**IN THE SUPREME COURT OF THE STATE OF NEVADA**

IN THE MATTER OF DISH NETWORK DERIVATIVE LITIGATION.

JACKSONVILLE POLICE AND FIRE PENSION FUND,

Appellant,

vs.

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

Respondents.

Supreme Court Case No.: 69012

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



*Consolidated with:*

Supreme Court Case No.: 69729

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

# ANSWER TO PETITION FOR REHEARING

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## I.
## INTRODUCTION

Respondent, the Special Litigation Committee of nominal defendant DISH Network Corporation (the "SLC"), opposes the Petition for Rehearing (the "Petition" or "Pet.") filed by Appellant Jacksonville Police and Fire Pension Fund ("Jacksonville"). The Petition should be denied for two reasons: First, contrary to Jacksonville's assertion, this Court did not "misapprehend" that the District Court's July 16, 2015 hearing (the "July Hearing") was an evidentiary hearing. The Court *decided*, based upon undisputed facts, for the multiple reasons set forth in the Court's opinion, that the July Hearing satisfied the evidentiary hearing requirement of *Shoen* and *Amerco*. Second, NRAP 40(c)(1) bars reargument of matters previously "presented in the briefs and oral arguments[.]" But the issue of whether the July Hearing was the evidentiary hearing required by *Shoen* and *Amerco* was presented in both parties' briefs and during oral argument. Jacksonville's assertion that it did not realize, when it was before the District Court, that the July Hearing was an evidentiary hearing is not true and is contradicted by the record. In any event, the assertion simply rehashes the argument Jacksonville already made to this Court.

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## II.
## STANDARD OF REVIEW

"The court may consider rehearings . . . [w]hen the court has overlooked or misapprehended a material fact in the record or a material question of law in the case[.]" (Pet. 1 (citing NRAP 40(c)(2).)[1] "A petition for rehearing may not be utilized as a vehicle to reargue matters considered and decided in the court's initial opinion." *Matter of Estate of Herrmann*, 100 Nev. 149, 151 (1984) (denying petition for rehearing and awarding sanctions). NRAP 40(c)(1) explicitly provides that "[m]atters presented in the briefs and oral arguments may not be reargued in the petition for rehearing, and no point may be raised for the first time on rehearing."

## III.
## ARGUMENT

### I. This Court Did Not "Misapprehend" That The District Court Held the Evidentiary Hearing Required by *Shoen* And *Amerco*.

Jacksonville claims that rehearing is needed because this Court "misapprehended a material fact in determining that the district court has already conducted the evidentiary hearing that was required" by *Shoen* and *Amerco*. (Pet. 1.) But this Court did not "misapprehend" that the District Court held the evidentiary hearing required under *Shoen* and *Amerco*. Rather, this Court *decided*

[1] NRAP 40(c)(2) also permits rehearing "[w]hen the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case." However, Jacksonville does not seek rehearing on this basis.

that the July Hearing was the required evidentiary hearing. It did so as a matter of law, based upon undisputed facts. This Court's decision ("Op.") expressly stated:

> [T]he record demonstrates that Jacksonville submitted with its supplemental briefing the evidence it obtained through discovery, including the deposition testimony of each SLC member. At the subsequent hearing, Jacksonville also quoted from the deposition transcripts, among other evidence, in illustrative slides it presented to the district court—Jacksonville did not request a more formal proceeding nor object to the lack thereof. Thus, the district court received evidence, heard arguments on the evidence, and considered the evidence in granting the SLC's motion.
>
> Additionally, we note that evidence need not be in a particular format to qualify as evidence—testimony is evidence whether it is given in court or a deposition. . . . Indeed, deposition proceedings involve the same procedures followed in court, including the ability to cross-examine the witness or object to a question or answer. Accordingly, *we disagree with our dissenting colleague's conclusion that there was no evidentiary hearing.*

(Op. at 11-12 n.3 (citation omitted) (emphasis added).) Despite claiming that this Court misapprehended a material fact, Jacksonville does not identify a single fact upon which this Court relied that Jacksonville claims is inaccurate.

In short, Jacksonville has not identified any misapprehension by this Court; Jacksonville simply disagrees with this Court's determination that the July Hearing, "which followed Jacksonville's discovery into the SLC's independence and good faith, was sufficient to constitute an evidentiary hearing" of the sort

required by *Shoen* and *Amerco*. (Op. at 11.) The Petition for rehearing should be denied, for this reason alone. *See, e.g., Herrmann*, 100 Nev. at 151.

## II. The Matter for Which Rehearing Is Requested Was Already Presented in the Parties' Briefs and at Oral Argument.

The Petition should be denied for the additional reason that, under NRAP 40(c)(1), matters already "presented in the briefs and oral arguments may not be reargued in the petition for rehearing." As detailed below, the matter for which the rehearing is requested – whether the District Court held the required evidentiary hearing – was presented on appeal in the briefs and oral argument — before this Court decided the issue.

In its opening brief on appeal, Jacksonville treated the July Hearing as addressing purely legal issues, thus ignoring (1) Jacksonville's submission, at and before the July Hearing, of all its evidence in support of its position, (2) the District Court's request, at the conclusion of the hearing, for proposed "findings of fact" and (3) the District Court's subsequent issuance of findings of fact.

Nonetheless, because Jacksonville's opening brief ignored the existence of the evidentiary hearing and the District Court's factual findings, the SLC raised the issue of the evidentiary hearing in its answering brief, making clear its position that the July Hearing was an evidentiary hearing, with the result that the District Court's factual findings were proper. The SLC first explained,

> Before Jacksonville had requested or obtained discovery concerning the independence of the SLC and the good faith, thoroughness of its investigation, the SLC argued that, if Jacksonville "comes forward with evidence sufficient to create a genuine issue of material fact, the court should resolve the factual dispute . . . . " . . . Jacksonville thereafter obtained discovery and *presented its evidence [at the July Hearing]*, and the District Court addressed, in the same hearing and Decision, both whether there was a genuine issue and *whether* the SLC *was* independent and *conducted* a good faith, thorough investigation.

(Respondent Special Litigation Committee of DISH Network Corporation's Answering Brief ("Ans. Br.") 39-40 (footnotes and citations omitted); *see also, e.g.,* Ans. Br. 10 ("After additional briefing ***and another hearing based upon the evidence*** . . .") (emphasis added); Ans. Br. 35 (arguing that the District Court was permitted to make factual findings, rather than simply identify disputes of material fact).)[2] Most significantly, the SLC made clear its position that the July Hearing sufficed as an evidentiary hearing, despite Jacksonville's election not to call live witnesses: "Although all three members of the SLC were present for the hearing, Jacksonville did not call them to testify, relying instead upon their deposition transcripts. . . . Under similar circumstances [involving the review of recommended dismissals by special litigation committees], courts frequently find such ultimate facts without relying upon live testimony." (Ans. Br. 40 n.12.)

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[2] The SLC similarly argued, "under Nevada law, the District Court was required to determine . . . whether the SLC actually was independent and actually conducted a good faith, thorough investigation, ***which the District Court determined***[.]" (Ans. Br. 69 (emphasis added).)

In its reply brief, Jacksonville reaffirmed its position that there had not been an evidentiary hearing: "[E]ven if this Court concludes that *Shoen* and *Amerco* do apply, the Court must reverse because the District Court did not hold such an evidentiary hearing." (Appellant's Reply Brief ("Reply Br.") 5.) Jacksonville elected not to counter the SLC's arguments that the July Hearing sufficed as the required evidentiary hearing, presumably because Jacksonville lacked meritorious counter-arguments. Instead, Jacksonville pretended that the SLC had admitted that there had not been an evidentiary hearing (*See* Reply Br. 3-4 ("If, however, this Court accepts the SLC's position and remands for purposes of an evidentiary hearing . . ."); Reply Br. 11 ("the SLC now seeks for the first time an evidentiary hearing"); Reply Br. 15 ("Should this Court, however, accept the SLC's invitation and order an evidentiary hearing . . .").)[3] This was contrary to the record. The SLC made no such admission; as quoted above, the SLC argued that the July Hearing sufficed as the required evidentiary hearing. Nor had the SLC sought a remand for an evidentiary hearing; it argued for complete affirmance. (Ans. Br. 2 ("Jacksonville does not even attempt to argue that the District Court's factual findings made on an extensive record were clearly erroneous, and they were not. This conclusion alone requires affirmance here.").)

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[3] Jacksonville makes similar absurd statements in its Petition. (Pet. 6-7 (citing Ans. Br. 37-38, 68-69).) But, at the cited pages, the SLC actually explained that, as a matter of law, "[i]f a genuine dispute of material fact is shown [on a motion to defer], the court resolves it at an evidentiary hearing." (Ans. Br. 38.)

At argument of the appeal, a similar pattern repeated itself: In its answering argument, counsel for the SLC explained that "[Jacksonville claims] the District Court did not hold an evidentiary hearing, but the District Court received evidence and conducted the factual analysis required by *Shoen*, *Amerco* . . . ." (Argument Tr. 18:17-19 (June 5, 2017), Ex. A hereto.) Counsel for the SLC then specifically explained:

> The [July] hearing consisted of a briefing and appendices. So if you look at the appendix that actually was submitted in [Jacksonville's] supplemental brief, it is an appendix that contained 101 exhibits, which included the entire transcript of each of the depositions of the three members of the SLC, it included transcripts from the bankruptcy, it included the transcript of Charlie Ergen, it included the interviews. So if you look [at] those 101 exhibits that the court had [at] its fingertips when they were submitted to the court and were argued at the hearing in July of 2015, that record, that supplemental briefing has all the evidence.

(Argument Tr. 18:22-19:7.) The SLC then argued that, based on these undisputed facts, the July Hearing constituted the evidentiary hearing required for the District Court to make the 90 separately numbered findings of fact set forth in its ruling. (Argument Tr. 5-23.)

In response, counsel for Jacksonville again asserted that the July Hearing was not an evidentiary hearing: "Nobody thought the motion to defer was an evidentiary hearing. . . . [The SLC] never asked for an evidentiary hearing, it wasn't treated as an evidentiary hearing, nobody thought it was supposed to be

under *Shoen*. . . . you need to reverse, because there was never an evidentiary hearing." (Argument Tr. 27:9-19.) And again counsel for Jacksonville elected not to address the SLC's arguments that the July Hearing sufficed as the required evidentiary hearing.

Regardless of how Jacksonville elected to respond to the SLC's arguments, both parties presented their positions in the briefs and oral argument. Rehearing is therefore barred by NRAP 40(c)(1). In all events, Jacksonville does not contend that it has any further argument to make on rehearing that it has not already presented in the briefs and oral argument. It makes the same points in its Petition that it had previously made in its briefs and oral argument, all of which were firmly rejected by this Court in its September 14 Opinion.

* * *

Finally, there is no merit to Jacksonville's contention that, when it was before the District Court, it did not understand that the July Hearing was an evidentiary hearing. (Pet. 5 ("At no point did the district court or any of the parties raise the slightest hint, suggestion or assertion that the [July Hearing] was itself an evidentiary hearing.").) In its briefing of the Motion to Defer and at the July Hearing, Jacksonville submitted all of its evidence, including its evidence

concerning the credibility of the members of the SLC.[4] Jacksonville indeed presented 101 voluminous exhibits, including the *complete* transcripts of the depositions that Jacksonville took of every member of the SLC. (*See* Argument Tr. 18:22-19:7.) At the conclusion of the July Hearing, the District Court made preliminary factual findings[5] and requested proposed findings of fact,[6] which the District Court could only have made and requested, if the July Hearing was an evidentiary hearing. Thereafter, Jacksonville submitted to the District Court *its own proposed findings of fact*, and the District Court made factual findings. At the time, Jacksonville was well aware that the July Hearing was an evidentiary hearing and that the District Court was making factual findings based upon the evidence presented at the hearing.[7]

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[4] *See, e.g.,* Jacksonville's presentation at the July Hearing: July Tr. 14:8-11, JA010062, ("Now, if you look at the slides, Slide 2, I asked Mr. Ortolf what does he think should happen if the Court selectively ignores allegations and evidence. And you can see his answers."); *id.* 16:25-17:4, JA010064-65 ("when I asked Mr. Brokaw, why didn't you disclose these facts to the Court, he was very glib. . . . you can see on Slide 11 his answer. He says, 'I didn't even think about it.'").

[5] (July Tr. 21:8-25 (making preliminary factual findings, rather than addressing the absence of disputed issues of material fact).)

[6] (July Tr. 22:15-17, JA010070 (directing counsel for the SLC "to draft the findings of fact, conclusions of law, send them over to [Jacksonville's counsel] so he can look at them[.]").)

[7] The record shows that, unlike the criminal defendants in the cases cited in the Petition, Jacksonville participated in an evidentiary hearing before the District Court. *See* Pet. 6 (citing *Mann v. State*, 118 Nev. 351, 354 (2002) (reversing and remanding for evidentiary hearing where District Court declined to hold a hearing based on affidavits); *Hatley v. State*, 100 Nev. 214, 216-17 (1984) (same). An evidentiary hearing does not require evidence in a particular form. NRCP 43(c) ("When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.");

Jacksonville's belated assertion that the July Hearing could not have been an evidentiary hearing sufficient to support factual findings is revisionism at its worst. Before the District Court, Jacksonville was content for the District Court to make factual findings based upon the evidence presented at the July Hearing. It did not object to the District Court making factual findings based upon such evidence. Nor did it object to the amount of time allocated to the parties for argument. It did not request to call witnesses live, content to rely upon their deposition testimony.[8] Nor did it object to the District Court making factual findings, in the absence of live testimony. Jacksonville may not now complain about the absence of live testimony that it never sought to present. *Hospitality International Group v. Gratitude Group, LLC,* No. 69585, 2016 WL 7105065, at *2 (Nev. Dec. 2, 2016) (no error in failure to adduce live testimony "especially where, as here, neither side asked to present witnesses").

Jacksonville does not even contend that it has more or different evidence that it could have presented if it was afforded a different form of a hearing that is

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NRCP 78 ("To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition."); *see McGee & McGee Wine Merchants, LLC v. Jam Cellars, Inc.*, 2017 WL 1078659 (Nev. Mar. 17, 2017) (affirming decision that live testimony was unnecessary); *Oliver v. Bank of America*, 128 Nev. 923 (2012) (finding no error where trial court relied on affidavits in lieu of live testimony).

[8] The SLC members were all present at the July Hearing, had Jacksonville wished to call them to testify live rather than to refer the Court to Jacksonville's carefully selected deposition excerpts. *See* July Tr. 4:23-5:5 ("the member[s] of the Special Litigation are here this morning. . . . We have, of course, starting over here on your far left, Your Honor, Mr. Ortolf, then Mr. Brokaw, and Mr. Lillis.").

more to its liking, but which it never asked for. Jacksonville submitted full depositions of its cross-examinations of its witnesses, without the benefit of direct examination by the SLC, and all of the documentary evidence it could muster after 7 months of discovery. The District Court found, based upon all of the evidence, that Mr. Lillis was disinterested and independent. This Court affirmed. (Op. at 17.) The District Court found, and this Court affirmed, that the unique voting structure of the SLC "ensured the independence of the SLC as a whole because the SLC could not act without Lillis' affirmative vote." (Op. at 18.) And, the District Court found, and this Court agreed, that "Jacksonville's arguments regarding good faith and the SLC's investigation lack merit." (Op. at 20.) Jacksonville nowhere even suggests that it has any basis to challenge these conclusions no matter what form of hearing it now prefers.

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## IV.
## CONCLUSION

Jacksonville's Petition for rehearing should be denied because this Court did not misapprehend any material fact and the issue on which Jacksonville seeks rehearing was presented in the briefs and at Argument. Jacksonville's Petition is an impermissible attempt to reargue a point on which it has already been heard.

DATED this 24th day of October 2017.


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## CERTIFICATE OF COMPLAINCE

I hereby certify that this Answer to Petition for Rehearing 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 page or type volume limitations of NRAP 40 because it is proportionately spaced, has a typeface of 14 points or more, and contains 2,860 words.

DATED this 24th day of October 2017.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of October, 2017, a true and correct copy of the foregoing Answer to Petition for Rehearing was electronically filed with the Nevada Supreme Court. Electronic Service of the foregoing document shall be made in accordance with the Master Service List to the persons and email addresses listed below:

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# EXHIBIT A

# EXHIBIT A

IN THE SUPREME COURT OF THE STATE OF NEVADA

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|---|---|
| IN THE MATTER OF DISH NETWORK CORPORATION DERIVATIVE LITIGATION | Supreme Court Case No. 69012 |
| | District Court Case No. A-13-686775 |
| JACKSONVILLE POLICE AND FIRE PENSION FUND, Appellant, | Consolidated with: Supreme Court Case No. 69729 |
| vs. | |
| CHARLES W. ERGEN, GEORGE R. BROKAW, THOMAS A. CULLEN, JAMES DeFRANCO, R. STANTON DODGE, CHARLES M. LILLIS, DAVID K. MOSKOWITZ, TOM A. ORTOLF, and CARL E. VOGEL Respondents. | **TRANSCRIPT OF ORAL ARGUMENT** |

**BEFORE THE EN BANC COURT**
**CHIEF JUSTICE CHERRY PRESIDING**

MONDAY, JUNE 5, 2017

APPEARANCES:

FOR THE APPELLANT: JEFFREY A. SILVESTRI, ESQ.

FOR THE RESPONDENTS: J. STEPHEN PEEK, ESQ.

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Proceedings recorded by audio recording, transcript produced by transcription service.

CARSON CITY, NEVADA, MONDAY, JUNE 5, 2017, 1:27 P.M.

(Court was called to order)

CHIEF JUSTICE CHERRY: Good afternoon, everybody. Please be seated. Our case this afternoon is 69012, DISH Network Derivative Litigation -- In Re DISH Network Derivative Litigation. Mr. Silvestri for the appellants, Mr. Peek for the respondents.

Justice Parraguire will be listening to this, and we'll conference on this later this week. He'll be involved in this decision.

Mr. Silvestri, you ready?

MR. SILVESTRI: Yes, I am. Thank you.

UNIDENTIFIED JUSTICE: Mr. Silvestri and Mr. Peek, I just have one comment before we get started and the clock starts. As you know, we're trying to develop our Business Court caselaw here, and although the parties haven't specifically addressed it, we should adopt one of the cases, Auerbach versus Veterans Audit Corp. versus Maldonado. I'll be interested in each of your takes considering how in this case in the future, if this is an appropriate opinion-related cases for us to write on.

UNIDENTIFIED SPEAKER: Absolutely.

MR. SILVESTRI: Thank you, Your Honor. Jeff Silvestri on behalf of appellants. I'd like to reserve two minutes for rebuttal, if possible.

The District Court in this case erred in granting the motion for and in dismissing the underlying complaint after concluding that there are no issues of fact, that the special litigation committee in this case acted independently and in good faith and thoroughly in determining that DISH would not pursue any type of million dollar claim against Mr. Ergen. The SLC was created in this case because the board of directors submitted a consent. It admitted it was not independent of Mr. Ergen. It could not thoroughly and in good faith evaluate this claim. Which is no surprise given that Federal Bankruptcy Court in evaluating this case right around the same time, evaluating the same claims, identified Mr. Ergen as the controlling shareholder who picked every member of this board of directors and that not a single member of that board would ever cross or question Mr. Ergen. That's the formula under which the board decided it would hand-select the special litigation committee to evaluate this claim.

And in evaluating the motion to defer, which is an issue of first impression, the Court should be cognizant of the fact that every other court -- and you won't see any citation in the record having an SLC that says the same. Every court holds an SLC to the highest standard of review, the highest level of scrutiny to ensure that that SLC when it's done can get the same type of business judgment deference that a board of directors would. And rigorous scrutiny is

required because of what an SLC is. The SLC is formed when the board can't do its job. Somebody has to evaluate whether those claims going forward or not. And that's what the SLC does. It essentially supplants the judiciary and supplants the judge in its fact-finding mission. That SLC is supposed to independently review the claim, and when it's done, if it's done it independently and then reviews it thoroughly and it makes a decision, the District Court will give it deference.

But because the District Court's [unintelligible] review process [unintelligible] are so constrictive, it's not really the fact finder anymore; its job is to evaluate the evaluators. And when evaluating the evaluators, the SLC, they need [unintelligible] highest standards. So we know that that group is just as independent as the judge would have been. This is the only place in American jurisprudence where this happens. And that's why all the courts who evaluate it say that that SLC needs rigorous scrutiny. And the standard -- while this is an issue of first impression, the tests that the court uses are [unintelligible]. It comes from the showing, it comes from all documents [unintelligible] which both sides agree to. And the facts in this case are so egregious that if the Court grants deference and says the District Court here was appropriate in granting deference to this SLC, there's not a single SLC that can be created [unintelligible]. These facts are so beyond the pale and so far outside of every other

case that's been cited the District Court erred [unintelligible].

The first thing it did is it provided a presumption of independence and good faith to the SLC, which no other court has done and which [unintelligible] and Auerbach say you cannot do. It then required the appellants to overcome that burden, which is contrary to the summary judgment standard in and of itself. It limited its constriction; secondly, it limited its evaluation of dependence, beholdenness, independence to financial dependence only even though this court was shown [unintelligible]. Beholdenness is evaluated under any circumstance wherein a person cannot evaluate the claims in [unintelligible] what would be open to inference or other considerations. Shoen itself was a case where it wasn't necessarily financial [inaudible], it was a case of personal ties.

Third and most importantly, the District Court, by looking at it through this lens of providing presumptions and restricting its analysis just got it wrong on the issues of fact. All the appellants had to show was that in the light most favorable to the appellant a reasonable person could conclude that this SLC was not independent and was not acting in good faith. They're high standards to begin with. And they should be.

JUSTICE PICKERING: Mr. Silvestri --

MR. SILVESTRI: Yes.

JUSTICE PICKERING: --if I may. Say for purposes of argument that the third director, the -- was independent and they had voting structure where the third -- the third person veto it, would that pass muster?

MR. SILVESTRI: It certainly would not. And it wouldn't pass muster for multiple reasons. First, you have the Booth Family Trust cases saying, since the SLC gets to pick its perfectly independent board, it needs to pick a perfectly independent board. Now, remember, the board of directors got to pick this SLC. It got to pick anybody it wanted, and this is the group it picked. It's not an independent board. Moreover, under the Shoen case this Court has already precluded that analysis. Under the Shoen case, which is a demand futility case [unintelligible] because in that case the board agrees that it's all independent, but the court is still going to evaluate the elements. It already said -- this Court has said, if a majority of the directors are not independent, then the SLC is not independent. And so we're looking at it in total.

Moreover, the facts of this would not allow for the analysis and the consideration that the District Court gave. Mr. Ortolf and Mr. Brokaw were so conflicted -- and if what we're trying to do is find a board that is completely independent, this was not it, and they should not be allowed

-- Mr. Lillis was only [unintelligible] for after it was clear that this SLC was bound to Mr. Ergen. And the post facto effort to put Mr. Lillis on the board and then say, well, if Mr. Lillis agrees then it's okay, that's not how special litigation committee works. This is so unique we could never find another case cited that's like it. We have a conflicted board, which tried to cure itself by adding one person that was arguably independent. And we don't consent that he is. We believe that he's not independent.

UNIDENTIFIED JUSTICE: Mr. Silvestri --

MR. SILVESTRI: Yes.

UNIDENTIFIED JUSTICE: -- you went through your three points. Let's go back. The third point you're basically arguing we should apply a summary judgment standard here --

MR. SILVESTRI: Yes.

UNIDENTIFIED: -- are there genuine issues of material fact. What's the legal basis for --

MR. SILVESTRI: It's Auerbach and Zapata. Those cases say and the Hassan [phonetic] confirms that -- Auerbach and Zapata, in evaluating a motion to defer you use a summary judgment standard. It's not a true summary judgment, because then it's over. If issues of fact exist, the court doesn't go back and decide the issue of independence or good faith. It's the threshold bar that the SLC has to meet. It has to

convince the court that in order to give deference it has to pass the issues of fact summary judgment test. Both side agree to it. Both sides agree that Auerbach or Zapata absolutely apply to this.

UNIDENTIFIED JUSTICE: Okay. Thank you.

MR. SILVESTRI: So when we're talking about -- when we talk about the SLC we talk about the issues of fact, whether issues of fact exist, okay, what we're looking for is independence of beholdenness. And the Shoen court, Justice Hardesty's opinion, the question is whether the evaluator can base it on corporate merits of the subject [unintelligible], whether or not they exchanged consideration or influence, citing a case from Delaware, Kizinnia [phonetic], which is a case purely about personal interactions, whether a CEO's brother-in-law can sit on an SLC and evaluate his actions, which that court, by the way, said, not even close. That creates so many issues of fact that that board could never be considered independent. The Shoen case itself was -- involved financial -- questions of financial dependence. It also resolved and involved questions of personal interactions between families, which this Court said was absolutely sufficient.

And so [unintelligible] is Mr. Brokaw and Mr. Ortolf, who start this process. They're the two people who start the SLC. Mr. Ortolf is part of the board of directors

of DISH, hand-selected by Mr. Ergen that the Federal Bankruptcy Court has already said would never cross Mr. Ergen or question him. If that doesn't raise issues of fact [unintelligible], what does? Mr. Ortolf is on the special -- Mr. Ortolf had just disbanded the special transaction committee, which was an independent body, which once it was disbanded the Federal Bankruptcy Court again said that was astonishing in its brazenness given that the [unintelligible] language. Mr. Ortolf had a 40-year [unintelligible] familial relationship with the Ergens. The Ergen kid calls him Uncle Tom. They vacation together, they spent time on vacations and holidays together, they went around the world, Switzerland, Peru, Nepal, Taiwan, Japan. They told each other's families that they love each other, they reciprocated. Mr. Ortolf on the eve of the SLC report writes a letter to Mr. Ergen and his wife, saying, I appreciate in this time of personal hardship that you're with me, I love and respect you, you are my true friends. Well, this is not the person who is independent. This is not the person -- reasonable person can look at this and say, that person is not going to find against Mr. Ergen. Uncle Tom is not going to file an $800 million claim against the person who says he loves and respects and [unintelligible] as a 40- or 50-year relationship. This is exactly identical to the Sanchez case we cited where the Court in that case said, someone with a 40- or 50-year relationship obviously

gets tremendous benefit from it, that's going to be something that raises issues of fact. The District Court didn't think so, but clearly issues of fact exist.

The same with Mr. Brokaw. Mr. Brokaw has the same long-term love and familial relationship. Mr. Brokaw is the godfather -- I'm sorry. Mrs. Ergen, the wife of Mr. Ergen, is the godmother to Mr. Brokaw's son. They vacation together, they talk about each other, they dote on their kids, they stay in each other's houses, they tell each other that they love them. The board could have picked anybody on the SLC [unintelligible], but the first thing they did was they put Mr. Ergen's two closest friends on it. That creates issue of fact as to whether the evaluators are going to be fair. Would this Court believe that a three-judge panel looking at this with the defendant's two best friends on it and the third person was arguably independent, would that pass muster? Would this Court think that was raising no issues of fact? Of course not. We want evaluators to be truly independent and act in good faith and evaluate thoroughly.

Which goes to the next question of was there a good-faith and thorough investigation. And again questions of fact exist. This board was formed -- the SLC was formed on the heels of transaction committee being disbanded. Everybody knew that you didn't cross Mr. Ergen. Mr. Ortolf knew it. He was on the board, and he disbanded that transaction committee.

But he ends up on the special litigation committee with Mr. Brokaw after the [unintelligible]. So the board starts out stacked, and it starts out with two people who understand not to cross Mr. Ergen. The question is did they prejudge. What did they do to [unintelligible]? The first thing they say was that the SLC believed with Mr. Ergen's interest along with the board's -- I'm sorry. The SLC identified with Mr. Ergen's interests along with the shareholders and the board. This is before it did any investigation. This is what the investigation was for, to determine that very question. In the middle of the case they did an inquiry of the SLC's [unintelligible] and tells the District Court the SLC is fully aligned on this side of the V as board and Mr. Ergen. That's the issue right there. The SLC shouldn't be aligned with anyone. The SLC telling the court, we are aligned with the person we're investigating, raises issues of fact as to whether this is an independent and good-faith investigation.

At the end the SLC ignored the Federal Bankruptcy Court's opinion. And this opinion is critical. The Bankruptcy Court was evaluating the same claims that are at issue here, Mr. Ergen's spectrum purchases. The Bankruptcy Court had a weeks-long trial with multiple witnesses and in the end issued a 175-page opinion which essentially said Mr. Ergen did what the complaint said, he was untruthful in his testimony, he uses our resources to buy the spectrum for

personal profit, he [unintelligible] acquired the spectrum for DISH [unintelligible]. The special litigation committee ignored that. This is not a question of asking the Court to nitpick this investigation, should they have looked at one issue over another. The wholesale review of how this investigation happened shows that it was prejudged. It's stacked. It starts from everybody knowing you don't cross Mr. Ergen. It's stacked with Mr. Ergen's two best friends. At the start, middle, and end they say, we're aligned with Mr. Ergen. That's not what this is supposed to be.

This Court should uphold the standards from Shoen. It should enforce -- Auerbach or Zapata both say the same thing, the standard is summary judgment, there's no presumptions given, the courts should follow the test from Shoen about independence. It's a board review, and the court should give strict and high scrutiny to this SLC. Because if it doesn't, it's not going to do what the defendants say. If this Court gives strict scrutiny to this SLC, it's not going to open the floodgates of litigation. What it's going to do is ensure that an SLC can get the same protections and deference that a board -- and it's going to make sure that the board picks correctly, the judiciary is comfortable with what happened, and the shareholders can be comfortable that an absolute independent evaluation is done. If the Court doesn't -- if the Court upholds what the District Court did and allows

deference to this SLC, it's basically allowing -- what it's doing is opening the floodgates not to litigation, but to corporate abuse. Because a corporate director, if he can do anything he wants, loot the company, do whatever, and when the time comes to evaluate it he just needs to appoint a special litigation committee that he'll stack.

JUSTICE PICKERING: Mr. Silvestri --

MR. SILVESTRI: Yes.

JUSTICE PICKERING: If you have an independent board, then what level of deference is their decision making due --

MR. SILVESTRI: If they have --

JUSTICE PICKERING: -- per Zapata? What would you --

MR. SILVESTRI: So in this case I don't think -- we never really got to that case, because the judge didn't get next level to see if the board -- if the court then would do the search and evaluation of the board's -- of the SLC's decision, it would be more consistent that it follows the corporate structure that the deference is given under a regular corporate model. Because if the STC is basically identical to an independent corporate board, there's not necessarily a need to do further investigation. That issue never came ripe with the court, because she did dismiss the complaint before we ever got there.

JUSTICE PICKERING: Thank you.

CHIEF JUSTICE CHERRY: Mr. Silvestri, you used up all your time, but I'll give you two minutes of rebuttal.

And, Mr. Peek, I'll give you 17 minutes. I will give you the two extra.

MR. SILVESTRI: Thank you, Your Honor.

CHIEF JUSTICE CHERRY: Two for you, and 17 for Mr. Peek.

MR. PEEK: I'm not sure I'll need that much time, but thank you very much. [Unintelligible]. Appreciate it.

UNIDENTIFIED JUSTICE: Mr. Peek, again if you would address the standard. I have a great deal of concern about the summary judgment-related standard. What is it from your point of view under Zapata and Auerbach?

MR. PEEK: Thank you. And I will address that.

So good afternoon, Your Honors. Stephen Peek on behalf of the special litigation committee of DISH Network.

The Court should affirm the District Court's decision for four reasons. First, based upon the evidence the District Court made factual findings that the SLC was independent, acted independently, and conducted a good-faith, thorough investigation. The findings are not [unintelligible] on this and are supported by substantial evidence.

As this Court has already determined in Shoen and [unintelligible], if a board or committee is independent and

conducted a good-faith, thorough investigation, its decision is protected by the business judgment rule and it's final. There's no reason for the court to reconsider established Nevada law.

Second, Jacksonville's alternative standards are also inconsistent with the statutory presumption of NRS 78.138(3) that, quote, "Directors in deciding upon matters of business are presumed to act in good faith, on an informed basis, and with a view to the interests of the corporation," end quote.

In Delaware and many of the other jurisdictions upon which Jacksonville relies the business judgment rule is [unintelligible] equipped and sometimes free to depart from it. Not the State of Nevada. In Nevada the presumption of good faith and independence is imposed by statute, and that statute [unintelligible] of no exceptions for special litigation committees.

Third, even if Nevada law permitted the truncated process advocated by Jacksonville in which the District Court cuts short its evaluation of independence upon the mere identification of a genuine issue of material fact, the District Court's decision should still be affirmed.

To address Jacksonville's [unintelligible] in the alternative and after considering all the evidence presented at the hearing that there was not a genuine issue of material

fact, that the SLC was independent, that it acted independently, and that it conducted a good-faith, thorough investigation.

CHIEF JUSTICE CHERRY: -- all these personal relationships that Mr. Silvestri raised --

MR. PEEK: The court heard the evidence on the personal relationships and with respect to the personal relationships of Mr. Ortolf and Mr. Brokaw what the court said in its finding was, given the structure of the vote of the committee that that coupled with all the evidence that it received and it heard she determined that the SLC acted independently, was independent and acted independently.

One thing that Mr. Silvestri doesn't point out to you is that typically, not only in Shoen, but in the cases that they cite you have to have not only the friendly familiar relationship, but the beholdenness. We see that even in Shoen. The same principle applies in Shoen, because Shoen talks about beholdenness and other reasons. In the case that they cite, for example, Sanchez, Sanchez was a case in Delaware in which the court combined both the personal relationship, as well as the financial beholdenness. Because remember that the two employees worked for a subsidiary.

UNIDENTIFIED JUSTICE: So you're arguing basically as far as the standard -- that's what I'm trying to get at -- is similar to a bench trial standard, we give deference to the

findings of fact of the District Court, not a Rule 56 is there a genuine issue of material fact.

MR. PEEK: Yes.

UNIDENTIFIED JUSTICE: Now, Mr. Silvestri says under both Zapata and Auerbach it's this genuine issue of material fact standard.

MR. PEEK: And I'm going to get to that. And I apology for not answering your question, but I'll --

UNIDENTIFIED JUSTICE: It's your time. You go --

MR. PEEK: I'm going to use my time wisely, and hopefully I'm going to get to your question. But I want to get to those four points.

Jacksonville's truncated process is also inconsistent with Shoen and Amerco. In both decisions this Court found that a plaintiff could not proceed with derivative claims unless and until the District Court held an evidentiary hearing and made factual findings that the board lacked independence or did not act in good faith such that demand on the board would have been futile. The same should apply here. A stockholder should not [unintelligible] control of a corporation's bigger plan without factual findings that the special litigation committee's decision could not be trusted.

Now, with respect to your question, I don't think that Auerbach or Zapata or necessarily either of them we should apply, because I think we had the application here

without the statutory scheme. We had 78.138(3), which gives us the presumption. We have the Shoen -- of course, Shoen I and Shoen II, if you will, that guide us and that tell us when the particularized allegation within the complaint that does not stop, you still have to hold an evidentiary hearing because of the presumption that exists within 78.138(3), where it says boards are presumed to act in good faith, directors are presumed to act in good faith. You could overcome that presumption by having a hearing, an evidentiary hearing. Delaware and New York, New York in Auerbach, Delaware in Zapata don't have similar evidentiary hearings.

Now, that's not to say that Auerbach and Zapata might give guidance to us, because they would give guidance to us. But I say that we already have a body of jurisprudence based upon Shoen, Shoen II, and the statutory scheme of Chapter 78 which is unique to Nevada. [Unintelligible] District Court did not hold an evidentiary hearing, but the District Court received evidence and conducted the factual analysis required by Shoen, Amerco, and NRS 78 --

UNIDENTIFIED JUSTICE: With witnesses, or just affidavits, or what? What did the hearing consistent of?

MR. PEEK: The hearing consisted of a briefing and appendices. So if you look at the appendix that actually was submitted in their supplemental brief, it is an appendix that contained 101 exhibits, which included the entire transcript

of each of the depositions of the three members of the SLC, it included transcripts from the bankruptcy, it included the transcript of Charlie Ergen, it included the interviews. So if you look those 101 exhibits that the court had the its fingertips when they were submitted to the court and were argued at the hearing in July of 2015, that record, that supplemental briefing has all the evidence.

UNIDENTIFIED JUSTICE: So you're saying like the depositions act the same as live testimony?

MR. PEEK: They do. And for that we have NRCP 43(c). 43(c) allows the court discretion to either hold that hearing or take evidence by deposition.

So at the conclusion of the first hearing, remember that the conclusion of the first hearing in January of 2015 upon the motion to defer Jacksonville requested discovery concerning the SLC's independence, their thoroughness and good faith nature of the investigation. The District Court granted that motion. That was [unintelligible] Jacksonville conducted months of discovery thereafter, and Jacksonville in those months of discovery conducted the depositions of all three members of the SLC. It is that evidence that they now present to you about the relationships of Ortolf, Brokaw, and Lillis to Mr. Ergen.

After that supplemental briefing the District Court had another hearing. And at that time, as I said, Justice

Gibbons, Jacksonville submitted the evidence that shows not only in the demonstrative PowerPoint that they presented, but also that appendix of over 101 exhibits consisting of almost 3,000 pages of evidence that they had obtained during the course of discovery. That 3,000 -- less than 3,000 pages [unintelligible] and the 20,000-some odd pages that we produced in discovery, as well as the thousands of pages that we produced along the way from the [unintelligible] bankruptcy. Although Jacksonville did not call live witnesses, it certainly could have been able to do so. It instead submitted the depositions and the transcripts of the depositions and the interviews that had been conducted pursuant to NRCP 43(c).

Jacksonville, interestingly, does not complain that it was deprived of any discovery, does not [unintelligible] discovery that it could have elicited, nor does it contend that there is further evidence to present at some future hearing concerning the SLC's independent investigation. Instead, they rely upon this short form of if I show a narrow issue of fact, game over, I get to proceed, no evidentiary hearing, I'm going to ignore Shoen, I'm going to ignore the presumption of 78, I'm going to ignore Amerco, all of which say that the court must hold an evidentiary hearing.

Jacksonville says the District Court did not make factual findings. But it did. At the conclusion of the

hearing the District Court requested proposed factual findings. Jacksonville did not object to those requested findings, nor did it object to the District Court making factual findings.

The District Court's ruling includes 90 separately numbered findings of fact, including findings suggesting the independence of the SLC, as well as the good faith and thoroughness of the SLC's investigation. For example, the District Court found, quote, "After considering the evidence concerning the independence of Messrs. Brokaw and Ortolf together with the evidence concerning the independence of Mr. Lillis and his voting power the Court is persuaded that the SLC as a whole was independent and acted independently."

Jacksonville claims now for the first time in its reply brief to this court that the District Court lacked authority to make factual findings without a further evidentiary hearing. But that argument is waived. That argument was waived when it was not raised at the District Court level pursuant to NRCP Rule 46, and was waived again when it was not raised in Jacksonville's opening brief to this Court. As I just said, that's of no moment, because Jacksonville has already presented its evidence and it had the opportunity to present the evidence and did so.

Jacksonville said that the District Court [unintelligible] presumed that the SLC was independent,

placing the burden on Jacksonville to rebut the presumption. But the District Court's factual findings show that this is also not true. Although it would have been proper, as I argued, for the District Court to place the burden on Jacksonville, the Court indulged Jacksonville by not doing so. The District Court wrote, "The Court need not address the issue of burden, because it concludes that the SLC was independent and conducted a good-faith, thorough investigation irrespective of which party bears the burden."

Jacksonville contends for the first time in the reply --

JUSTICE PICKERING: How does it get to the finding of independence as to the two -- not Lillis so much, but as to the two? How does the court justify that finding?

MR. PEEK: Two ways. The voting structure is one -- actually, three ways. The voting structure is one, the lack of --

JUSTICE PICKERING: In other words, it's like the Pardons Board. If we don't have the governor's vote, there's no --

MR. PEEK: That is correct.

THE COURT: Okay.

MR. PEEK: Yes, Justice Pickering.

Secondly, the lack of any beholdenness, financial beholdenness on the part of them, because family relationships

standing alone would not conflict them.

JUSTICE PICKERING: But are you translating -- are you transforming demand futility analysis to the special litigation committee analysis, and is that appropriate in that setting, the latter setting?

MR. PEEK: I think under the business judgment rule, under 78.138(3), yes, it is.

JUSTICE PICKERING: Okay. So you would distinguish Zapata and Auerbach on the grounds that special litigation committees should just be analyzed under the same independence rubric as in the demand futility setting?

MR. PEEK: Yes. Yes.

JUSTICE PICKERING: And then you had a third point. I'm sorry.

MR. PEEK: I apologize. The third point is the lack of beholdenness, the special voting power, and the fact that what the court said was that they acted independently. That was the third point. She made a finding that they acted independently. So not only amount of independence, but acted independently in coming to their conclusion.

JUSTICE PICKERING: So you would maintain that the two directors on whom Jacksonville focuses -- you would say they could pass the Shoen, Amerco -- they could be in that determination of demand futility?

MR. PEEK: Yes. It's interesting, because I

actually was involved in the Shoen II evidentiary process where we dealt with [unintelligible] Hardy, John Dodd, Rogen, and Grogen and developed that same evidence that led to --

JUSTICE PICKERING: So you said they can do that and therefore that's good for the special litigation committee?

MR. PEEK: I think that they can do that, yes. Because I don't think that -- given the nature of their familial, that sort of godfather, I don't think it's a family relationship, as well as given the friendships, that those standing alone without the additional concept of beholdenness is not sufficient to disqualify --

JUSTICE PICKERING: What about if we didn't have our statutory scheme and we were straight under Auerbach and Zapata? Would your answer still be the same?

MR. PEEK: Yes. And I look, for example, to guidance from Sanchez. That's the recent case that is cited by Jacksonville. Sanchez was a case where there was a very close relationship between the director and the two members of the SLC, and those two members had both a beholdenness and a personal relationship, and so the Delaware Supreme Court said based upon that combination they are not independent. And there are many other cases, Your Honor, that say that a family relationship or friendship -- excuse me, friendship relations standing alone do not make a person independent -- or --

JUSTICE PICKERING: Dependent.

MR. PEEK: -- not independent.

JUSTICE PICKERING: Okay.

MR. PEEK: Jacksonville contests for the first time in its reply that the District Court's factual findings should be reversed. But Jacksonville did not make this argument in its opening brief, so that argument again was waived. Even if the argument is not waived, Jacksonville cannot meet the clearly erroneous standard for reversal, because the District Court's factual findings were supported by substantial evidence, devoid of even a genuine issue of material fact.

There is no genuine issue of fact as to Mr. Lillis's independence, nor was there any question that under [unintelligible] resolutions that the SLC could not act without Mr. Lillis's approval. Due to Mr. Lillis's required further independence of Messrs. Brokaw and Ortolf matters only to the extent as to whether the SLC in fact functioned independently.

Despite voluminous discovery, Jacksonville has yet to identify a single instance in which the SLC acted less than independently. As the District Court correctly found and as we've detailed in our papers, there was no merit in any of Jacksonville's [unintelligible].

CHIEF JUSTICE CHERRY: I'll allow another minute, and then I'll --

MR. PEEK: Thank you.

CHIEF JUSTICE CHERRY: Another minute, Mr. Peek.

MR. PEEK: Let me talk about Jacksonville's truncated process, because that's I think where we're coming to and why it should be rejected.

First, it would be inconsistent with Nevada's business judgment rule. It would require rejecting the decision of the special litigation committee upon the mere showing of an issue, novation of an issue, rejecting the decisions that were permitted that the court may find to be disinterested, independent, and fully informed runs directly counter to the business judgment rule, and here it was -- the District Court has already found this committee to be independent. [Unintelligible] would be inconsistent with NRS 78.138(3). The mere raising of an issue does not rebut the statutory presumption. Directors on a special litigation committee must be treated as independent, acting in good faith, and fully informed unless and until factual determinations are made to the contrary.

Third, it would be inconsistent with NRS 78.125, which treats a board committee the same as the full board. Since Shoen [unintelligible] following the business judgment rule, the decision of the full board absent factual findings overcoming the business judgment rule, the same would be true for the board committee, such as the special litigation committee. Absent being clearly erroneous and supported by

substantial evidence, the District Court's decision should be affirmed. Thank you very much. Thank you for the additional time.

CHIEF JUSTICE CHERRY: Mr. Silvestri, 15 minutes.

MR. SILVESTRI: Thank you, Your Honors.

That argument and that position of shock [unintelligible] how different it was to what they asked for from the District Court. Nobody asked for an evidentiary hearing in the District Court. Nobody thought the motion to defer was an evidentiary hearing. The defendant at that point had submitted Auerbach and Zapata apply. They had told the court, this is a summary judgment standard. They never asked for an evidentiary hearing, it wasn't treated as an evidentiary hearing, nobody thought it was supposed to be under Shoen. This was going to be done under Auerbach and Zapata. They can't now come back and say this should have been an evidentiary hearing standard. If that's the case, you need to reverse, because there was never an evidentiary hearing. But it shouldn't be under that standard. This is different from Shoen. You have in this case a board who is admittedly conflicted. NRS 78.125, presumptions can't be transmuted to the SLC. Perhaps if the board was itself independent the presumptions could be transmuted. But when the board itself admits it is 100 percent captured by Mr. Ergen and he admits in setting forth the SLC that it can't

establish it, we're in a different world. We're not in Shoen. The beholdenness standard from Shoen applies. And I notice that Mr. Peek interchanged beholdenness with financial independence. That's not the case. Beholdenness means board, financial, personal [unintelligible].

CHIEF JUSTICE CHERRY: Mr. Silvestri, I'm going to get it straight. In this case did Mr. Peek's argue to Judge Gonzalez that the summary judgment standard applies as far as the view --

MR. SILVESTRI: They certainly did. Because they cited and said Auerbach and Zapata apply. In their briefs you can see summary judgment standard -- the District Court's opinion says, no genuine issues of material fact exist. That's summary judgment. There's no question we were not -- that this was not an evidentiary hearing under Shoen, which, as everybody understood, we were outside of.

And Justice Pickering, to your question, this is a different consideration. We're using that test from inside of Shoen, and when you talk about financial and beholdenness -- evidence, yes, we're talking about the same tests, but we're doing so with much higher [unintelligible], with a much broader evaluation, look to make sure an SLC is independent. Because, again, it was hand-selected by an automatically and admittedly conflicted board. And if this Court's going to say that the Shoen standards and evaluation of applied to an SLC,

then why have [unintelligible]. Everyone to the point of -- what about Mr. Ergen -- or, I'm sorry, Mr. Ortolf and Mr. Brokaw? Under Mr. Peek's analysis you might as well have just put Mr. Ergen and his wife on that board and it still apparently would have satisfied the standard of something that no issue of fact exists as to independence. No --

JUSTICE PICKERING: You would maintain that every member needs to be independent and that regardless of the structure of the committee being [unintelligible] like the Pardons Boards where the one independent --

MR. SILVESTRI: At a minimum the majority has to be independent under Shoen. At a minimum Shoen said --

JUSTICE PICKERING: Even if the one guy has a total veto?

MR. SILVESTRI: Especially if the one guys has a total veto. The way this committee was set up -- and the facts are important -- it was set up with Mr. Ortolf and Mr. Brokaw, and only after we presented the conflicts did they come up with this scheme to put Mr. Lillis on and try to save it. But because Booth Family Trust tells us we ask that the board gets its chance, pick a perfectly independent SLC, anybody you want. You can't just pick two people that are [unintelligible] and stacked and then put one person on who's arguably independent and then say, we've washed our hands of it, we have created something that everybody can trust and not

one person can say that it raises an issue of fact. We -- I'm sorry, Justice Hardy.

JUSTICE HARDY: If I may. Justice Pickering, have you finished your questioning?

JUSTICE PICKERING: I have, thank you.

JUSTICE HARDY: Okay. In reviewing the judge's order at pages 24, 25, and 26, Mr. Silvestri, where the judge discusses the standard of review it appears to me that the judge is making the point that Zapata and Auerbach stand for the outcome of the deference determination. I don't see in the standard of review discussions at paragraphs 5, 6, 7, 8, and 9 a declaration by the judge that the summary judgment standard is the standard that the judge is applying, that in fact she makes the observation that under either Zapata or Auerbach the issue isn't determinative. So I acknowledge that the judge has cited those two cases, but I don't think that the judge in her order is saying that this is a summary judgment standard of review. She certainly hasn't said so specifically.

MR. SILVESTRI: She might not have said so specifically, but in the remainder of the language it's clear that it was a summary judgment standard, and it's clear when looking at the underlying briefs that the parties are presenting to the court -- that we are presenting to the court issues of fact exist. The SLC has presented to the court

issues of fact do not exist. That's the rubric under which the court was analyzing this. And when both parties are telling the Court Auerbach and Zapata apply and Auerbach and Zapata both stand for the -- and these are the leading cases. There's nothing else that anybody cites. Everybody cites Auerbach and Zapata, and they both say this is a summary judgment standard and it's the burden of the SLC to present to the court that no issues of fact exist as to the independence and good faith. And it's not just a free for all --

JUSTICE HARDY: [Unintelligible]. It's pretty clear that under our business judgment rule we have said there is a presumption that directors -- I understand the issue about the committee. That's a separate question. But assuming that the court were to conclude that the committee was entitled to the same deference as the board members, independence and good faith investigation, then the question really is how in Nevada should we allow the presumption to be rebutted. That's really the fundamental question. Isn't the analysis different than what has been undertaken in New York and in Delaware?

MR. SILVESTRI: I don't believe the analysis --

JUSTICE HARDY: By the way, let me just finish. And if it is summary judgment, aren't we putting the courts in the exact same position that all of this jurisprudence says, regardless of what state, a judge should not be doing, and that is second guessing the actions taken by an independent

board who acts in good faith under that presumption?

MR. SILVESTRI: To answer your second -- your last question first, we're not putting a judge in an improper position. The judge we agree in an SLC standard, if it's an SLC or it's a board, once you have an established [unintelligible], whether it's the board or the SLC, that is established to be independent and in good faith the judge absolutely grants deference. Neither side disagrees with that. It's a question of how do we get to the point of establishing the independence and good faith. And it happens two separate ways. In Shoen we have a statute that says the starting point is the board gets -- the board gets a presumption that it's independent and in good faith, and then it's up to the shareholders to present evidence. And there's a legion of caselaw that identifies what kind of evidence overcomes a presumption. In this case a 40-year [unintelligible] familial relationship where the kids call him Uncle and they vacation together and they love each other, that would overcome any presumption. There's no way that that satisfies -- or it doesn't get past the hump. In an SLC standard, because [unintelligible] is hand-picked by an already conflicted board, the [unintelligible] mistakes are made. No presumption is given to that board. They've got to prove it. And they've got to prove it in a way that the statutes don't contemplate. Perhaps if the board itself was

independent and picked an SLC, perhaps a presumption could apply. But when a board admits it's already conflicted, Justice Hardy, under any analysis it would be possible, and in Mr. Peek's analysis, that the board hand-picks the SLC, it puts Mr. Ergen, Mrs. Ergen and one person on the board, and then the court starts with the presumption that that board deserves independence and good faith. And yet the wrongdoer himself gives you --

JUSTICE HARDY: Isn't that what our statute requires as the starting point?

MR. SILVESTRI: Only if it's a board itself that identifies itself as independent, not if it's an SLC that's been hand-picked. And that's [unintelligible] and say we can't give that presumption because if the wrongdoer sits on the SLC and the board picks the wrongdoer and says, I'm going to let you sit on the SLC, how in the world could the judge decide starting from scratching we're giving the presumptions? That's why --

JUSTICE HARDY: It appears that this judge was influenced by the independent vote of the -- and basically the veto power of the third person. Now, you had commented, and I wonder if you could just expand --

Chief, if that's all right, just one final question.

CHIEF JUSTICE CHERRY: Go ahead.

JUSTICE HARDY: Could you expand, please, on your

view -- what evidence in the record would you point me to at least that causes an error in the court's conclusion that the third member of the SLC was not independent?

MR. SILVESTRI: Well, the evidence that we presented was that Mr. Lillis and his wife are best friends with Mr. Ergen's best friend, a tie that's not -- it's not -- and we didn't present that it was as extreme as Mr. Ortolf or Mr. Brokaw, because it wasn't. But he clearly wasn't independent in the way that you would want, but the problem is that the committee as a whole has to act independently. And again, if the court is going to allow one person in the minority to [unintelligible] or somehow cure obvious beholdenness and obvious independence, it's going [unintelligible] the end result to say it's okay for Mr. Ergen and Mrs. Ergen to sit on this board, also, just as long as Mr. Lillis votes the right way. But that would not only -- it eliminates or doesn't take into effect -- or consideration the way commissions are formed, how they -- how they reach decisions. And to say that Mr. Lillis is going to be able to fight off Mr. Ergen any other person's magnitude, it just -- it kicks the court and the judges into a [unintelligible] it shouldn't get to. The board and the SLC itself should be independent, at least the majority. In this case it's not. And if not and we're going to allow a minority person to somehow save it and create independence, we're going to go down a rabbit hole. It's

going to be very hard to put a test.

JUSTICE HARDY: I guess in this context -- and I said one more question, and I apologize.

I guess in this context if the basis for the court's decision was this one individual had the veto power, what would we do in a case in which the board selected only one person to make this determination?

MR. SILVESTRI: If -- Booth Family Trust says if you want a perfectly independent board, pick it, and if the SLC decides it wants to pick one person who is completely independent and can pass the test, I don't see why they couldn't. There might be some caselaw that says otherwise; I'm not sure. But if the board wanted Mr. Lillis to be their SLC, they should have picked Mr. Lillis to be the SLC. And instead they picked Mr. Ortolf and Mr. Brokaw first, and only after we showed the extreme beholdenness did they try to put Lillis on there, too.

This case should be remanded. This case should be reversed, because they didn't meet their standard. In order for them to beat a standard -- to have to satisfy the court and then a motion to defer granted they have to meet the summary judgment standard. Since they did not, this Court should reverse the order granting the motion to defer, send this case back to court, revert it to the appellants for their protection and their consideration, and let me take it to

trial.

CHIEF JUSTICE CHERRY: Thank you, Mr. Silvestri.

MR. SILVESTRI: Thank you. And thank you for the extra time.

CHIEF JUSTICE CHERRY: -- your challenging arguments and briefs in this matter, and this matter will stand submitted. Thank you very much.

THE PROCEEDINGS CONCLUDED AT 2:15 P.M.

* * * * *

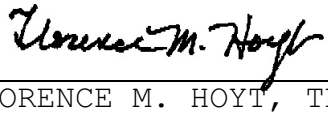
**CERTIFICATION**

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

**AFFIRMATION**

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

**FLORENCE HOYT**
**Las Vegas, Nevada 89146**



FLORENCE M. HOYT, TRANSCRIBER

10/12/17

DATE