

IN THE SUPREME COURT OF THE STATE OF NEVADA

PLUMBERS LOCAL UNION NO. 519
PENSION TRUST FUND; AND CITY OF
STERLING HEIGHTS POLICE AND FIRE
RETIREMENT SYSTEM, DERIVATIVELY
ON BEHALF OF NOMINAL DEFENDANT
DISH NETWORK CORPORATION,

Appellants,

vs.

CHARLES W. ERGEN; JAMES DEFRANCO;
CANTEY M. ERGEN; STEVEN R.
GOODBARN; DAVID K. MOSKOWITZ; TOM
A. ORTOLF; CARL E. VOGEL; GEORGE R.
BROKAW; JOSEPH P. CLAYTON; GARY S.
HOWARD; DISH NETWORK
CORPORATION, A NEVADA
CORPORATION; AND DISH NETWORK
SPECIAL LITIGATION COMMITTEE
COUNSEL,

Respondents.

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District Court No.
A-17-763397-B

**UNOPPOSED MOTION TO FILE PLAINTIFFS-APPELLANTS' OPENING
BRIEF AND JOINT APPENDIX VOLUMES 78-85 UNDER SEAL**

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Plaintiffs-Appellants, by and through undersigned counsel, hereby submit this Unopposed Motion to File Opening Brief and Joint Appendix Volumes 78-85 under seal. This Motion is made and based upon the Stipulated Confidentiality Agreement and Protective Order, signed by the district court on November 27, 2018 (the “Protective Order”), which Plaintiffs-Appellants and Respondents are bound as signatories, Part VIII of the Nevada Rules for Sealing and Redacting Court Records (the “SRCR”), and the attached Memorandum of Points and Authorities.

I. MEMORANDUM OF POINTS AND AUTHORITIES

On January 12, 2018, Plaintiffs-Appellants’ filed their Verified Consolidated Shareholder Derivative Complaint for Breach of Fiduciary Duties of Loyalty and Good Faith, Gross Mismanagement, Abuse of Control, Corporate Waste and Unjust Enrichment (the “Complaint”) alleging breach of fiduciary duties against certain of Dish Network Corporation’s (“Dish” or the “Company”) current and former officers and directors. In response to Plaintiffs-Appellants’ allegations, on April 11, 2018, Dish’s Board of Directors appointed a Special Litigation Committee (the “SLC”) to investigate Plaintiffs-Appellants’ claims and recommend how the Company should respond. On November 27, 2018, the SLC issued its Report of the Special Litigation Committee of DISH Network Corporation (the “SLC Report”) recommending that Dish seek to dismiss Plaintiffs-Appellants’ Complaint and not pursue the claims asserted therein. That same day, the SLC sought an Order redacting certain parts of

the SLC Report and sealing certain exhibits (“SLC Motion to Redact and Seal”). The lower court granted the SLC’s request on February 11, 2019.

On December 19, 2018, the SLC filed a Motion for Summary Judgment Deferring to the Special Litigation Committee’s Determination that the Claims Should Be Dismissed (the “Summary Judgment Motion”). The Summary Judgment Motion sought to dismiss the claims asserted in the Complaint and relied, in part, on documents designated Confidential and/or Highly Confidential under the Protective Order.

Shortly thereafter, the parties engaged in limited discovery regarding the independence of the SLC and the good faith and thoroughness of its investigation. This limited discovery process was governed by the Protective Order with regards to the treatment of certain documents deemed confidential and produced in the action. The Protective Order defines Confidential Information as “any information that constitutes, reflects, or discloses non-public, trade secrets, proprietary, and/or sensitive business or personal information or other legally protected information.”

See Protective Order, ¶4. Highly Confidential designations are allowed for:

any Confidential Information as defined in Section 4 above that also includes extremely sensitive, highly confidential, non-public information, consisting either of trade secrets or proprietary or other highly confidential business, financial, regulatory, or strategic information (including information regarding business plans, technical data, and non-public designs), the disclosure of which would create a

substantial risk of competitive or business injury to the Producing Party.

Id., ¶5.

Pursuant to the terms of the Protective Order, Plaintiffs-Appellants agreed that documents produced in this action designated Confidential or Highly Confidential shall be submitted with a motion to seal or redact. *Id.*, ¶12.

On January 31, 2020, Plaintiffs-Appellants filed their Opposition to Motion for Summary Judgment Deferring to the Special Litigation Committee's Determination that the Claims Should Be Dismissed (the "Opposition to Summary Judgment"). Plaintiffs-Appellants' Opposition to Summary Judgment relied, in part, on certain exhibits to the SLC Report and other documents deemed confidential under the Protective Order. Thus, on that same day, Plaintiffs-Appellants filed a Motion to Seal Plaintiffs' Opposition to Motion for Summary Judgment, Declaration of David C. O'Mara in Support Thereof, and the Appendix of Exhibits. The District Court granted Plaintiffs-Appellants' motion on May 22, 2020.

Thereafter, the parties participated in a July 6-7, 2020 evidentiary hearing before the Honorable Elizabeth Gonzalez regarding the SLC's Summary Judgment Motion. During the course of that hearing, the SLC agreed to designate the redacted SLC Report and sealed exhibits as evidence and removed the confidentiality provisions from such documents. *See* July 6, 2020 transcript at 10-11. However, on July 7, 2020, the Court granted a motion brought by the SLC seeking to keep certain

documents relied upon by Plaintiffs-Appellants in their Opposition to Summary Judgment, but not included in the SLC Report, confidential. *See* July 7, 2020 transcript at 129:7-132:8.

Accordingly, by this Motion, Plaintiffs-Appellants seek to seal their opening brief and certain volumes of the Joint Appendix containing Plaintiffs-Appellants' Opposition to Summary Judgment and its accompanying exhibits.

II. LEGAL ARGUMENT

A. Standards

SRCR 3 sets forth the grounds upon which the Court may seal or redact documents or exhibits filed with the Court. Pursuant to SRCR 3(1), “[a]ny person may request that the court seal or redact court records for a case that is subject to these rules by filing a written motion.” SRCR 3(1). SRCR 3(4) provides, in pertinent part:

4. Grounds to seal or redact; written findings required. The court may order the court files and records, or any part thereof, in a civil action to be sealed or redacted, provided the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety interests that outweigh the public interest in access to the court record. The parties' agreement alone does not constitute a sufficient basis for the court to seal or redact court records. The public interest in privacy or safety interests that outweigh the public interest in open court records include findings that:

(a) The sealing or redaction is permitted or required by federal or state law;

(b) The sealing or redaction furthers an order entered under NRCP 12(f) or JCRCP 12(f) or a protective order entered under NRCP 26(c) or JCRCP 26(c).

SRCR 3(4)(a)-(b). SRCR 3(5)(b) states that “[a] court record shall not be sealed under these rules when reasonable redaction will adequately resolve the issues before the court under subsection 4 above.” SRCR 3(5)(b).

B. The Court Should Allow Plaintiffs-Appellants’ Opening Brief and Joint Appendix Volumes 78-85 to Be Sealed

Plaintiffs-Appellant’s’ Opening Brief and Joint Appendix Volumes 78-85 should be sealed pursuant to SRCR 3(4). The Company has designated certain of the Exhibits cited in Plaintiffs-Appellants’ opening brief and cited in and attached to Plaintiffs-Appellants’ Opposition to Summary Judgment as Confidential or Highly Confidential pursuant to the terms of the Protective Order.¹ The Protective Order only allows such designations when such information “constitutes, reflects, or discloses non-public, trade secrets, proprietary, and/or sensitive business or personal information or other legally protected information” or where it contains “extremely sensitive, highly confidential, non-public information, consisting either of trade secrets or proprietary or other highly confidential business, financial, regulatory, or strategic information.” *See* Protective Order, ¶¶4-5. The SLC has previously explained that “many of the exhibits were produced in the underlying litigation giving rise to the instant lawsuit, and these documents were designated as

¹ Specifically, Dish has designated Opposition to Summary Judgment Exhibits 3, 10, 15, 17-22, 26, 30-32, 37-39, 42-43, and 49 (the “Exhibits”) as Confidential or Highly Confidential.

Confidential or Highly Confidential in those lawsuits.” SLC Motion to Redact and Seal at 6. In addition, certain of the documents are notes taken by attorneys during interviews of witnesses undertaken by the SLC’s counsel and the parties agreed to treat those documents as confidential.

Certain of the documents designated as confidential by Respondents are cited and/or summarized in Plaintiffs-Appellants’ opening brief. As a result, the opening brief should be sealed. Pursuant to SRCR 3(5)(b), Plaintiffs-Appellants can adequately resolve the issue by publicly filing a redacted copy of their opening brief.

However, the designated Confidential and/or Highly Confidential Exhibits are relied upon and cited prolifically throughout Plaintiffs-Appellants’ Opposition to Summary Judgment which is contained in Volumes 78-85 of the Joint Appendix. Plaintiffs-Appellants’ Opposition to Summary Judgment is not reasonably capable of redaction.

Accordingly, pursuant to paragraph 12 of the Protective Order and SRCR 3(4) and 3(5)(b), Plaintiffs-Appellants therefore seek to seal their opening brief and Volumes 78-85 of the Joint Appendix as they include Plaintiffs-Appellants’ Opposition to Summary Judgment and its supporting exhibits.

Plaintiffs-Appellants have conferred with Respondents’ counsel and were informed that they do not oppose this Motion.

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III. CONCLUSION

For the reasons stated herein, Plaintiffs-Appellants respectfully request that their opening brief and Volumes 78-85 of the Joint Appendix be sealed pursuant to SRCR 3(4).

Dated this 26th day of March 2021.

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Lead Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of March 2021, I submitted the foregoing **UNOPPOSED MOTION TO FILE PLAINTIFFS-APPELLANTS' OPENING BRIEF AND JOINT APPENDIX VOLUMES 78-85 UNDER SEAL** for filing via the Court's eFlex electronic filing system to all parties of record.



Judy Estrada, an employee of H1 Law
Group