergen further informed the STC that DISH would miss out on the opportunity to acquire LightSquared spectrum because his other controlled company, EchoStar, would join in the threatened bid. (Vol. 10 JA002439.)

On July 21, 2013, based on the STC's financial advisor's ***preliminary*** assessment that the value of LightSquared spectrum to DISH was between $4.4 billion and $13.3 billion, with a midpoint of ***$8.85 billion***, the STC recommended that DISH submit a conditional $2.22 billion bid. (Vol. 34 JA008256; Vol. 34

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JA008342-43.) Notably, the STC's recommendation expressly conditioned the bid on (1) the STC's involvement in the negotiations to "***monitor and manage potential conflicts of interest as they arise***"; and (2) the STC's continued investigation of Ergen's debt purchases. (Vol. 9 JA002198-99 (emphasis added).) The STC did not pass on the fairness of the overall transaction to DISH and DISH's public shareholders because, as STC-member Goodbarn explained, "***we had not completed the process. We only reached a conclusion on the valuation. We did not reach a conclusion regarding the conflict of interest, and that's really integral to that decision. . . .should we go after any profits that Charlie [Ergen] has in those bonds and say those belong to DISH, we specifically reserve that.***" (Vol. 8 JA001840 at 236:18 - 22; JA001841 at 238:25-239:3 (emphasis added).)

Immediately after the STC issued its report, the Board abruptly terminated the STC even though doing so was contrary to the provisions in the May 8, 2015 enabling resolution that created the STC. (Vol. 8 JA001836 at 219:3-15; Vol. 9 JA002007.)

D. Ergen Causes DISH to Walk Away from the Valuable Opportunity to Purchase LightSquared Spectrum in Order to Protect Himself.

On September 30, 2013, the Bankruptcy Court approved DISH's $2.2 billion bid as the "stalking horse" bid for the upcoming auction of LightSquared spectrum. (Vol. 12 JA002855:7-58:6; Vol. 20 JA004815.) On November 15, 2013,

LightSquared filed claims against Ergen personally, as well as against SPSO and DISH. (Vol. 20 JA004825-26.) LightSquared alleged that Ergen's debt purchases violated the LightSquared credit agreement, and that DISH was liable for tortious interference by assisting Ergen. (Vol. 20 JA004826-27.) [redacted] DISH's bid for LightSquared spectrum was not only conditioned upon LightSquared releasing its claims against him personally, but also upon Ergen being paid in full on his LightSquared debt position. (Vol. 30 JA007264:3-7; JA007267:10-12.) Ergen threatened to terminate DISH's efforts to acquire valuable LightSquared spectrum [redacted] (Vol. 30 JA007264:3-7; JA007265:14-16; JA007267:10-12.) [redacted] Vol. 30 JA007231- 35.) The SLC hid this information from the District Court. (Vol. 26 JA006471; Vol. 20 JA004830 at n.741.)

On December 11, 2013 – the date for the LightSquared bankruptcy auction – no other bidder for LightSquared's spectrum had emerged, and DISH was poised to acquire LightSquared's spectrum for $2.22 billion. (Vol. 14 JA003373.) However, LightSquared cancelled the pending bankruptcy auction, identifying DISH's requirement that LightSquared release its pending claims against Ergen as a "very big factor" in the cancellation. (Vol. 14 JA003457:11; Vol. 24 JA005890.)

Although LightSquared canceled the auction, DISH's bid for LightSquared spectrum remained pending. (Vol 18. JA004483.) Despite the plain conflict of interest between DISH's desire to buy the LightSquared spectrum and Ergen's desire to avoid personal liability to LightSquared and demonstrated willingness to use DISH's bid as leverage against LightSquared, on December 23, 2013, the Board (including the SLC) passed a resolution giving Ergen complete authority to terminate DISH's bid in his discretion. (Vol. 30 JA007339-40.) Ergen immediately used the leverage and on January 7, 2014, two days before the trial of LightSquared's claims against Ergen was scheduled to start, Ergen's counsel terminated DISH's bid. (Vol. 14 JA003400:13-15; JA003376.)

E. The Bankruptcy Court Makes Adverse Findings Against Ergen.

The court overseeing the LightSquared bankruptcy was stunned by Ergen's brazen misconduct, finding after a several months-long trial:

> From his stunning lack of candor with the DISH Board . . . to the stonewalling and disbanding of the Special Committee, the message is loud and clear. No one crosses or even questions the actions of the Chairman. Charles Ergen is, in every sense, the controlling shareholder of DISH and wields that control as he sees fit.

(Vol. 37 JA009074:24-75:4.)

The Bankruptcy Court also found, after a full trial with extensive live testimony and documentary evidence, and citing a "troubling pattern of non-credible testimony" by Ergen, that:

- Ergen used DISH resources and his position as DISH's Chairman to purchase LightSquared debt for his personal profit (Vol. 22 JA005402, JA005412, JA005428-29);

- DISH could have acquired LightSquared debt through an affiliate, just like Ergen; (Vol. 22 JA005497);

- Ergen and the Officer Defendants deliberately did not inform the Board that Ergen was purchasing LightSquared debt until after Ergen had placed his final trade (Vol. 22 JA005402, JA005412, JA005428-29);

- Ergen used his control over DISH's Board to protect his personal investment in LightSquared debt (Vol. 23 JA005514);

- The Board and the Officer Defendants consciously favored Ergen's interest over the interests of DISH and DISH's public shareholders (Vol. 22 JA005494-96) (noting "the apparent attitude of members of the DISH board and senior management that where Mr. Ergen was concerned, it was better not to ask a lot of questions and to let him conduct his business as he saw fit");

- The Board terminated the Transaction Committee in violation of the May 8, 2013 resolution and without advance notice (Vol. 22 JA005448; Vol. 23 JA005509-10); and

- The purported "technical issue" for pulling DISH's bid was a pretext and, regardless, the Board did not take any steps to determine whether it could resolve any "technical issue" and secure LightSquared's valuable spectrum assets for DISH. (Vol. 23 JA005605, JA005621-22, JA005628-30 & JA005629 at n.82.)

F. Based on Ergen's Self-Serving Conduct, Ergen Makes an $800 Million Personal Profit While DISH Misses Out on the LightSquared Spectrum.

Ergen's self-serving conduct, including his personal LightSquared debt purchases, paid off handsomely. Indeed, developments in the Bankruptcy Court confirmed that LightSquared's spectrum was at all times worth much more than

$2.2 billion. On March 6, 2015, the ad hoc group of secured lenders (the "Ad Hoc Secured Group") filed a brief supporting LightSquared's plan, which assigned a value of $9.6 billion to $13 billion to the spectrum that DISH could have acquired for $2.2 billion only a few months earlier. (Vol. 35 JA008635.)

Under the confirmed plan of reorganization in the LightSquared bankruptcy, Ergen received a payment of approximately ***$1.5 billion***, in cash, for his personal LightSquared debt purchases, representing approximately ***$800 million in personal profits*** (on top of his $694 million cash outlay to buy the debt) from the investment opportunity that arose from his breaches of fiduciary duty and rightfully belonged to DISH. (Vol. 35 JA008662; Vol. 26 JA006490.) DISH, which could have bought the $9 billion asset for $2.2 billion, got nothing.

G. The Board Forms a Tainted Special Litigation Committee to Protect Ergen.

After DISH first made its bid and Ergen faced the threat of litigation by LightSquared, Appellant sued in the District Court to ensure that Ergen did not use his control over DISH to elevate his personal interests above DISH's. (Vol. 1 JA000001.) The Complaint alleged that Ergen breached his duty of loyalty by placing his own interests above those of DISH when he: (1) caused SPSO to secretly acquire LightSquared debt despite his knowledge of DISH's interest in acquiring LightSquared itself and without obtaining disinterested director approval, and (2) used his control over DISH and DISH's Board to protect his

personal interest in his acquisitions of LightSquared debt despite his knowledge that (i) this harmed DISH's ability to investigate his debt purchases, and (ii) he would harm DISH's ability to acquire valuable LightSquared spectrum assets.

On September 18, 2013, the night before argument on Appellant's motion to expedite discovery and set a preliminary injunction hearing, the Board formed the SLC and promptly argued for a stay of Appellant's claims pending a purported SLC investigation. (Vol 5. JA001030:15-18; JA001068:11-13.) The SLC consisted of two members, Ortolf and Brokaw. (Vol. 33 JA008230-33.) Appellant's evidence showed that both were beholden to Ergen and were not independent. (Vol. 26 JA006473-77.)

1. SLC Member Tom Ortolf was not Independent.

The evidence presented in the District Court presented disputed issues of material fact as to SLC member Ortolf's independence. First, Ortolf voted to terminate the STC to protect Ergen. (Vol. 34 JA008352; Vol. 20 JA004796.) As the Bankruptcy Court explained after trial, Ortolf and the other Board members' conduct with respect to the STC showed that they were beholden to Ergen and would do whatever Ergen wanted. (Vol. 23 JA005522.)

The SLC's lack of candor to the District Court about the Ortolf-Ergen personal relationship itself shows bad faith. In the SLC's October 3, 2013 status report to the District Court, Ortolf disclosed only that he has "maintained a

generally friendly professional relationship" with Ergen since they met in 1977. (Vol. 6 JA001342.) This disclosure was materially misleading.

First, for nearly 40 years, Ortolf and his family shared a deep and loving personal friendship with the entire Ergen family. (Vol. 26 JA006473-74, JA006499-500.) Over several decades, Ortolf and Ergen worked and invested together. (Vol. 19 JA004532.) Both of Ortolf's children worked for Ergen at DISH. (Vol. 5 JA001143-46; Vol. 24 JA005831.) 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," [redacted] Vol. 27 JA006538 at 74:22-75:5; Vol. 30 JA007344-55; Vol 27 JA006536 at 66:15-24.)

Second, Ortolf testified that he personally told Ergen, Ergen's wife, and Ergen's kids that he loves them, and the Ergens return the sentiment. (Vol 27 JA006538 at 75:24-76:11; Vol. 27 JA006539 at 79:5-12, 80:5-12; Vol. 27 JA006543 at 96:21-23.) Ergen took Ortolf to the Super Bowl. (Vol. 30 JA007357.) Ergen's daughter refers to Ortolf as "Uncle Tom." (Vol. 28 JA006758.) Four of the 17 people invited to Ortolf's son's bachelor party were Ergen family members. (Vol. 27 JA006540 at 84:5-19; Vol 30 JA007359-61.) Moreover, on October 13, 2014, just as he was finalizing the SLC Report

demanding that the District Court defer to the SLC, Ortolf wrote the following to Cantey Ergen:

> Can't thank you enough for the love and friendship you have shown to our family these past several weeks, and to [my wife] Laurie in particular. I don't think she would have made it through without you. ***Amazing how real friends always show up when they're needed and those who just claim to be somehow disappear***. Love you. Tom.

(Vol. 28 JA006756.) [redacted] Vol. 27 JA006543 at 96:9-15.)

Ortolf admitted that he deliberately withheld the details of his relationship with the Ergens from the District Court. (Vol. 27 JA006543 at 97:3-10.)

2. SLC Member George Brokaw was not Independent.

The evidence presented in the District Court also raised material issues of fact concerning Brokaw's purported independence. As with the Ortolfs, the Brokaws routinely express their love for the Ergens and their children, and *vice versa*. (Vol. 30 JA007448-55; Vol. 27 JA006689 at 350:16-17, 350:19-351:2.) Cantey Ergen agreed to be the godmother of Brokaw's son. (Vol. 24 JA005820; Vol. 30 JA007484.) The Brokaws and Ergens plan "family dinners," celebrate birthdays together, and actively seek out time together. (Vol. 30 JA007457-63.) 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. (Vol. 30 JA007451-53, Vol. 30 JA007466-70.) Within

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days after Brokaw joined the SLC, Cantey Ergen asked if she and her children could stay on an airbed or a couch in Brokaw's home, preferring the Brokaws' company over the comfort of a hotel room. (Vol. 30 JA007468.)

The affectionate bond between the Brokaws and Ergens is family-wide. Brokaw assisted Ergen's daughter Kerry with her job search, and provides guidance to the Ergens' sons, Chase and Chris. (Vol. 30 JA007472-76.) The Ergens' children visit the Brokaws without their parents, and sleep at the Brokaws' home when they are in New York. (Vol. 30 JA007455-57, Vol. 30 JA007478.) 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. (Vol. 30 JA007448-49, Vol. 30 JA007470, Vol. 30 JA007480-85, Vol. 30 JA007493-98, Vol. 30 JA007455.) When asked about the loving nature of their relationship, Brokaw admitted that he and his wife are close to the Ergens. (Vol. 27 JA006689 at 350:16-351:2, 351:9-10.)

Brokaw did not disclose to the District Court his and his wife's loving relationships with the Ergens. (Vol. 27 JA006692 at 364:23-365:8, Vol. 27 JA006693 at 366:20-367:10.)

3. SLC Member Charles M. Lillis was not Independent from Ergen and the Board.

The evidence presented in the District Court demonstrated disputed issues of fact as to whether Brokaw and Ortolf were independent. Indeed, the Ergen-controlled Board recognized as much. Only after the SLC submitted its first status report and Appellant pointed out several of the SLC's material omissions about its members' lack of independence (Vol. 5 JA001106-09) did the Board add a new director, Charles Lillis ("Lillis"), to the SLC. However, similar to Ortolf and Brokaw, the record evidence in the District Court created disputed issues of material fact and, indeed, established that Lillis was not independent from Ergen and the Board.

Specifically, Lillis and his wife are "long-time friends" of senior DISH executive Thomas A. Cullen ("Cullen") – who is Ergen's "right hand man" – and Cullen's wife, who just recently vacationed together. (Vol. 26 JA006468, Vol. 27 JA006703 at 22:19-23:1, 24:9-14, Vol. 30 JA007501.) Lillis takes Cullen and his wife to football games around the country, invites each of the Cullens separately over for dinner, and readily agreed to endorse Cullen in the press. (Vol. 31 JA007503-16, Vol. 33 JA008244.) When a friend asked in 2010 whether Lillis was available for a dinner, Lillis responded: "[a]re we discussing business opportunities on Thursday or just socializing? If it is just socializing I know Tom Cullen would love to be included." (Vol. 31 JA007517.) The friendship is

reciprocal, and Cullen has been recommending Lillis for board positions since the two worked together in jointly creating private equity firm LoneTree Capital. (Vol. 26 JA006477, Vol. 24 JA005806, JA005809.)

Despite his 20-year business and personal relationship with Ergen's right-hand man, Lillis chose not to disclose that information to the District Court.[5] (Vol. 27 JA006704 at 28:6-11.)

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[5] The fact that the SLC included only members with extensive ties to Ergen was itself consistent with the Bankruptcy Court's observations of DISH's corporate governance, including that: (1) "the apparent attitude of members of the DISH board and senior management [is] that where Mr. Ergen was concerned, it was better not to ask a lot of questions and to let him conduct his business has he saw fit." (Vol. 22 JA005495); (2) "no one crosses or even questions the actions of the Chairman [Ergen]"; (*Id.*); (3) "Ergen is, in every sense, the controlling shareholder of DISH and wields that control as he sees fit"; (*Id.*) and (4) Ergen had manipulated the LightSquared bankruptcy process though his personal purchases of LightSquared debt, personal bid of $2 billion, and by using his control over DISH to ensure that he would be paid in full, because "no one was interested in making him unhappy by altering that." (Vol. 23 JA005506.). Populating the SLC with Board members who the Bankruptcy Court determined after trial had shown an attitude of letting Ergen do whatever he wanted without recourse illustrates the lack of good faith in the investigation.

4. The SLC's Investigation Into the Derivative Claims was a Sham.

Despite producing a voluminous SLC Report, the SLC did not conduct its investigation in good faith, purposely distorted the record and refused to investigate key factual issues raised in Appellant's claims, thus violating its mandate to "review, investigate, and evaluate the claims asserted in the Derivative Litigation." (Vol. 19 JA004641.) Appellant presented ample evidence of the same to the District Court.

a. The SLC's Prejudgment of the Claims and Objective Lack of Impartiality Creates Disputed Facts About Its Good Faith

From its inception, the reason for the SLC's existence was to undermine Appellant's claims. The SLC was created on September 18, 2013, the night before the hearing on Appellant's motion for expedited discovery. (Vol. 5 JA001030:15-18.) Indeed, the Board's counsel stated its intention to seek a stay based on the mere creation of the SLC. (Vol. 5 JA001030:18-21.) After hearing that the SLC had not even retained counsel, the Court stated "[w]hy don't you call Steve Peek," who was later retained by the SLC. (Vol. 5 JA001068:25-69:1.)

Confirming its goal of undermining Appellant's claims, the SLC made clear that it reached its conclusions before even investigating the facts as almost immediately, the SLC took the lead role litigating on behalf of Ergen and the Board. For example, in its first status report, the SLC stated that Ergen had no

"material personal interest in DISH's decisions that diverges from those of DISH's remaining stockholders" that might induce him to make decisions for DISH that are not in DISH's best interest, and that "Ergen's participation [in the bid] does not threaten to impair DISH's efforts to acquire LightSquared." (Vol. 6 JA001347-48.) In its report opposing Appellant's request for injunctive relief, the SLC determined, in conclusory fashion, that if consummated, "the transaction will be fair" to DISH. (Vol. 13 JA003103.) And during oral argument, the SLC's counsel, taking the lead on behalf of all defendants, went so far as to baldly assert that "there's not a breach of fiduciary duty if you have an independent valuation that you accept; there's not a breach of duty to terminate the transaction committee, because its job was done." (Vol. 13 JA003244:22-25.)

On November 27, 2013, the District Court recognized that fixing DISH's $2.2 billion bid to the release of LightSquared's personal claims against Ergen presented a conflict of interest that could jeopardize DISH's bid for LightSquared's spectrum. (Vol. 14 JA003329.) The District Court concluded that DISH had an "economic interest in exploring the possibility of resolving the Bankruptcy Trustee's objection [of the Ergen-related release] by modifying the release and carving out claims against SPSO and Ergen," but that "***DISH is unable to explore this option so long as DISH's actions in the LightSquared bankruptcy related to***

the release provisions are controlled by Ergen." (Vol. 14 JA003330 (emphasis added).)

The District Court enjoined "Charles Ergen or anyone acting on his behalf . . . from participation, including any review, comment or negotiations, related to the [Ergen-related] release contained in the Ad Hoc LP Secured Group Plan pending before the Bankruptcy Court for any conduct which was outside or beyond the scope of his activities related to DISH and LBAC." (Vol. 14 JA003330.)

Notably, while the SLC told the District Court during the November 25 hearing to ignore the release as a non-issue, concurrently, [redacted] (Vol. 30 JA007267:10-12.) And, a few weeks later, when Appellant informed the Court of its belief that Ergen had, in violation of the injunction itself, conditioned DISH's bid on his personally receiving a release and full repayment on his bonds, the SLC defended Ergen. (Vol. 14 JA003356:3-7.)

Later, before actually completing its investigation and issuing its report, the SLC made clear that it had predetermined the outcome by moving to dismiss Appellant's claims. (Vol. 18 JA004351.) Far from exhibiting the neutrality that is the hallmark of a trustworthy special litigation committee, much less placing DISH's interests above all else, Appellant presented evidence that the SLC has,

since its inception, carried the laboring oar in advocating for Ergen before it investigated the facts, and acted like a group of Ergen loyalists intent on completing a whitewash.

b. The SLC Report Reflects the SLC's Lack of Independence, and Failure to Conduct a Good Faith Investigation.

The SLC's lack of independence and thoroughness also manifested itself in the substance of the SLC Report. Rather than thoroughly investigate and present the facts in a balanced and objective way, the SLC concealed evidence and engaged in contortionist logic in order to avoid any determination adverse to Ergen and the other Defendants. (*Compare generally* Vol. 19 JA004674-77 (discussing tangential issues like the background of wireless spectrum); *with* Vol. 20 JA004833-34 (concluding that DISH outside counsel Robert Giuffra "misspoke" or "was mistranscribed" when he admitted to Judge Chapman that DISH could have bought the debt directly in the fall of 2011); Vol. 20 JA004926 (rejecting unjust enrichment claim because "the purchases of Secured Debt did not constitute corporate opportunities belonging to DISH" with [our opposition arguments on the points).)

In reaching its conclusions in favor of Ergen and the Board, the SLC ignored and misrepresented significant evidence of misconduct concerning Appellant's core allegations.

First, it is undisputed that DISH both had an interest in, and the ability to buy, LightSquared debt. (Vol. 29 JA007170; Vol. 26 JA006469, JA006480.) Yet, the SLC repeatedly told the District Court that the LightSquared credit agreement prohibited DISH from purchasing LightSquared debt. (Vol. 19 JA004713-15; Vol. 19 JA004631.)

Likewise, in opposing Plaintiff's injunction motion, the SLC represented that it "has determined that DISH and any subsidiary of DISH were Ineligible Transferees at the time that the secured debt was transferred to Mr. Ergen." (Vol. 13 JA003108 at n.14.) As the SLC knew, however, nothing in the LightSquared credit agreement prevented DISH from buying LightSquared debt until the list of disqualified companies was amended to add DISH on May 9, 2012. (Vol. 28 JA006752-53 at 220:15-221:4, 221:23-222:4; Vol. 34 JA008317-19; Vol. 39 JA009711:10-11.) And, DISH could always have acquired LightSquared debt through an affiliate – i.e., exactly how Ergen justified his debt purchases to the Bankruptcy Court. (Vol. 29 JA007170-71; Vol. 26 JA006469, JA006480.)

Knowing that DISH could have acquired LightSquared debt, the SLC concocted several after-the-fact rationalizations to prevent DISH from pursuing the $800 million in profits that Ergen reaped on the debt purchases that he denied DISH. (*See e.g.* Vol. 26 JA006481-83.) For example, the SLC claimed the opportunity came to Ergen personally, while concealing from the District Court

that on September 30, 2011, the LightSquared debt administrative agent invited DISH (not Ergen personally) to buy LightSquared debt. (Vol. 31 JA007532-33; Vol. 26 JA006479.) Ergen and the SLC also hid from both the Bankruptcy Court and the District Court [redacted] that DISH could have purchased LightSquared debt through an affiliate.[6] (Vol. 29 JA007170-71; Vol. 26 JA006469, JA006480.)

Second, the SLC deliberately avoided uncovering facts that could harm Ergen. The SLC neither interviewed DISH's outside counsel nor confronted Ergen or Kiser [redacted] Vol. 26 JA006481; Vol. 27 JA006732 at 138:24-139:2; JA006726 at 116:4-7; JA006728 at 122:7-123:11.) The SLC instead told the District Court that "[n]o one at DISH investigated whether DISH could purchase the Secured Debt through an affiliate." (Vol. 19 JA004715.) [redacted] this was simply untrue.

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6 [redacted] (Vol. 31 JA007534; Vol. 26 JA006480.) [redacted] Vol. 29 JA007169; Vol. 26 JA006480.) [redacted] (*Id.*)

(Vol. 29 JA007170-71.) And, despite the Bankruptcy Court's express findings that Ergen and Kiser were consistently untruthful, the SLC blindly accepted whatever Ergen or Kiser said. (Vol. 26 JA006481; Vol. 40 JA009938 ("Mr. Kiser's testimony that the reason for again checking the credit agreement was to confirm that there was no corporate opportunity for DISH was not credible"); Vol. 40 JA009935 (finding "a troubling pattern of non-credible testimony" by Kiser and Ergen).)

Third, the SLC asserted that LightSquared debt was not a DISH opportunity because DISH does not invest through non-controlled affiliates. (Vol. 19 JA004715-16.) As the SLC knew, however, [redacted]. (Vol. 27 JA006578 at 234:12-23; Vol. 34 JA008417-23; Vol. 35 JA008617-19.)

Fourth, the SLC took no position regarding the improper termination of the STC despite determinations by both the Bankruptcy Court and the District Court that the STC's termination raised serious questions of loyalty issues. (Vol. 14 JA003294:7-10) (telling Appellant that "you've got loyalty issues that you're going to be able to allege and get past a motion to dismiss and probably a motion for summary judgment based on what I've seen."); (Vol. 40 JA009952) (stating that the SLC was "little more than window dressing"). As SLC counsel admitted

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during the deposition of Ortolf, "you've been informed by Mr. Ortolf that the SLC – and the report – that the SLC did not investigate the issue of the disbandment of the Special Transaction Committee." (Vol. 27 JA006568 at 197:19-24.) In other words, the SLC knew that it could not credibly absolve Ergen and the Board concerning the STC's termination, so it simply put blinders on.

Fifth, the SLC admitted that it ignored the personal profit Ergen made on his LightSquared debt purchases. (Vol. 26 JA006492; Vol. 27 JA006571-72 at 209:19-210:1.) The SLC asserted that Ergen's profits are irrelevant, with Ortolf admitting that "[i]t didn't matter if [Ergen]'s going to make $8 or 80 million or 800 million." (Vol. 27 JA006571 at 206: 23-25.) Such complete indifference to the magnitude of DISH's potential claims against Ergen is telling, as the size of possible damages obviously affects any determination whether it is in DISH's interest to pursue those claims.

Sixth, the SLC took no position regarding Appellant's claims that Ergen should disgorge profits from his misuse of DISH resources, despite the lack of any dispute that Ergen used DISH email and personnel, including DISH Treasurer Kiser and DISH's outside counsel at S&C, to personally purchase LightSquared debt. (Vol. 19 JA004652-53.) To sidestep this issue, the SLC observed that the out-of-pocket cost to DISH of Ergen's use of those resources, rather than his profits therefrom, was immaterial. (Vol. 19 JA004638-39.)

Seventh, the SLC also took no position regarding Appellant's claim that Ergen was unjustly enriched through his LightSquared debt purchases. (Vol. 26 JA006494-96; Vol. 20 JA004936-37 (summarily concluding that "it is not in the best interests of DISH to pursue such a claim.").) The SLC simply conflated the unjust enrichment claim with Appellant's corporate opportunity claim. (Vol. 20 JA004936 (listing elements of unjust enrichment under Nevada law as (1) the plaintiff has conferred a benefit on the defendant; (2) the defendant has retained that benefit; and (3) the benefit "in equity and good conscience" belongs to plaintiff).) The SLC did not assess unjust enrichment because, in Ortolf's own words, "we didn't believe [Ergen's enrichment] was relevant to our investigation." (Vol. 27 JA006570 at 204:11-205:25.)

H. The District Court's Decision, Findings of Fact and Conclusions of Law.

On July 16, 2015, the District Court heard argument on the SLC's Motion to Defer and on Defendants' and the SLC's pending motions to dismiss. (Vol. 41 JA010049.) After briefing and argument setting forth evidence of the SLC's lack of independence and thoroughness, the District Court read into the record a pre-written, brief oral ruling. (Vol. 41 JA010069:8-25.) The District Court held that under Nevada law, Lillis was independent, thus obviating any inquiry into the other two members, and that although the Court may not have conducted its investigation in the same way or reached the same conclusions as the SLC, the

Court would defer to the SLC's investigation. (Vol. 41 JA010070:15-20.) The District Court instructed the SLC's counsel to draft the findings of fact and conclusions of law. After the SLC did so, the District Court adopted the SLC's findings of fact and conclusions of law wholesale. (Vol. 41 JA010070:15-16; Vol. 41 JA010074.)

I. The District Court Awards the SLC $186,100.60 in Costs, which Includes Over $150,000.00 in Electronic Discovery Costs.

On October 19, 2015, the SLC filed a Memorandum of Costs, claiming taxable costs under NRS 18.005, including over $150,000 in electronic discovery costs. (Vol. 41 JA010185.) Appellant timely filed a motion to retax, arguing that neither NRS 18.005 nor this Court's controlling precedent allow for taxation of electronic discovery costs, as well as certain other claimed expenses. (Vol. 43 JA010589.) After briefing, the District Court granted in part and denied in part Appellant's Motion to Retax, including imposing on Appellant the SLC's significant electronic discovery costs. (Vol. 43 JA010712.) The District Court ultimately awarded the SLC $186,100.60 in costs, plus interest. (Vol. 43 JA010726.)

VII. SUMMARY OF ARGUMENT

In granting the SLC's Motion to Defer, the District Court erred by (1) providing the SLC with a presumption that they were independent and conducted a good faith and thorough investigation; (2) incorrectly placing the burden of proof

on Appellant to overcome that legally improper and factually unsupportable presumption; (3) refusing to view the evidence in the light most favorable to Appellant; (4) incorrectly limiting its consideration of the SLC's independence to "financial independence," thus ignoring that the SLC consisted of Ergen's self-described "best friends" and individuals with close family-like relationships to Ergen; (5) incorrectly concluding that the SLC could be independent even if two of its three members were not independent; and (6) disregarding evidence showing that the SLC's investigation was prejudged, not thorough and not in good faith.

None of these errors can or should be considered harmless, and the errors – both taken individually and in combination – require this Court to reverse the judgment below, conclusively hold that Nevada, like all jurisdictions, will hold a special litigation committee to the nationally-recognized high standard of independence, conclude that the record evidence before the District Court created issues of fact that require denial of the SLC's Motion to Defer, and remand the case to the District Court to proceed on its merits.

VIII. ARGUMENT

A. Standard of Review.

1. The Motion to Defer is Reviewed Under a Summary Judgment Standard.

The District Court reviews the Motion to Defer using a summary judgment standard, which the parties have agreed to and which is not in dispute. (Vol. 24

JA005760-62.) *See Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981); *Auerbach v. Bennett*, 393 N.E.2d 994 (N.Y. 1979). And this Court reviews an award of summary judgment "de novo, without deference to the findings of the lower court." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

"When reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Id.* at 729, 121 P.3d at 1029. The District Court's award of summary judgment can be affirmed only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NRCP 56(c). A genuine issue of material fact exists if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Oehler v. Humana, Inc.*, 105 Nev. 348, 350, 775 P.2d 1271, 1272 (1989).

Accordingly, *only* if the District Court concludes that the SLC has satisfied its burden under the summary judgment standard can it then defer to the SLC's substantive determination that pursuing the derivative claims is not in the best interests of the company and dismiss the complaint. However, if the District Court concludes that the SLC has not met its burden of showing no disputed issues of

material fact, then the SLC's request to defer will be rejected, no further resolution is required on the issues of independence or thoroughness and good faith of the investigation, and the case will proceed to the merits of the claims against the defendants. *Booth Family Trust v. Jeffries*, 640 F.3d 134, 142-3[7] (6th Cir. 2011); *see also London v. Tyrell*, Civ. A. No. 3321-CC, 2010 WL 877528, at *12 (Del. Ch. March 11, 2010) ("[i]f the Court determines that a material fact is in dispute on any of these issues, it must deny the SLC's motion" and "[w]hen an SLC's motion to dismiss is denied, control of the litigation is returned to the plaintiff shareholder.").

2. In Evaluating the SLC's Motion to Defer, The District Court Cannot Apply Any Presumption in Favor of the SLC.

In the context of a motion to defer, the SLC enjoys no presumption that it acted independently or that its investigation was reasonable and done in good faith. *London*, 2010 WL 877528, at *12-13 (SLCs "are not given the benefit of the doubt as to their impartiality and objectivity"); *see also Hasan v. Cleretrust Realty*

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[7] For this reason, it is not truly a summary judgment motion, although a summary judgment standard is used. Unlike a summary judgment motion, where if issues of fact are raised those issues later get resolved by the court, in this instance there will be no further consideration or resolution of the issue of independence or thoroughness once the court finds a "reasonable doubt" on the SLC's impartiality. *Booth Family Trust*, 640 F.3d at 142-43 & n.3.

Investors, 729 F.2d at 372 at 376 (6th Cir. 1984). ("[n]either the *Auerbach* approach nor the *Zapata* approach allows a reviewing court to extend to the members of a [SLC] the presumption of good faith and disinterestedness").[8] Instead, the law places a heavy burden on the SLC because the consequences of deferring to an SLC seeking dismissal of a well-pled complaint are at odds with how our adversarial judicial system otherwise operates. "The special litigation committee is . . . the 'only instance in American jurisprudence where a defendant can free itself from a suit by merely appointing a committee to review the allegations of the complaint.'" *Einhorn v. Culea*, 235 Wis. 2d 646, 671 (2000) (quoting *Lewis v. Fuqua*, 502 A.2d 962, 967 (Del. Ch. 1985)).

As such, "the SLC has the burden of establishing its own independence by a yardstick that must be like Caesar's wife – above reproach." *London*, 2010 WL 877258, at *12 quoting *Beam v. Stewart*, 845 A.2d 1040, 1055 (Del. 2004); *see also Booth Family Trust*, 640 F.3d at 144-5 (same). The composition of the SLC

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[8] This is very different from the test used to evaluate allegations in a complaint that it would be futile to make a demand on a board of directors to commence a lawsuit directly against the corporation because the board members are interested or lack independence. In this test, inapplicable here and so-called the "Pre-Suit Demand Futility" analysis, the board is presumed to act independently. *Shoen v. SAC Holdings*, 122 Nev. 621, 635-36, 137 P.3d 1171, 1180-81 (2006). But this is expressly *not* the test used when evaluating the independence of an SLC in the context of a motion to defer. As show herein, however, the District Court applied the incorrect "Pre-Suit Demand Futility" test to the SLC's Motion to Defer.

must be such that it "fully convinces the Court that the SLC can act with integrity and objectivity." *London*, 2010 WL 877528 *13; *see also In re Oracle Corp. Derivative Litigation*, 824 A.2d at 917 at 940 (Del. Ch. 2003) ("The composition and conduct of a special litigation committee therefore must be such as to instill confidence in the judiciary and, as important, the stockholders of the company that the committee can act with integrity and objectivity.").

Indeed, courts recognize that "the delegation of corporate power to a special committee, the members of which are hand-picked by defendant-directors, carries with it inherent structural biases." *Hasan*, 729 F.2d at 376. Because of this inherent structural bias whereby the Board hand-picks the members of the SLC, courts are "'mindful of the need to scrutinize carefully the mechanism by which directors delegate to a minority committee the business judgment authority to terminate derivative litigation.'" *Will v Engebretson & Co.*, 213 Cal. App. 3d 1033, 1043-44 (Cal. App. 1989) (quoting *Gaines v. Haughton*, 645 F.2d 761, 772 (9th Cir. 1981)).[9] And "[b]ecause a corporation has every opportunity to form a

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[9] *See also, e.g., Blake v. Friendly Ice Cream Corp.*, No. 030003, 2006 WL 1579596, at *17 (Mass. Super. Ct. May 24, 2006) (SLC members are subject to "extraneous considerations or influences," including "a dynamic of group loyalty geared toward insulating other members of the Board from liability, and/or an improperly deferential relationship" to defendants); *Houle v. Low*, 407 Mass 810, 815 (1990) ("The concern expressed . . . with the 'structural bias' of special litigation committees is not unfounded."); (*Cox & Munsinger, Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate*

perfectly independent special committee," courts require it to do so. *Booth Family Trust*, 640 F.3d at 143. Thus, "[a] defendant who desires to avail itself of this unique power to self destruct a suit brought against it ought to make certain the Special Litigation Committee is truly independent." *Lewis*, 502 A.2d at 967; *see also London*, 2010 WL 877528 *13; *In re Oracle Corp. Derivative Litigation*, 824 A.2d at, 940 (Del. Ct. Ch. 2003). Accordingly, the District Court erred in applying a presumption favoring the SLC in considering the Motion to Defer.

3. The Burden is on the SLC to Prove that It is Independent and that It Performed a Reasonable and Good Faith Investigation.

Courts uniformly conclude that the ***SLC bears the burden*** of demonstrating that there are no genuine issues of material fact as to its independence and the reasonableness and good faith of its investigation. *See Zapata*, 430 A.2d at 788 ("the corporation should have the burden of proving independence, good faith and a reasonable investigation"); *Auerbach*, 393 N.E.2d at 1003 (SLCs "may be expected to show that the areas and subjects to be examined are reasonably complete and that there has been a good-faith pursuit of inquiry into such areas and subjects"); *Joy v. North*, 692 F.2d 880, 892 (2d Cir. 1982) ("the burden is on the

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Cohesion, 48 Law & Contemp. Probs. 83, 85 (No. 3, 1985) ("[i]n combination, . . . several psychological mechanisms can be expected to generate subtle, but powerful, biases with result in the independent directors' reaching a decision insulating colleagues on the board from legal sanctions").

moving party, as in motions for summary judgment generally, to demonstrate that the action is more likely than not to be against the interests of the corporation"); *London*, 2010 WL 877528, at *13 (SLCs "are not given the benefit of the doubt as to their impartiality and objectivity"); *Day v. Stascavage*, 251 P.3d 1225, 1229 (Colo. Ct. App. 2010) ("[t]he corporation has the burden of proving independence, good faith, and a reasonable investigation") (quoting (13 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 6019.50, at 250).[10]

Placing the burden on the SLC is consistent with Nevada law regarding summary judgment motions: "The burden of proving the absence of triable facts is upon the moving party." *Butler v. Bogdanovich*, 101 Nev. 449, 451, 705 P.2d 662, 663 (1985).

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[10] *See also, e.g.*, *Grosset v. Wenaas*, 35 Cal. Rptr. 3d 58, 64 (Cal. Ct. App. 2005) (acknowledging burden on SLC); *Benfield v. Wells*, 749 S.E.2d 384, 387 (Ga. Ct. App. 2013) ("[T]he defendants had the burden of proving that the [SLC]'s members were independent"); *Blake v. Friendly Ice Cream Corp.*, 21 Mass. L. Rptr. 610, at *11 (Mass. Super. Ct. 2006) ("the SLC has the burden of proving that its determination was in good faith and after a reasonable inquiry upon which its conclusions were based"); *In re UnitedHealth Grp. Inc. S'holder Derivative Litig.*, 754 N.W.2d 544, 561 (Minn. 2008) ("the corporation, as well as any other proponent of the SLC recommendation, should bear the burden to show that the elements of our standard have been met"); *Brady v. Calcote*, No. M2003-01690-COA-R3-CV, 2005 WL 65535, at *3 (Tenn. Ct. App. Jan. 11, 2005) ("The party seeking dismissal of a shareholder derivative suit based on the recommendation of a [SLC] has the burden").

B. The District Court Made Numerous Reversible Errors in Evaluating the Independence of the SLC.

As detailed below, the District Court made several reversible errors in granting the SLC's Motion to Defer. First, the District Court improperly presumed that the SLC acted independently and in good faith. Second, the District Court compounded the first error by then placing the burden on Appellant to overcome the improper presumption that the SLC was independent. Using that incorrect test, the District Court erroneously concluded that Nevada law looks solely to "financial independence" for determining whether an SLC member would sue a fellow director, and incorrectly concluded that an SLC can be legally independent even if a majority of the SLC members lack independence. Finally, the District Court improperly concluded that Appellant presented no disputed issues of material fact that the SLC lacked independence despite Appellant presenting overwhelming evidence of the SLC's lack of independence, thoroughness and good faith.

1. The District Court Committed Reversible Error when It Provided the SLC with a Presumption of Independence.

The District Court improperly presumed that the SLC was independent and placed the burden on Appellant to rebut the Court's erroneous presumption. *See* Vol. 41 JA010099 ("It is well settled that 'long standing personal and business ties' are insufficient to '***overcome the presumption of independence that all directors . . . are afforded***'"); *see also* Vol. 41 JA10069 at 21:13-18 ("the fact that

. . . one member, Mr. Lillis, is . . . independent and is not conflicted creates for the Court ***a presumption that the SLC is independent***").

As support for its conclusion and application of the presumption, the District Court cited a litany of cases in the context of "Pre-Suit Demand Futility" – ***not*** in the context of a court's assessment of the SLC's independence in a case where the SLC seeking to dismiss an action pursuant to a Motion to Defer. (Vol. 41 JA010099.)[11] Thus, the District Court was obviously – and incorrectly – using the test and standard from a "Pre-Suit Demand Futility" assessment, which is inapplicable in the context of a motion to defer. Such a presumption is contrary to the law cited above in Section VIII.A.2, and was reversible error because it impacted the entirety of the District Court's adjudication of the Motion to Defer. The presumption in the SLC's favor improperly changed the entire calculus on what Appellant had to establish to defeat the Motion to Defer. The District Court's judgment should be reversed on this ground alone.

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[11] The one case that the District Court cited concerning an SLC's independence, *Ankerson v. Epik Corp.*, 277 Wis. 2d 874, at *5. (Wis. App. 2004), concerned one SLC member whose relationships with defendants included looking at a prior business opportunity that "[n]either party . . . pursued," "d[id] not have a social relationship with either [defendant]," and did not "conduct[] any business with" either defendant; and a second SLC member with "no social relationship with either [defendant]," and "no direct business dealings with either" defendant since six years prior to the court's decision. Here, in contrast and as detailed herein, the SLC members have lengthy, significant, and present-day close personal and business relationships with Ergen and other Defendants.

2. The District Court Committed Additional Reversible Error when It Compounded the Presumption Error by Holding that the Appellant had the Burden to Overcome the Erroneous Presumption that the SLC was Independent.

The District Court compounded its first error by then concluding that the Appellant had the burden to overcome the improper presumption that the SLC was independent. *See* Vol. 41 JA010099 ("It is well settled that 'long standing personal and business ties' are insufficient to 'overcome the presumption of independence that all directors . . . are afforded'"); *see also* Vol. 41 JA010069 at 21:13-18 ("the fact that . . . one member, Mr. Lillis, is . . . independent and is not conflicted creates for the Court a presumption that the SLC is independent"). This further improperly changed the correct standard about what the SLC had to prove – and what the Appellant did not have to prove – in order for the District Court to grant the Motion to Defer and committed reversible error. These combined errors were not harmless because if the SLC did not carry its burden, the case would proceed to a trial on the merits.

3. The District Court Erred in Concluding that There was no Evidence of a Lack of Independence; had the District Court Used the Correct Standard of Review It would have Concluded that Appellant Presented Evidence that Created Issues of Fact on Independence such that Summary Judgment could not have been Awarded in Favor of the SLC.

The District Court's use of the wrong standard (affording the presumption of independence) coupled with improperly placing the burden on Appellant to overcome that erroneous presumption was not harmless error. Using the correct test, Appellant had only to present evidence that a reasonable trier of fact could rely on to conclude that the SLC was not independent. Appellant did so, but the District Court failed to recognize the same because it was using the wrong test. This failure constitutes reversible error.

a. The Test for Independence.

When examining whether the SLC acted independently, the central inquiry is whether it could decide "based on the corporate merits of the subject before the [Board or SLC] rather than extraneous considerations or influences." *Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1984) (cited by this court in *Shoen v. SAC Holdings*, 122 Nev. 621, 137 P.3d 171 (2006)). The Board or SLC must be able to "act free of personal financial interest and improper extraneous influences." *Rales v. Blasband*, 634 A.2d 927, 935 (Del. 1993). This court has stated in *Shoen* that a director (or SLC member) lacks independence when he is "beholden to" directors

who would be liable under the actions at issue *or for any other reason* is "unable to consider a demand on its merits, for directors' discretion must be free from the influence of other interested persons." *Shoen*, 122 Nev. at 639.

Moreover, courts evaluating directors' independence do not consider individual facts in isolation. Rather, the question is whether, "[c]onsidering the totality of the circumstances . . . a member of a committee has a relationship with an individual defendant or the corporation that would reasonably be expected to affect the member's judgment with respect to the litigation in issue." *Einhorn*, 235 Wis. 2d at 667. Indeed, as the Delaware Supreme Court discussed in detail in *Sanchez*, "it is important that the trial court consider all the particularized facts pled by the plaintiffs about the relationships between the director and the interested party in their totality and not in isolation from each other, and draw all reasonable inferences from the totality of those facts in favor of the plaintiffs." *Del. Cnty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1019 (Del. 2015) *Id.* at 1022 ("all the pled facts regarding a director's relationship to the interested party [must] be considered in full context in making the . . . determination of independence"); *see also, e.g., Blake*, 21 Mass. L. Rptr. 610, at *1 ("Courts conducting an independence analysis of SLC members employ the 'totality of the circumstances' test"); *In re Allion Healthcare, Inc.*, 911 N.Y.S.2d 691 (Table), at *7 (N.Y. Sup. Ct. 2010) ("the totality of the circumstances and overlapping issues create a

reasonable inference sufficient to survive a motion to dismiss" premised on the Allion directors' purported independence).

b. Appellant Presented Ample Evidence to Create an Issue of Fact that the SLC was not Independent and the District Court's Conclusion that No Such Issues of Fact Existed was Reversible Error.

(i) The Evidence Created Disputed Issues of Material Fact that Ortlf was not Independent.

The relationship between Ortolf and Ergen, including close ties between Ortolf's wife and children and Ergen's wife and children, undermines any notion that Ortolf would ever cause DISH to pursue claims against the Ergens. This Court has recognized that "allegations of close familial ties might suffice to show interestedness or partiality." *Shoen*, 122 Nev. at 639 n.56; *see also Amerco II*, 252 P.3d at 698-9 (same). In the SLC context, which mandates that the SLC bear the burden of proving its independence and no presumption of independence is proper, it would be "a fundamental obstacle to corporate due process if a director who would risk damaging a close, longstanding friendship by siding with the dissident shareholder would still be deemed 'independent.'" *Boylan v. Boston Sand & Gravel Co.*, No. 022296BLS1, 2009 WL 765404, at *6 (Mass. Sup. Ct. Jan. 23, 2009).

Here, the record shows that Ortolf was one of the DISH directors who – as the federal Bankruptcy Court concluded following a six week trial – completely

abdicated their jobs to Ergen and who would do whatever Ergen wanted (Vol. 23 JA005522 (finding that "no one crosses or even questions the actions of the Chairman. Charles Ergen is, in every sense, the controlling shareholder of DISH and wields that control as he sees fit.").) This judicial finding alone raises a material, disputed issue of fact about Ortolf's purported independence from Ergen.

Moreover, as set forth in Section VI.G.1 above, Ortolf and the Ergens share an extremely close, personal, and loving relationship. Perhaps most telling, on October 13, 2014, just as he was finalizing the SLC Report demanding that the District Court dismiss this action, Ortolf wrote to Cantey Ergen to thank her for her "love and friendship," telling her she was a rock of support [redacted], and Cantey responded by saying "It's what good friends do." (Vol. 28 JA006756.)

If this Court assesses the matter with any pragmatism about human relations, it becomes clear that the unique record in this case raises material factual disputes about Ortolf's purported independence. The decision whether to approve a transaction where a fellow director has a personal interest, which is the typical question in the context of determining demand futility in a derivative suit, is nowhere near as challenging as the decision whether to sue the conflicted director after the transaction is completed, potentially for massive amounts of monetary liability. *In re Oracle Corp. Derivative Litigation*, 824 A.2d at, 940-41; *see also,*

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e.g., (*Blake v. Friendly Ice Cream Corp.*, 21 Mass L. Rptr. 131, at *17 (Mass. Super. Ct. May 24, 2006) (SLC members are subject to "extraneous considerations or influences," including "a dynamic of group loyalty geared toward insulating other members of the Board from liability, and/or an improperly deferential relationship" to defendants).

Here, Ortolf's relationship with Ergen is far closer, and inherently more compromised, than the types of ties courts regularly determine call independence into doubt. *See Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, 889 (Del. Ch. 1999) (disqualifying SLC member who was CEO's brother-in-law), cited in *Amerco II*, 252 P.3d at 698-99; *London*, 2010 WL 877258, at *13-14 (director could not independently investigate wife's distant cousin, with whom he "only occasionally cross[ed] paths at large family functions"); *Sanchez*, 124 A.3d 1017 at 1021-22 (director was not independent where, given "deeper human friendship[]"and business relationship, "the coincidence of these personal and business ties are, well, no coincidence"); *Grace Bros., Ltd. v. Uniholding Corp.*, No. Civ.A. 17612, 2000 WL 982401, at *10 (Del. Ch. July 12, 2000) (brother-in-law could not investigate claims); *CALPERS v. Coulter*, No. Civ. 19191, 2002 WL 31888343, at *9 (Del. Ch. Dec. 18, 2002) (director lacked independence because he was friends with self-dealing CEO, his son worked for the company, and he approved of transaction at issue).

The Delaware Supreme Court's *Sanchez* decision is instructive. There, the court held that a director, Jackson, could not independently consider a litigation demand against the company's board chairman, Sanchez. Jackson and Sanchez had been close friends for five decades, and Jackson and his brother both worked at a subsidiary of a corporation where Sanchez served as a director. The court inferred from those facts that Jackson's position "derive[s] in large measure from his 50-year close friendship with Chairman Sanchez . . . because Sanchez trusts, cares for, and respects [Jackson]." *Sanchez*, 124 A.3d at 1023.

Similarly, here, Ortolf and Ergen have had deep, close personal and business ties for decades, since the two met in 1977. The Ortolfs and Ergens regularly express love for each other, Ortolf and Ergen have worked and invested together, and Ortolf's children were employed by Ergen at DISH.

The relationship between Ortolf and Ergen closely resembles the relationship between Jackson and Sanchez; as the *Sanchez* court understood, the two have far more than a "thin social-circle friendship," but rather the kind of "deeper human friendship[] . . . that would have the effect of compromising a director's independence. . . . Close friendships of that duration are likely considered precious by many people, and are rare. . . . [T]here is of course nothing wrong with that. Human relationships of that kind are valuable. In this context, however, where the question is whether the plaintiffs have [shown] facts

suggesting that Jackson cannot act independently . . . the[] obvious inferences that arise" preclude a determination of independence. *Sanchez*, 124 A.3d at 1022-23.

The District Court's conclusion that no issues of fact existed regarding Orlof's independence is not supported by the record and was reversible error.

(ii) The Evidence Created Disputed Issues of Material Fact that Brokaw was not Independent.

The relationship between the Brokaw and Ergen families likewise undermines any notion that Brokaw would cause DISH to pursue claims against the Ergens. As detailed above in Section VI.G.2, Brokaw – like Ortolf – shares a particularly close, loving and personal relationship with the Ergens. Of all the people in the world, Brokaw and his wife chose Cantey Ergen to serve as godmother to their firstborn son. (Vol. 30 JA007484.) Indeed, no other case in the country holds that a director with this sort of voluntary family-like relationship is, as a matter of law, impartial and independent. It was clear error to ignore such a powerful sign of non-independence.

As set forth above, the record before the District Court plainly raised material factual disputes about Brokaw's purported independence. In fact, the Brokaw and Ergen families regularly stay at each other's homes, including while the SLC was supposedly considering suing Ergen to recover over $800 million. (Vol. 26 JA006475; Vol. 30 JA007468.)

As with Ortolf, at a minimum, the evidence created material issues of disputed fact about Brokaw's willingness to ever pursue claims against Ergen, including claims for disgorgement of $800 million of profits that belonged to DISH. The District Court's conclusion that no issues of fact existed regarding Brokaw's independence is not supported by the record and was reversible error.

(iii) The Evidence Created Disputed Issues of Material Fact that Lillis was not Independent.

As set forth in Section VI.G.3, Lillis and his wife have a 20-year personal friendship with defendant Tom Cullen and Cullen's wife. And Cullen serves as Ergen's "right-hand man" on all things wireless. Indeed, it was Cullen who withheld information about Ergen's personal LightSquared debt purchases from the DISH Board, and it was Cullen who recommended Lillis join the DISH Board.

As set forth above, the evidence presented in the District Court concerning Lillis created a factual dispute about Lillis's impartiality. Indeed, the relationship between Lillis and Cullen closely resembles the relationship in *Booth Family Trust* between an SLC member and a defendant he was investigating, which the court determined established a lack of independence. *Booth Family Trust*, 640 F.3d at 143 (SLC member and defendant had previously worked together at a different company, defendant "spearheaded the effort" to have SLC member join the board, and SLC member and defendant were planning family travel).

The District Court's conclusion that no issues of fact existed regarding Lillis' independence was not supported by the record and constituted reversible error.

c. The SLC Members' Personal Involvement in the Board's Disloyal Favoring of Ergen Undermines the Notion that They Would Sue Ergen.

Courts recognize that directors who personally participate in well-pled misconduct cannot impartially investigate that same misconduct as part of an SLC. (*See, e.g.*, *Blake*, 21 Mass L. Rtpr. 131, at *17) (SLC member was not "in a position to have objectively assessed [plaintiff's] demands or to have based his decision as an SLC member on the merits" where he "was essentially being asked to evaluate his own conduct on the Board . . . . [b]ecause [he] was substantially and personally involved in the conduct challenged"); *Klein v. FPS Grp., Inc.*, No. 02-20170-CIV., 2004 WL 302292, at *20 (S.D. Fla. Feb. 5, 2004) (denying dismissal where SLC "consisted of the very individuals who had been involved in approving the transactions at issue"); *Mills v. Esmark*, 544 F. Supp. 1275, 1283-84 (N.D. Ill. 1982) (SLC members could not "be expected to exercise truly independent judgment in evaluating the propriety of their own decision to approve" misrepresentations at issue).

Each SLC member was substantially and personally involved in protecting the personal interests of Ergen over the interests of DISH and DISH's public

stockholders. They therefore face potential liability for breaching their duty of loyalty. *See Amerco II*, 252 P.3d at 700-01 ("The duty of loyalty requires the board and its directors to maintain, in good faith, the corporation's and its shareholders' best interests over anyone else's interests").

Ortolf faces the most obvious conflict, having helped to disband the STC in order to shut down its investigation of Ergen's debt purchases and oversight over DISH's LightSquared bidding. In addition, Ortolf, Brokaw, and Lillis each knowingly and affirmatively allowed Ergen to use his control over DISH's bid for valuable LightSquared spectrum assets to protect his personal interests in LightSquared debt purchases. Thus, the record before the District Court raised material issues of disputed fact about the SLC's purported independence and impartiality in assessing DISH's claims.

4. The District Court Improperly Limited its Analysis to Whether SLC Members Were "Financially Independent."

The District Court concluded that the sole criteria for determining independence was the SLC members' *financial* independence. (Vol. 41 JA010099 ("A director lacks independence if the director is 'beholden' to an interested person. Beholdenness is generally shown through financial dependence.") (citations omitted); *see also* Vol. 41 JA010099-100 (rejecting the contention that business or personal connections could result in lack of independence).) That

standard is incorrect, and the District Court's use of the standard lead to conclusions that were reversible.

As this Court explained in *Shoen*, "directors' independence can be implicated by particularly alleging that the directors' execution of their duties is unduly influenced." *Shoen*, 122 Nev. at 639. *Shoen* expressly recognized that a lack of independence could be shown when a director is "beholden," "or for other reasons . . . is unable to to consider a demand on its merits, for directors' discretion must be free from the influence of other interested persons." *Shoen,* 122 Nev. at 639.

This Court made clear that the undue influence need not be financial. For example, in *Amerco II*, this Court held that there was a reasonable doubt as to the impartiality of a defendant who was the defendant-directors' uncle, who "consistently aligned himself" with them. *Amerco II*, 252 P3d at 699.

Courts around the country are in accord. (*See, e.g.*, *Oracle*, 824 A.2d at 940) ("beholden . . . does not mean just owing in the financial sense, it can also flow out of 'personal or other relationships" to the interested party."); *Boland v. Boland,* 423 Md. 296 at 355 (2011), ("The [SLC] independence inquiry should not end with an examination of business relationships," and includes "evidence of significant personal or social relationships"); *Lewis*, 502 A.2d at 967 ("potential conflicts of interest or divided loyalties, when considered as a whole, raise a question of fact as

to whether [the SLC] could act independently"). As Chancellor Chandler explained in *London v. Tyrrell*, "an SLC member is not independent if he or she is incapable, ***for any substantial reason***, of making a decision with only the best interests of the corporation in mind. . . . For example, independence could be impaired if the SLC member senses that he owes something to the interested director based on prior events. ***This sense of obligation need not be of a financial nature***." 2010 WL 877528, at *12.

Here, the District Court's inquiry should have asked whether the relationships of the SLC members with the Ergens and the other defendants were "of such a nature that they might have caused [them] to consider factors other than the best interests of the corporation in making their decision for dismissal." *London*, 2010 WL 877528, at *13; *see also Booth Family Trust,* 640 F.3d at 142 ("Concluding that a committee member is not independent merely recognizes that his or her connection to the alleged wrongdoers or the alleged wrongdoing would be on the mind of the [SLC] member in a way that generates an unacceptable risk of bias," and means that the SLC member is "not situated to act with the required degree of impartiality") (quotation marks, citation, and brackets omitted).

Here, the record before the District Court created issues of material fact as to whether Ortolf, Brokaw and Lillis would focus on DISH's best interests to the exclusion of all other personal consideration. *See London*, 2010 WL 877528, at

*14 ("The Company, not plaintiffs, must do the explaining in the first instance if there are associations that cast a shadow on independence").

The District Court's initial limitation of its SLC independence inquiry to financial independence, and its resulting failure to even consider the SLC members' personal and business relationships with the Ergens and other defendants, constitutes reversible error.

5. The District Court Committed Reversible Error in Holding that an SLC is Independent Even if a Majority of its Members is Not.

The District Court erred by concluding that the SLC was independent even if only one of its three members were independent. (Vol. 41 JA010100) ("A special litigation committee is generally independent if the committee cannot lawfully act without the approval of at least one director who is independent . . . . This is true even if there is reason to doubt the independence of another member or members of the special litigation committee").) This was reversible error because (1) the SLC as a whole needs to be independent – not just one of three members, and (2) the District Court's focus on just one director (i) ignored evidence creating disputed issues of material fact regarding that director's independence, and (ii) sidestepped the overwhelming evidence of the other two directors' complete lack of independence, and concealment of those facts from the Court.

Where, as here, the Board created and empowered a multi-person SLC, the ***committee as a whole*** must be independent; one member's ostensible independence cannot save the SLC. The *Booth Family Trust* case is instructive. There, the board created a two-member SLC, but one of the members (Tuttle) recused himself from assessing claims against a defendant (Singer) with whom he had a close relationship. *Booth Family Trust*, 640 F.3d at 144. The court rejected Tuttle's recusal from part of the SLC's analysis, writing: "[t]he problem is that the special litigation committee only had one member when the resolution that created it called for a two-member committee. If Abercrombie had wanted a special litigation committee with just one member, it could have so chosen. But, instead, it appointed two members." *Id.* at 145.

Here, the DISH Board had the burden to create an independent committee that "fully convince[d] the Court that the SLC can act with integrity and objectivity." *London*, 2010 WL 877528 *13; *see also, e.g.*, *Booth Family Trust*, 640 F.3d at 144; *Lewis*, 502 A.2d at 936; *Oracle*, 824 A.2d at 940. Instead, the Board decided to create an SLC stacked with defendants' closest friends and personal confidantes. Having done so, it was error for the District Court to ignore the members of the SLC with deep personal ties to the Ergens and act – contrary to the record – as if they had no part in the SLC's investigation and conclusions.

Further, the District Court misconstrued the cases it cited on this point. (Vol. 41 JA010100.) First, none of the cited cases involved a multi-person SLC with, at best, a single independent member. And in the cases upon which the District Court relied, there was no basis to conclude that ***any*** of the SLC members was tainted.

Specifically, in *Johnson v. Hui*, 811 F. Supp. 479, 486-87 (N.D. Cal. 1991), the court ***did not*** conclude that ***either*** of the two committee members lacked independence. Instead, with regard to one, the court expressly determined that the facts "do not demonstrate the sort of substantial bias or interest which would cause the Court to question the SLC's ability 'to base [its] decision on the merits of the issue rather than . . . extraneous considerations or influence.'" Because there was no basis to find a lack of independence, the case hardly supports a conclusion that a single independent member obviates a lack of independence by the balance of the SLC. Likewise, in *Struogo ex rel. The Brazil Fund v. Padegs*, 27 F. Supp. 2d 442, 450 n.3 (S.D.N.Y. 1998), the court ***did not*** find that the challenged SLC member lacked independence. Rather, the director had only fleeting and tangential connections to one defendant, expressly disclaimed any friendship with any of the company's directors, and there was no other evidence calling the challenged director's independence into question. And in *In re Oracle Securities Litigation*, 852 F. Supp. 1437, 1442 (N.D. Cal. 1994), the court ***did not*** conclude that the

challenged director lacked independence, and there was "nothing to indicate that the SLC's judgment was tainted in any way." *Id.*

Here, by contrast, the record contains substantial evidence that the SLC members were conflicted, well beyond simply being named as defendants or having some general incidental relationship with Ergen or another Defendant, and further leaves no genuine question that neither Ortolf nor Brokaw would ever authorize DISH to sue the Ergen family.

Even if, contrary to the record, there were no material factual disputes about Lillis's purported impartiality, the District Court's conclusion that one independent director could somehow render the entire SLC ***independent as a matter of law*** is unsupported by Nevada law and leads to absurd results. If the District Court's ruling is affirmed, then the DISH Board could have appointed an SLC comprising of Charles Ergen, his wife Cantey Ergen, and Lillis. Or, for that matter, the entire Board – which suffered pervasive conflicts necessitating the SLC's formation in the first place – could serve as an SLC, as long as they added a new and arguably independent director. Such a legal regime invites severe misconduct by insiders, and turns governance structures (such as the SLC here) into illusory protections.

6. The District Court Erred in Determining that the SLC Conducted a Good Faith, Reasonable and Thorough Investigation.

The District Court improperly concluded that, as a matter of law, the SLC conducted a reasonable and thorough investigation in good faith. The record before the District Court raised material factual disputes that the SLC prejudged the outcome of its investigation, failed to take a position on a number of Appellant's claims, and ignored critical evidence and judicial findings. Thus, the SLC failed to carry its burden, and deferring to the SLC was error.

a. The SLC Prejudged the Outcome of its Investigation.

Courts universally hold that deference to an SLC is inappropriate when the SLC prejudges the outcome of its investigation. For example, in *In re Galena Biopharma, Inc. Derivative Litigation*, No. 3:14-CV-382-SI LEAD, 2014 WL 5410831, (D. Or. Oct. 22, 2014), *reconsideration denied*, No. 3:14-CV-382-SI LEAD, 2014 WL 5494890 (D. Or. Oct. 30, 2014), the court held that it could not defer to an SLC – represented by the same counsel as the DISH SLC – that had demonstrated its decision to absolve the defendants before it conducted its investigation. *See id.* at *8. Many other cases refuse to defer to an SLC that fails

to show that prejudged the merits or fails to prove that it conducted a reasonable and thorough investigation in good faith.[12]

Here, the District Court erred by ignoring substantial evidence that the SLC prejudged the outcome of the investigation from the outset. Just like the board in (*Taneja v. FamilyMeds Grp.*, a case applying Nevada law, "[a]t the time of the delegation, the directors were not disinterested" and "[t]he assumption and expectation were that the investigation's conclusion was predetermined, and that it

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[12] *See London,* 2010 WL 877528 at *15 (SLC conclusions carry no weight "if evidence suggests that SLC members prejudged the merits of the suit"); *Biondi v. Scrushy*, 820 A.2d 1148, 1166 (Del. Ch. 2003), *aff'd sub nom. In re HealthSouth Corp. S'holders Litig.*, 847 A.2d 1121 (Del. 2004) (no deference where shareholders could not "reasonably repose confidence in an SLC whose Chairman has publicly and prematurely issued statements exculpating one of the key company insiders whose conduct is supposed to be impartially investigated by the SLC" because "there will always linger a reasonable doubt that its investigation was designed to paper a decision that had already been made"); *Auerbach*, 393 N.E. 2d at 1002-03 ("Proof, however, that the investigation has been so restricted in scope, so shallow in execution, or otherwise so pro forma or half-hearted as to constitute a pretext or sham, consistent with the principles underlying the application of the business judgment rule, would raise questions of good faith or conceivable fraud which would never be shielded by that doctrine"); *In re Audiovox Derivative Litig.*, No. 787-N (Del. Ch. Apr. 22, 2005) Tr. at 7-8, cited in *Kaufman v. Computer Assocs., Int'l.*, No. Civ.A. 699-N, 2005 WL 3470589, at *4 n. 19 (Del. Ch. Dec. 21, 2005) ("Rather than taking steps to investigate at the time allegations were brought, they filed a motion to dismiss. How can I ignore that? . . . A sham SLC that is established merely as a device for delaying litigation will receive little respect from the court.").

was to be in the board's favor." HHDCV094045755S, 2012 WL 3934279, at *5 (Conn. Super. Ct. Aug. 21, 2012) (applying Nevada law).[13])

Here, the Board created the SLC – consisting of Ergen's best friends and confidantes Ortolf and Brokaw – the night before the District Court was scheduled to hear Appellant's motion seeking expedited discovery and to set an injunction hearing. Upon formation, the Board's counsel immediately used the SLC's formation to attempt to delay the Court's consideration of Appellant's motion.

The SLC and its counsel thereafter took up the laboring oar on behalf of Ergen and the other Defendants, including:

- Declaring to the District Court on October 3, 2013, before conducting ***any*** investigation, that Ergen had no "material personal interest in DISH's decisions that diverges from those of DISH's remaining stockholders" and that "Ergen's participation [in the bid] does not threaten to impair DISH's efforts to acquire LightSquared." (Vol 6 at JA001347-48.)

- Taking the lead on behalf of all Defendants during the preliminary injunction hearing on November 25, 2013, arguing long before completing its investigation that "There's not a breach of duty if you have an independent valuation that you accept; there's not a breach of duty to terminate the transaction committee, because its job was done." (Vol. 13 JA003244.)

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[13] *Taneja* was a demand *refused* case where the Board was presumed to be independent and the plaintiff had the burden to show that the Board had improperly refused his demand. The requirement that the Board must conduct a thorough and good faith investigation before it is entitled to any deference applies *a fortiori* when, as here, ***the Board has the burden*** of demonstrating that there are no genuine issues of material fact as to the reasonableness and good faith of its investigation.

- Admitting to the District Court on December 19, 2013 that the SLC fully aligned itself with Ergen and the Board "on this [] side of the V." (Vol. 14 JA003349-53.)

- Refusing to intervene when Ergen openly conditioned DISH's bid for LightSquared spectrum assets on Ergen getting a full release and being paid in full on his debt. (*See* Vol. 30 JA007267.)

- Moving to dismiss Appellant's claims on August 29, 2014, two months before the SLC completed its investigation. (Vol. 18 JA004351.)

- Refusing to investigate Ergen's resulting personal profits. (Vol. 28 JA006817:11-18:25.)

- Limiting the scope of its investigation to exclude the Board's termination of the STC. (Vol. 28 JA006815:19-24.)

An independent SLC conducting an objective, reasonable, and independent investigation in good faith does not act this way. *See Galena*, 2014 WL 5410831 at *8 (denying SLC motion to terminate litigation because, among other things, the SLC could not "meet its burden to prove that [the SLC] conducted an objective, reasonable, and independent investigation done in good faith, after having already formed judgment"); *London,* 2010 WL 877528 at *15 (SLC conclusions carry no weight "if evidence suggests that SLC members prejudged the merits of the suit"); *cf. In re Consumers Power Co. Derivative Litig.*, 132 F.R.D. 455, 478-79 (E.D. Mich. 1990) (law firm "could not serve as counsel to the [SLC] since they represent the defendant directors in this derivative action"). The District Court (which was improperly presuming that the investigation was done in good faith)

erred in ignoring the substantial evidence that created a material issue of fact concerning the thoroughness and good faith of the SLC's investigation.

b. The SLC's Decision Not to Investigate Certain Claims Created Material Issues of Fact Regarding the Lack of Good Faith and Thoroughness.

Courts around the country refuse to defer to an SLC that has failed to investigate key claims and allegations. For example, in Sutherland v. Sutherland, the court refused to defer because "the SLC's selective investigation . . . does not adequately address all of [plaintiff's] claims," and "the SLC's decision not to conduct that analysis . . . gives rise to substantial questions concerning the reasonableness and good faith of the SLC's investigation." 958 A.2d 235, 243-44 (Del. Ch. 2008) (quotation marks and alteration omitted). Similarly, in *Blake*, 201 Mass L. Rptr. 610, at *7, the court refused to defer because of "significant gaps in the SLC's 'analysis,' which failed to answer serious, longstanding questions raised by the plaintiff's demand letter and complaint, and which are not without support in the discovery materials."[14]

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[14] *See also, e.g.*, *Booth Family Trust*, 640 F.3d at 138-41 (refusing to defer to SLC despite 144-page report); *Peller v. S. Co.*, 707 F. Supp. 525 (N.D. Ga. 1988) (facial length of investigation did not determine whether SLC "pursued its charge with diligence and zeal, or whether it played softball"); *Boland*, 423 Md. at 358-59 (lower court "incorrectly applied a presumption that the SLC's methodology was reasonable" where court "focused primarily on the sheer volume of the SLC's exhibits and report").

An SLC's selective focus is shown when there is an "incongruity" between the SLC omitting an analysis of plaintiff's claims while detailing "innocent" actions by defendants, thereby "rais[ing] significant questions as to the good faith of the SLC's work." *Sutherland v. Sutherland,* 958 A.2d 235 at 243 (De. Ch. 2008), 958 A.2d at 243. Thus, "[t]o conduct a good faith investigation of reasonable scope, the SLC must investigate ***all theories of recovery*** asserted in the plaintiffs' complaint." *London*, 2010 WL 877528, at *17 (Del. Ch. Mar. 11, 2010) (emphasis added).

Here, the SLC admittedly refused to investigate core theories of recovery. For example, the SLC refused to investigate Ergen's $800 million in profits on his LightSquared debt purchases, the related termination of the STC when it insisted that it needed to investigate those debt purchases as a potential corporate opportunity for DISH, and the asserted unjust enrichment claims against Ergen. The SLC thereby ignored Ergen's own testimony admitting that he should have offered the opportunity to buy Lightsquared debt to DISH and findings by a federal court after trial that:

- Ergen used DISH resources and his position as DISH's Chairman to purchase LightSquared debt for his personal profit;
- DISH could have acquired LightSquared debt through an affiliate, just like Ergen;

- Ergen and other DISH executive officers deliberately did not inform the Board that Ergen was purchasing LightSquared debt until after Ergen had placed his final trade;

- Ergen used his control over DISH's Board to protect his personal investment in LightSquared debt;

- The DISH Board favored Ergen's interest over the interests of DISH and DISH's public shareholders; and

- The Board terminated the STC in violation of the May 8, 2013 Board resolution.

The SLC's decision not to investigate a core theory of recovery renders its investigation unreasonable and fatally undermines its claim to deference. As the *London* court concluded after a special litigation committee declined to investigate a relevant transaction:

> If the SLC had investigated this transaction, it likely would have shed light on the broader allegations in plaintiffs' complaint. . . . ***The SLC should have challenged defendants on this point. It may have taken nothing more than a few questions. But the SLC declined to do so. Seeing this omission, I must conclude that the SLC's investigation . . . was not reasonable in scope.***

2010 WL 877528, at *23 (emphasis added); *see also Day*, 251 P.3d at 1230 (SLC did not investigate in good faith where it "conducted no independent investigation into [a] critical point"); *Electra Inv. Trust PLC v. Crews*, No. 15890, 1999 WL 135239, at *4 (Del. Ch. Feb. 24, 1999) (SLC's failure to explore all claims cast doubt on SLC's investigation because a minimal investigation would have helped SLC better evaluate the merits of all claims); *Boland*, 423 Md. at 358 (reversing

decision to defer to SLC where lower court "focused primarily on the sheer volume of the SLC's exhibits and report," and holding that the court must "examine what issues the SLC actually set out to address. The SLC cannot arrive at a reasonable answer if [it] addresses the wrong issues. Thus, addressing the wrong issues is an example of unreasonable methodology.").

Demonstrating a purposely narrow investigation, the SLC refused to interview witnesses who might offer information tending to harm Ergen. Indeed, Lillis admitted that the SLC did not interview anyone who "would be considered adverse" to Ergen. (Vol. 27 JA006732 at 140:16-23.) Rather, the interviewees were only current or former DISH directors or officers and Ergen's personal counsel at Willkie Farr – all of whom were loyal and beholden to Ergen. (Vol. 19 JA004658-59.) The SLC did not try to interview DISH's own counsel at Sullivan & Cromwell, who admitted in open court that DISH could have bought the LightSquared debt, much less the STC's counsel at Cadwalader, who tried investigating Ergen's debt purchases before the STC was punitively disbanded. The District Court should not have deferred to the SLC when it failed to interview those key witnesses.

Indeed, as one federal district court has held, "when a stockholder identifies a witness or set of witnesses who should have been interviewed but were not in connection with a board's investigation, a court may find that investigation was

unreasonable." *Barovic v. Ballmer*, Case No. C14-0540-JCC, 2014 WL 7011840, at *4 (W.D. Wash. Dec. 10, 2014) (citations omitted) (denying defendant's motion to dismiss where board interviewed only company's own employees, directors, and executives); *see also London*, 2010 WL 877258, at *21 ("An objective SLC would have been ***duty bound*** . . . to thoroughly explore" evidence that "inferentially supports plaintiffs' allegations") (emphasis in original).

The SLC's refusal to confront Ergen or Kiser with documents showing that DISH could have purchased LightSquared debt, particularly in light of the Bankruptcy Court's findings regarding their credibility, further evidences the SLC's bad faith. *See Peller v. The Southern Co.*, 707 F. Supp. 525, 529 (N.D. Ga. 1988) ("The conduct of interviews is a most important factor in determining whether the [SLC] pursued its charged with diligence and zeal, or whether it played softball with critical players. . . . This is not good faith.").

In *Peller*, the court denied a motion to dismiss based on the SLC's recommendation and recognized that a facially thorough investigation does not deserve deference if the SLC's interviews did not actually press witnesses on key, material points. Likewise, in *Weiser v. Grace*, 683 N.Y.S.2d 781, 786 (N.Y. Sup. Ct. 1998), the court expressed deep concern about the SLC's practice of "rel[ying] heavily on counsel" to conduct interviews, where "the witness interviews were not transcribed" and "[t]he only written record of the interviews are counsel's . . .

summaries." The court recognized that scrutiny of the SLC's investigation was necessary to prevent the SLC from "deny[ing] plaintiffs the opportunity to discover the questions asked of the key witnesses, and whether the responses thereto were used or ignored by the SLC," which "would impermissibly allow the SLC to insulate its investigation from scrutiny." *Id.*

Here, although the SLC and its counsel admitted that the SLC did not investigate the STC's disbandment (Vol. 27 JA006568 at 197:19-24; Vol. 20 JA004949-50; Vol. 27 JA006566 at 187:8-14), the District Court nevertheless concluded that "the SLC addressed this issue." (Vol. 41 JA010104 at ¶ 27.) However, the Court's findings and conclusions cite to the page of the SLC report admitting that "the SLC d[id] not separately analyze the allegations concerning the termination of the STC." (Vol. 20 JA004951); *see also* Vol. 27 JA006745 at 193:9 (SLC counsel representing that SLC "didn't analyze the STC claims.") Tellingly, the Bankruptcy Court found following a six-week trial, "***[a]s it turned out, [the STC's enabling resolutions] were not worth the paper they were written on. The evidence reveals that these board resolutions were quickly and flagrantly disregarded.***" (Vol. 37 JA009055:11-13) (emphasis added). Nevertheless, and directly contradicting the District Court's finding, the SLC failed to investigate Appellant's claims concerning the disbandment of the STC.

Similarly, although the SLC Report made clear that the SLC did not investigate whether DISH had an unjust enrichment claim against Ergen in connection with his LightSquared debt purchases, the District Court incorrectly found to the contrary. (Vol. 41 JA010104 at ¶ 28 (citing SLC Report at 324-25 (contending in one sentence that Plaintiff's unjust enrichment claim should be dismissed in the context of discussion of Ergen's "allegedly exposing DISH to an increased risk of greater legal fees" – ***not*** whether his $800 million in profits should, as a matter of equity, go to DISH under an unjust enrichment theory)).)

The SLC's refusal to investigate the asserted unjust enrichment claim deprived DISH of a potential $800 million recovery from Ergen. Specifically, under Nevada law, DISH can seek a recovery because: (1) Kiser (acting as a DISH officer) conferred an $800 million benefit on Ergen by not pursuing the debt for DISH and by helping facilitate Ergen's debt purchases; (2) Ergen made $800 million in profits; and (3) DISH would have been in line to enjoy those massive profits had Kiser and Ergen let DISH pursue the investment, as required "in equity and good conscience." *See Certified Fire Prot. Inc. v. Precision Constr.*, 283 P.3d 250, 257 (Nev. 2012) (stating elements of unjust enrichment claim).

The SLC justified its recommendation not to pursue claims because of the potential litigation costs to DISH. (Vol. 19 JA004628, Vol. 19 JA004639, Vol. 20 JA004952 at n.998, Vol. 20 JA004955-56.) As the U.S. Court of Appeals for the

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Second Circuit explained, however, where the claims at issue have large potential returns to the corporation (even considering risk), an SLC's recommendation to dismiss claims that "far exceed[] the potential cost of the litigation to the corporation" deserves no deference because "the probability of a substantial net return to the corporation is high." *Joy*, 692 F.2d at, 897. Here, as there, the SLC's willful ignorance of the financial benefits to DISH of pursuing these claims against Ergen precludes any deference.

All of this guidance created material issues of fact regarding the good faith and thoroughness of the investigation. The District Court's failure to recognize the same was reversible error.

c. The SLC misrepresented and concealed material facts.

The District Court's decision to defer to the SLC ignored that the SLC misrepresented and concealed key facts concerning the SLC's independence and the merits of DISH's claims. Among other things, the SLC misrepresented the nature of the relationship between Ortolf and the Ergens. Ortolf stated that he was fully capable of considering the claims at issue in this action while "considering only DISH's best interest," but did not disclose any of the longstanding and highly personal contacts he has had to Ergen and the Ergen family for decades. (Vol. 27 JA006541-42 at 89:1-3, 90:10 – 91:17; Vol. 24 JA005830.)

Similarly, Brokaw pretended that the Ergens were merely part of his "wide general social circle" while withholding from the District Court the close personal nature of his and his wife's relationship with the Ergens. (Vol. 28 JA006693 at 366:11-14; Vol. 24 JA005820.) Ortolf and Brokaw admitted that they submitted their declarations to persuade the District Court to defer to the SLC and affirmatively chose not to disclose those facts about their close personal relationships with the Ergens. (Vol. 27 JA006543 at 97:3-10; Vol. 27 JA006692-93 at 364:23-365:8, 366:20-367:10.) Those facts came to light only after Appellant – over the SLC's objection – obtained discovery. (Vol. 26 JA006300:16-22, Vol. 25 JA006025 at n.11.)

Furthermore, the SLC concealed key facts concerning the merits of DISH's claims against Ergen in connection with the lost opportunity to acquire LightSquared spectrum assets. For example, the SLC concealed a [redacted] (Vol. 29 JA007169.)

The SLC also concealed from the District Court that DISH's bid for LightSquared spectrum was conditioned on Ergen getting paid in full on his LightSquared debt. (Vol. 24 JA005890-91.) The SLC further concealed that the

Board (including the SLC) gave Ergen discretion to use DISH's bid for LightSquared assets to protect his personal interests in LightSquared debt, at the expense of DISH and DISH's public shareholders. (Vol. 24 JA005892.)

The District Court erred in deferring to the SLC despite learning about the SLC's misrepresentations concerning its purported independence and its concealment of key facts. *See Sutherland*, 968 A.2d at 1030 (failure to disclose evidence that "neither the court nor [plaintiff] would have ever known about . . . from the report . . . plainly prevented the court from . . . showing that this . . . SLC acted reasonably and in good faith"). No court is required to defer to an SLC that misrepresents facts concerning its purported impartiality and conceals facts that support claims on behalf of the company.

C. The District Court Abused its Discretion In Awarding Costs.

After incorrectly deferring to the SLC's recommendation to dismiss the case, the District Court committed further error when it ignored this Court's binding precedent to deny in significant part Appellant's Motion to Retax. Of course, if this Court reverses the District Court's decision to defer to the SLC, the case will be remanded to consider the merits of Appellant's claims, and the question of the District Court's ruling on the motion to retax is moot.

Even if this Court affirms the District Court's decision to defer (and it should not), the Court should vacate the District Court's decision on Appellant's

Motion to Retax. Where "a trial court exercises its discretion in clear disregard of the guiding legal principles, this action may constitute an abuse of discretion." *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993) (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law")).

1. Electronic Discovery Costs were not Properly Taxable.

The District Court's order and judgment taxing costs on Appellant totaling $186,100.60 included $151,178.32 in electronic discovery costs. (Vol. 43 JA010714.) Those costs are not allowable under NRS 18.005. NRS 18.005 provides an exhaustive list of the costs that a prevailing party is entitled to recover. As this Court has directed, NRS 18.005 is to be "construe[ed] . . . narrowly." *Bergmann*, 109 Nev. at 679; *see also Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352, 971 P.2d 383, 386 (1998). Unless specifically enumerated in the statute, costs are not recoverable where they are "better considered part of the attorney's fee or non-recoverable overhead." *Bergmann*, 109 Nev. at 680. And although NRS 18.005 allows a prevailing party to tax certain discovery-related costs, none of the enumerated costs at NRS 18.005(1)(16) identify electronic discovery costs.

The District Court allowed taxation of electronic discovery costs pursuant to NRS 18.005(17). This is a residual clause allowing taxation of "[a]ny other reasonable and necessary expense incurred in connection with the action, including reasonable and necessary expenses for computerized services for legal research." *Id.* (emphasis added). However, nothing in this provision suggests that the District Court could award taxation of "electronic discovery" as opposed to reasonable and necessary expenses for legal research such as Westlaw and Lexis. *See Berosini*, 114 Nev. at 1352, P.2d at 385 (holding that NRS 18.005(17) should be construed narrowly, as "statutes permitting the recovery of costs are to be strictly construed because they are in derogation of the common law."); *see also Gibellini v. Klindt*, 110 Nev. 1201, 1205, 885 P.2d 540, 543 (1994) (same).

Indeed, this Court rejected a claim for legal research costs under a prior version of the statute that did not explicitly include computerized legal research. In *Bergmann*, the Court discussed NRS 18.005(16), which was at the time of that decision the statute's residual subsection and allowed "[a]ny other reasonable and necessary expense incurred in connection with the action." The Court rejected the claimed Westlaw costs because "there is no indication that the Nevada Legislature intended NRS 18.005 . . . for that purpose." Accordingly, "[c]onstruing NRS 18.005(16) narrowly, [the Court] h[e]ld that computer research expenses are not

recoverable costs." *Bergmann*, 109 Nev. at 680. The same is true of the SLC's electronic discovery costs here.

Moreover, the District Court's taxation of electronic discovery costs violated the well-established rule against treating counsel's fees as a form of recoverable costs. *Bergmann*, 109 Nev. at 680. Electronic discovery may be used to identify and review documents maintained in electronic format, and is a means for a litigant to lower its lawyers' costs. When the SLC chose to use electronic discovery platforms to limit its attorneys' expenses, which clearly would not be recoverable or taxable, the SLC chose to make an expenditure that would not be recoverable. There was no legal basis for the District Court to award electronic discovery costs, and doing so was tantamount to taxing part of the SLC's legal fees to Appellant.

In sum, it is the legislature's role to expand the categories of recoverable costs under NRS 18.005, not the District Court's. *See Bergmann*, 109 Nev. at 680. The District Court's order taxing the electronic discovery costs to Appellant was an abuse of discretion and should be reversed.

2. Costs of Teleconferences, Photocopying, and Scanning were not Supported by Sufficient Evidence of Reasonableness and Necessity.

The District Court abused its discretion when it determined that the SLC submitted sufficient support to determine that the photocopying and scanning costs were reasonable and necessary under NRS 18.005(12)(13). A prevailing party, at

the time of its memorandum of costs, must provide sufficient support for the court to conclude that each taxed cost was reasonable and necessary. *See Cadle Co. v. Woods & Erickson, LLP,* 131 Nev. Adv. Op. 15, 345 P.3d 1049, 1054 (2015).

Here, the SLC claimed photocopying and scanning costs under NRS 18.005(12) totaling $18,820.08, and costs for teleconferences under NRS 18.005(13) totaling $708.02. (Vol. 41 JA010200.) As backup for the copies and scans, the SLC submitted records showing only that copies and scans were made, the dates they were made, and by whom. (Vol. 42 JA010287-371.) Likewise, as backup for the teleconferences, the SLC submitted records showing only the date, time, length, number of participants, and moderator of certain conference calls. (Vol. 42 JA010373-91.) After Plaintiff raised those deficiencies, the SLC submitted a declaration discussing counsel's photocopying practices and opinion that the claimed costs were reasonable and necessary. The declaration did not address teleconferences at all. (Vol. 43 JA010621-23.)

The SLC's proffer was legally insufficient to demonstrate reasonableness and necessity. *See Berosini*, 114 Nev. at 1353, 917 P.2d at 386 (rejecting taxation because "PETA failed to provide sufficient justifying documentation beyond the date of each photocopy and the total photocopying charge"); *Cadle Co.,* 131 Nev. Adv. Op. 15, 345 P.3d at 1054-55 (rejecting taxation request based on affidavit of counsel stating that each copy was reasonable and necessary because "it did not

demonstrate how such fees were necessary"); *Cadle Co.*, 131 Nev. Adv. Op. 15, 345 P.3d at 1054 (rejecting memorandum for costs for photocopies and other expenses for lack of "sufficient justifying documentation," where party "did not present the district court with evidence enabling the court to determine that those costs were reasonable and necessary").

The District Court abused its discretion when it taxed photocopying, scanning, and teleconference costs to Appellant when the SLC did not demonstrate that those costs were reasonable and necessary. Accordingly, the District Court's order should be reversed.

IX. CONCLUSION

Appellant respectfully submits that, for the reasons discussed above, the Court should reverse and vacate the judgment of the District Court, and remand for further proceedings on the merits. Appellant further respectfully requests, should the Court affirm the judgment of the District Court, that the Court reverse and vacate the District Court's decision on taxable costs, and disallow taxation of electronic discovery and other disputed costs.

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 in 14-point font, Times New Roman style. I further certify that this brief complies with the Court's March 10, 2016 Order because it is less than 21,000 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this 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 with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in this brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: May 26th, 2016

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By: /s/ *Jeff Silvestri*

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify, under penalty of perjury, that I am an employee of McDonald Carano Wilson LLP and that on this 26th day of May, 2016, a true and correct copy of the foregoing Appellant's Opening Brief – Redacted was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system, which will provide copies to all counsel of record registered to receive such electronic notification.

/s/ *CaraMia Gerard*
An employee of McDonald Carano Wilson LLP

EXHIBIT B

EXHIBIT B

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF DISH NETWORK DERIVATIVE LITIGATION.

No. 69012

JACKSONVILLE POLICE AND FIRE PENSION FUND,

Appellant,

vs.

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

Respondents.

FILED

AUG 17 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

IN THE MATTER OF DISH NETWORK DERIVATIVE LITIGATION.

No. 69729

JACKSONVILLE POLICE AND FIRE PENSION FUND,

Appellant,

vs.

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

Respondents.

ORDER

Appellant has filed a motion to redact portions of its opening brief and to file documents in its appendix under seal. The Special Litigation Committee of DISH Network Corporation (SLC) has filed a limited opposition and countermotion for leave to make additional

redactions.[1] The parties agree that the documents and portions of the opening brief identified by appellant should remain sealed pursuant to Protective Orders entered by the district court. The SLC, however, contends that additional information on page 74 of the opening brief is also subject to the protective order and should be redacted. SLC also agrees to appellant's motion that referenced documents at pages JA007346-47, JA007356-57 and JA007468 of Volume 30, pages JA007502 and JA7535-43 of Volume 31, pages JA007769-72 of Volume 32 and page JA008245 of Volume 34 of the sealed portions of the Joint Appendix may be unsealed and disclosed publicly. Accordingly, the clerk of this court shall unseal the identified portions of the joint appendix, filed as "Appendix to Opening Brief." However, with respect to the referenced documents at pages JA007348-55 of Volume 30 of the sealed portions of the Joint Appendix, we agree with SLC that the personal contact information of third parties contained therein (including personal email addresses) shall remain redacted pursuant to the District Court's October 21, 2013, Stipulated Confidentiality Agreement and Protective Order and August 21, 2015, Minute Order. Cause appearing, we grant the motions. The clerk of this court shall file the redacted opening brief provisionally received on May 31, 2016, and shall file under seal the unredacted opening brief and sealed portions of the appendix to the opening brief, provisionally received in this court on May 27, 2016.

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[1]We direct the clerk of this court to file SCL's "limited Opposition to Appellant's Motion for Leave to Redact Portions of Appellant's Opening Brief and to Seal Portions of the Appendix and Countermotion for Leave to Make Additional Redactions" with "Sealed Exhibit C," provisionally received on June 10, 2016.

The parties have filed a stipulation to extend the time for SLC to file its answering brief and for Jacksonville to file its reply brief. The stipulation is approved. SLC has also filed a motion for leave to file an answering brief in excess of the page and type-volume limitations of NRAP 32, and a motion for leave to file a redacted version of its answering brief and to file Volume II of the answering appendix under seal pursuant to a district court order sealing the documents contained in the appendix. The motions are not opposed. Having considered the motions, we grant them. The clerk of this court shall file SLC's redacted answering brief and appendix Volume I, provisionally received on July 28, 2016, and the sealed copies of the answering brief and Volume II of the appendix received on August 2, 2016. Pursuant to the parties' stipulation, appellant Jacksonville Police & Fire Pension Fund's reply brief shall be due September 26, 2016. Failure to timely file the reply brief may be deemed a waiver of the right to file a reply brief.

It is so ORDERED.

/ Saitta, A.C.J.

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