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.

Supreme Court No. 81704

District Court No.
A-17-763397-B

APPELLANTS' OPENING BRIEF
[REDACTED]

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I. NRAP DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in Nevada Rule of Appellate Procedure ("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.

Pursuant to NRAP 26.1(a), Plaintiffs-Appellants Plumbers Local Union No. 519 Pension Trust Fund and City of Sterling Heights Police and Fire Retirement System state that they are not corporations and do not issue stock.

In the district court proceedings, the law firm Robbin Geller Rudman & Dowd LLP and the O'Mara Law Firm, P.C. appeared for Plaintiffs-Appellants Plumbers Local Union No. 519 Pension Trust Fund and City of Sterling Heights Police and Fire Retirement System. Before this Court, the law firms Robbin Geller Rudman & Dowd LLP and H1 Law Group appear for Plaintiffs-Appellants Plumbers Local Union No. 519 Pension Trust Fund and City of Sterling Heights Police and Fire Retirement System.

Dated this 26th day of March 2021.

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Plaintiffs-Appellants Plumbers Local Union No. 519 Pension Trust Fund and City of Sterling Heights Police and Fire Retirement System, by and through their counsel, submit their Opening Brief.

II. JURISDICTIONAL STATEMENT

This appeal is from the Findings of Fact and Conclusions of Law entered in this action on the 17th day of July, 2020, with the Notice of Entry filed on July 31, 2020, and Judgment entered in this action on the 3rd day of August, 2020, with the Notice of Entry of Judgment filed on August 4, 2020. Volume 77 Joint Appendix at 017610-32 (hereinafter cited as [Volume#]JA__); 77JA017633-58; 77JA017659-61; 77JA017662-67. Plumbers Local Union No. 519 Pension Trust Fund and City of Sterling Heights Police and Fire Retirement System timely filed a Notice of Appeal on August 25, 2020. 77JA017668-71.

This Court has jurisdiction over the matter pursuant to NRAP 3A(a) and (b)(1) which provides for an appeal from a final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered.

III. ROUTING STATEMENT

This case is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(11) because it involves questions of first impression regarding the evaluation of a motion for summary judgment by a corporation's Special Litigation Committee ("SLC"). The Court also retains jurisdiction pursuant to NRAP 17(a)(9) because the appeal is from a business court order. Finally, the Court retains jurisdiction pursuant

to NRAP 17(a)(12) because this appeal concerns issues of statewide importance regarding Nevada's corporate law and issues in which Plaintiffs-Appellants request that this Court reconsider a prior ruling due to conflicts with other cases.

IV. ISSUES PRESENTED FOR REVIEW

A. Whether the District Court Erred in Refusing to Apply the Summary-Judgment Standard to the SLC's Motion for Summary Judgment

B. Whether the SLC's Purported Investigation of the AVC-Based Breach of Fiduciary Duty Claim Was Unworthy of Deference as *Pro Forma* and Half-Hearted Because the SLC's Procedures Did Not Include Review of Whether the *Krakauer* and *Dish II* Adjudications Supported an Inference that Defendants Breached Their Fiduciary Duties to Ensure Dish's Compliance with the Duties Imposed by the AVC

C. Whether the SLC's Purported Investigation of the TCPA-Based Breach of Fiduciary Duty Claim Was Unworthy of Deference as *Pro Forma* and Half-Hearted Because the SLC's Procedures Did Not Include Review of Whether the *Krakauer* and *Dish II* Adjudications Supported an Inference that Defendants Breached Their Fiduciary Duties to Ensure Dish's Compliance with the TCPA

D. Whether the SLC Recommendation of Dismissal Was Not Supported by an Independent Majority of SLC Members Because the District Court Did Not Find One SLC Member Was Disinterested and the Remaining Two Members Disagreed on SLC Procedures

V. STATEMENT OF THE CASE

This is a shareholder-derivative action on behalf of nominal-defendant DISH Network Corporation ("Dish") for breach of fiduciary duties of loyalty and good faith by Dish's senior executives in connection with Dish's violations of the 2009 Assurance of Voluntary Compliance ("AVC") entered with Attorneys General of 46 states and of the Telephone Consumer Protection Act ("TCPA"). 4JA000683-86(¶¶1-9); 4JA000690-91(¶¶27-28); 4JA000702-04(¶¶55-57); 4JA000706(¶¶64-

67).[1] These violations resulted in over $300 million in fines and penalties borne by Dish, thereby harming it and its shareholders. 4JA000701-02(¶49). Plaintiffs-Appellants ("Plaintiffs") are Dish shareholders Plumbers Local Union No. 519 Pension Trust Fund and City of Sterling Heights Police and Fire Retirement System. 4JA000687(¶¶14-15).

DISH provides, *inter alia*, satellite-television services and often contracts with third-party marketers (frequently termed "retailers") to solicit new customers ("activations"). *See Krakauer v. DISH Network L.L.C.*, No. 1:14-CV-333, 2017 U.S. Dist. LEXIS 77163, at *6 & n.6(1JA000103) (M.D.N.C. May 22, 2017) ("*Krakauer I*"), *aff'd, Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643 (4th Cir. 2019) ("*Krakauer II*"), *cert. denied*, 140 S. Ct. 676 (2019). Despite entering the AVC – which described Dish's duties to monitor and control its retailers to enforce TCPA compliance – one Dish retailer, Satellite Services Network ("SSN"), "made more than 50,000 telemarketing calls on behalf of Dish to phone numbers on the National Do Not Call Registry in 2010 and 2011," thus repeatedly violating the TCPA. *Krakauer I*, 2017 U.S. Dist. LEXIS 77163, at *1-*2(1JA000101-02). Dish knew "SSN had a history of TCPA violations," and was making prohibited calls, yet "[w]hen it learned of SSN's noncompliance, Dish repeatedly looked the other way."

[1] "AVC" refers to the 2009 AVC.

Id. at *2(1JA000101-02). Ultimately, *Krakauer I* found Dish "willfully and knowingly violated the TCPA and that treble damages are appropriate to deter Dish and to give suitable weight to the seriousness and scope of the violations Dish committed." *Id*. at *37(1JA000112). In this action, Plaintiffs seek to hold Defendants – officers and directors responsible for Dish's misconduct – to account for the significant damage to Dish caused by their breaches of fiduciary duty.

Faced with adjudications of Defendants' TCPA-related malfeasance in *Krakauer* and *United States v. Dish Network LLC*, 256 F. Supp. 3d 810 (C.D. Ill. 2017) ("*Dish II*"), *aff'd in relevant part*, *United States v. Dish Network L.L.C.*, 954 F.3d 970, 975-76 (7th Cir. 2020) ("*Dish III*"), *cert. dismissed*, 140 S. Ct. 676 (2021), as well as Plaintiffs' Verified Consolidated Shareholder Derivative Complaint ("Complaint") alleging facts established in those cases, 4JA000683-86(¶¶1-9); 4JA000691-702(¶¶31-49); 4JA000702-05(¶¶55-59); 4JA000706(¶¶64-67) [redacted]. In *In re DISH Network Derivative Litig.*, 401 P.3d 1081, 1087-89 (Nev. 2017) ("*Dish I*"), this Court authorized deference to an SLC's findings ***only*** if the SLC demonstrates that its members are independent ***and*** that the SLC conducted a thorough, good-faith investigation. The investigation here – which

[redacted]

was "*pro forma*," "half-hearted," and "shallow in execution" – does not merit business-judgment protection. *Id*. at 1092. Appellee SLC nonetheless moved for summary judgment on deference to its recommendation to dismiss the Complaint and the district court granted its motion, dismissed the Complaint, and entered judgment. 77JA017610-32(Order:1-23); 77JA017659-61.

VI. STATEMENT OF FACTS AND PROCEEDINGS BELOW

A. Statement of Facts

1. The TCPA

Congress adopted the TCPA in 1991 in response to "[v]oluminous consumer complaints about abuses of telephone technology." *Mims v Arrow Fin. Servs.*, *LLC*, 565 U.S. 368, 370-71 (2012). The TCPA authorizes a National Do-Not-Call ("DNC") Registry and establishes DNC rules under which "[a]ny person or entity making telephone solicitations (or on whose behalf telephone solicitations are made)" is liable for DNC violations. 47 C.F.R. §64.1200(c)(2). "A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations" may bring an action to recover "up to $500 in damages for each such violation." 47 U.S.C. §227(c)(5). "If the court finds that the defendant willfully or knowingly violated the regulations … , the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available …." *Id*.

2. The AVC

On July 16, 2009, Dish entered the AVC, promising 46 State Attorneys General that Dish would comply with the TCPA. 1JA000014-15(AVC:3-4), 1JA000019(AVC:8).[3] The AVC reflected the Attorneys General's determination that Dish "controls the conduct, practices and procedures of its Third-Party Retailers," and, accordingly, that "DISH['s] ... Third-Party Retailers, with DISH['s] ... assent, are acting on DISH['s] ... behalf as its agents." 1JA000013(AVC:2). Moreover, "[c]onsumers who do business with DISH['s] ... Third-Party Retailers reasonably believe that DISH['s] ... Third-Party Retailers are employees or agents of DISH ... who are acting on behalf of DISH ... and, therefore, DISH['s] ... Third-Party Retailers are apparent agents of DISH." 1JA000013(AVC:2). Because the retailers are Dish's "actual or apparent agents, DISH ... is responsible for the conduct of its Third-Party Retailers and is bound by [their] representations … to Consumers." 1JA000013(AVC:2).

While Dish disputed the Attorneys General's straight-forward conclusions regarding Dish's agency relationship with its retailers, Dish – and its "officers [and] directors" – accepted imposition of the AVC's various "duties, responsibilities, burdens and obligations," although Dish maintained that those duties "exceed[ed]

[3] Defendants Charles Ergen, Cantey Ergen, DeFranco, Goodbarn, Moskowitz, Ortolf, Vogel, and Howard each served on the Dish Board when Dish entered the AVC. 4JA000687-90(¶¶17-23, 26).

applicable legal and common law standards." 1JA000015(AVC:4); 1JA000019(AVC:8). *Inter alia*, Dish agreed to comply with applicable telemarketing laws, including honoring DNC lists. 1JA000033(AVC:22). Dish was further obligated to establish "policies and procedures[] to ensure that" Dish and any telemarketers it has authorized to contact consumers on Dish's behalf "do not call any Consumers on DISH['s] ... internal do-not-call list or any Consumer listed on any federal, state or local do-not-call list." 1JA000033(AVC:22). It was also obliged to "monitor ... outbound telemarketing campaigns conducted by an Authorized Telemarketer to determine whether the Authorized Telemarketer is complying with all applicable [DNC laws]." 1JA000033-35(AVC:22-24).

Dish agreed to "require its Third-Party Retailers to comply with the[se] terms and conditions" and assumed the duties to "affirmatively investigate Complaints ... pertaining to its Third-Party Retailers' [marketing activity on Dish's behalf], and [to] take appropriate and reasonable disciplinary action as soon as reasonably practicable, against any Third-Party Retailer it has determined to be in violation of the requirements of this Assurance." 1JA000019(AVC:8); 1JA000031(AVC:20); 1JA000033-35(AVC:22-24). Dish's AVC-imposed duties regarding its third-party retailers were mandatory regardless of whether they were also imposed by any other source of legal obligation (such as the TCPA). 1JA000014-15(AVC:3-4). Dish (mistakenly) believed the duties imposed by the AVC "exceeded applicable legal

and common law standards" but nonetheless "agreed to [them] by signing [the AVC]." 1JA000014-15(AVC:3-4).

The AVC also expressly provided that Dish's directors and officers – *i.e.*, Defendants here – shall be responsible for Dish's TCPA compliance, stating Dish's "duties, responsibilities, burdens and obligations undertaken in connection with [the AVC] shall apply to DISH Network ***and*** [its] officers [and] directors." 1JA000019(AVC:8). Accordingly, Dish was required to provide a copy of the AVC to its officers and directors. 1JA000019(AVC:8).

By July 20, 2009, Defendants Charles Ergen, [redacted] DeFranco, [redacted] and [redacted], managers at Dish, were briefed on the AVC's terms, including those related to the TCPA. 5JA000951(SLC Report:212) ("Most Director Defendants learned about the 2009 AVC around the time that DISH entered into it from various sources.") [redacted]. Thus, these Director Defendants were aware of the AVC's terms and Defendants' obligations to cause Dish and its third-party retailers to honor the TCPA and DNC laws.

3. *Krakauer* Details Dish's Multifarious AVC and TCPA Violations

Even though the AVC comprised a TCPA-compliance roadmap, Dish's

directors – particularly [redacted] Defendants DeFranco, Charles Ergen, Cantey Ergen, Clayton, Moskowitz, Ortolf, and Vogel – did nothing to improve Dish's TCPA compliance efforts, as evidenced by Dish's disregard of SSN's many thousands of TCPA violations committed while acting in Dish's stead. *Krakauer I*, 2017 U.S. Dist. LEXIS 77163, at *19(1JA000106-07) ("the record is silent about any efforts Dish undertook to comply with the promises and assurances it made"); *id*. at *28-*30(1JA000109-10) ("Dish had the power to control SSN's telemarketing; it simply did not care whether SSN complied with the law or not.... Dish would turn a blind eye to any recordkeeping lapses and telemarketing violations by SSN …."); *id.* at *20(1JA000107) (DeFranco testified "'[t]his is how we operated even prior to the agreement as it related to telemarketing.'") [redacted].

Bedeviled by Dish's unwanted telemarketing calls, Thomas Krakauer brought a consumer-class-action lawsuit against Dish for TCPA violations in federal court. *Krakauer I*, 2017 U.S. Dist. LEXIS 77163, at *3-*4(1JA000102). Following a six-day trial, on January 19, 2017 the jury found Dish violated the TCPA and awarded the plaintiff class $400 per violation. 1JA000099.

On May 22, 2017, following post-trial briefing, Judge Eagles ordered Dish to pay treble damages of $65.1 million, justifying the order with a searing indictment of Dish's misconduct committed on Defendants' watch:

> Dish contends its conduct was not willful or knowing for several reasons, none of which are persuasive. Dish first contends that its actions were not willful because it instructed SSN to comply with the

law and, specifically, to scrub its lists with PossibleNow [a compliance vendor]. While there was evidence of this, ***the evidence also revealed that these were empty words***. For instance, when SSN told Dish's compliance department that it was, in fact, not using PossibleNow to scrub customer lists in 2009, and again in 2010, Dish did nothing. In context, ***Dish only paid lip service to compliance***.

* * *

Dish contends that the complaints received about SSN were few in number and insufficient to put it on notice that there were widespread violations, and that everyone involved at Dish believed that SSN was complying with telemarketing laws. ***First, the testimony that Dish thought SSN was in compliance is not credible and is controverted by Dish's own documents***. Second, even if some Dish employees did think this, that belief was only possible because Dish ignored the facts and failed to investigate and monitor SSN's compliance.... ***Given the tens of thousands of violative calls SSN made in a span of just over a year, even a cursory investigation or monitoring effort by Dish would have uncovered the violations***. Under these circumstances, what Dish calls a mistaken belief ***is actually willful ignorance***.

* * *

The evidence shows that Dish's TCPA compliance policy was decidedly two-faced. Its contract allowed it to monitor TCPA compliance and it told forty-six state attorneys general that it would monitor and enforce marketer compliance but in reality it never did anything more than attempt to find out what marketer had made a complained-about call.... ***The [AVC] did not cause Dish to take the TCPA seriously, so significant damages are appropriate to emphasize the seriousness of such statutory violations and to deter Dish in the future***.

* * *

Dish contends that the Court should not treble the damages because the existing damages are material to Dish and will be adequate to deter. This appears unlikely.... It paid a nearly $6 million fine as part of the Compliance Agreement in 2009 ***yet Dish's co-founder testified that the Compliance Agreement did not change Dish's procedures at all***. A damages award that is an order of magnitude larger is warranted here.

Dish also contends that the harm caused was only a "minor nuisance" and "inconvenience." ***Dish's description has left out*** "***illegal,***" ***not to mention*** "***infuriating***." ***Dish's argument shows a failure to recognize the purpose of the law*** and is demeaning to consumers who put their names on the Do Not Call Registry and who are entitled by law to have their privacy respected. It also ***reflects a lack of appreciation for the seriousness of the violations found by the jury***: over 50,000 connected calls to over 18,000 private individuals.

Krakauer I, 2017 U.S. Dist. LEXIS 77163, at *28-*29(1JA000109-10), *31-*32(1JA000110-11), *34-*37(1JA000111-12); 4JA00069-701(¶¶47-48).[4]

Dish appealed the judgment and treble-damages award but the Fourth Circuit affirmed, finding "ample support" for the district court's factual and legal findings. *Krakauer II*, 925 F.3d at 662. *Krakauer II* rejected Dish's argument that Dish and its officials objectively believed Dish was complying with the TCPA:

> The district court … noted the half-hearted way in which Dish responded to consumer complaints, finding that the "evidence shows that Dish cared about stopping complaints, not about achieving TCPA compliance." The court then assessed Dish's arguments to the contrary, finding that ***its refrain that it knew nothing of SSN's widespread violations was simply not credible***: "Given the tens of thousands of violative calls SSN made in a span of just over a year, even a cursory investigation or monitoring effort by Dish would have uncovered the violations. ***Under these circumstances, what Dish calls a mistaken belief is actually willful ignorance***."

Id.

Krakauer II agreed, dismissing Dish's renewed arguments that it was not responsible for third-party-retailer SSN's actions and that it "occasionally" warned SSN to stop:

> The evidence also showed that Dish failed to respond to … concerns [regarding SSN] in any serious way and was profiting handsomely from SSN's sales tactics. It may be that Dish believes that its warnings and admonitions should have been given greater weight by the jury. Because the jury resolved this question and had extensive evidentiary support for its conclusion, it does not matter whether Dish now believes its argument to be convincing. Dish had its chance to persuade the jury, and it lost.
>
> * * *

[4] "Scrubbing" is removing DNC consumers from a call list. Additionally, throughout this brief, emphasis is added and citations are omitted unless otherwise stated.

> Dish seems to think that so long as it includes certain language in a contract or issues the occasional perfunctory warning to a retailer the court will not look past the formalities and examine the actual control exercised by Dish. Moreover, ***Dish failed to recognize that repeated expressions of ignorance as to a widespread problem can evince more than simply negligence; they can also be a sign that the violations are known, tolerated, and even encouraged***. Trebling is never to be done lightly. Given the consequences for a company, a trebled award must rest on solid evidence. Here there was.

Id. at 661-63.

4. *Dish II* Reaffirms Dish's Misconduct

While Dish settled with 46 State Attorneys General, the other four State Attorneys General and the federal government pursued claims that Dish was regularly violating the TCPA. In that action Dish was again found liable for numerous TCPA violations, *see Dish II*, 256 F. Supp. 3d 810, its arguments that its retailers were not its agents were flatly rejected, *id.* at 922, and the judgment was affirmed on appeal. *See Dish III*, 954 F.3d at 975-76. *Dish II* explained that "Dish initially hired Order Entry Retailers based on one factor, the ability to generate activations. Dish cared about very little else. As a result, Dish created a situation in which unscrupulous sales persons used illegal practices to sell Dish ... programming any way they could." 256 F. Supp. 3d at 978.[5] Thus, "Dish has some level of culpability for its direct marketing and a significantly higher level of culpability for the illegal calls made through its Order Entry program." *Id.* at 976.

[5] In the Order Entry ("OE") program "Dish authorized marketing businesses to market Dish Network programming nationally. These marketing businesses secured consumers' offers to purchase Dish Network programming. Dish completed the sales solicited by these businesses." *Dish II*, 256 F. Supp. 3d at 821.

The court also expressed "serious[] concern[]" about Dish's response to SSN's nearly 400,000 improper calls – Dish crafted a "standard" letter to consumers "essentially" saying "go away, it's not our problem, go after [SSN]." *Id.* at 987. Despite being "repeatedly put on notice" of violations, Dish routinely looked the other way because the risks "'seem[ed] to be greatly outweighed by the results.'" *Id*. at 858, 929. *Dish II* ultimately concluded that Dish caused its telemarketers – including SSN – to violate DNC laws through "years and years of careless and reckless conduct" and therefore ordered penalties against Dish totaling $280 million. *Id*. at 983.

5. Dish Formed an SLC that Purported to Analyze Whether Dish Should Pursue the Complaint's Derivative Clams

On April 11, 2018, three months after the Complaint was filed, Defendants created the SLC in an attempt to take control of the derivative claims. 4JA000763-64(SLC Report:24-25). The SLC comprised Dish directors Brokaw and Lillis and Anthony Federico, a director of EchoStar Corporation, a Dish affiliate controlled by Defendant Charles Ergen. 4JA000763-67(SLC Report:24-28); 76JA017376-77 (Transcript of Proceedings July 6, 2020 ("JH1"):159-60). The SLC retained counsel to perform the investigation. 4JA000767-68(SLC Report:28-29).

On November 27, 2018, the SLC filed its Report of the Special Litigation Committee of DISH Network Corporation ("SLC Report") with the district court. 4-73JA000739-016874. The gist of the SLC Report was its claim that ***no*** evidence

supported the Complaint's allegations. The SLC Report concluded that Defendants had an objectively reasonable belief that they and Dish were complying with the TCPA, and therefore, Dish cannot prevail on any claims against any Defendant, even DeFranco, whose testimony formed the basis of the *Krakauer* treble-damages award. 4JA000756(SLC Report:17) ("[M]ost fundamentally, the allegation that the Director Defendants knowingly caused DISH to violate the DNC Laws is not correct. The SLC's thorough investigation turned up ***no evidence*** supporting the allegation.... [T]he Director Defendants believed that DISH was not legally responsible for any violations by Retailers."); *accord* 4JA000761-62(SLC Report:22-23), 4JA000835(SLC Report:96); 5JA000888-89(SLC Report:149-50); 5JA000940-50(SLC Report:201-11); 5JA000955-61(SLC Report:216-22); 5JA001032(SLC Report:293); 5JA001045(SLC Report:306); 5JA001055(SLC Report:316); 5JA001091(SLC Report:352). Further, it found "***no evidence*** that the Director Defendants disregarded 'red flags' that DISH was not complying with the DNC Laws," and that Defendants "believed that DISH was complying with DNC Laws … both before and after the 2009 AVC." 4JA000756(SLC Report:17). The SLC also concluded that *"**[n]o evidence*** suggested that they believed that DISH was not complying with the 2009 AVC." 4JA000762(SLC Report:23); *accord* 5JA000949(SLC Report:210).

B. Proceedings Below

1. The Summary-Judgment Motion

On January 12, 2018, Plaintiffs filed their Complaint, alleging, among other things, that Dish's directors breached their legal obligations to conduct Dish's business in accordance with the TCPA and the AVC as reflected by the *Krakauer* verdict and treble-damages order. 4JA000683-86(¶¶1-9); 4JA000690-91(¶¶27-28); 4JA000702-04(¶¶55-57); 4JA000706(¶¶64-67).

On February 26, 2018, Defendants and Dish separately moved to dismiss the Complaint. But on April 11, 2018, Defendants created the SLC, which filed its SLC Report on November 27, 2018. 78JA017778. Based on the SLC Report, the SLC moved for summary judgment on December 12, 2018, asking the district court to dismiss all claims against each of the Defendants. JA016875-908.

The SLC's summary-judgment motion was predicated on the summary-judgment standard – it argued Plaintiffs could not identify a disputed issue of material fact. 74JA016880-82. The motion did not argue the preponderance standard applied.

Plaintiffs were provided with some of the materials reviewed by the SLC that were cited in its SLC Report, but not all of the materials reviewed by its counsel. *See* 74JA017045-51.

2. The Summary-Judgment Evidentiary Hearing

SLC members Lillis, Federico, and Brokaw testified at the summary-

judgment hearing. Their testimony revealed multiples conflicts with each other and with the SLC Report itself. Most significantly, while the SLC members found that the *Krakauer* and *Dish II* courts did not ***decide*** that Defendants were liable for Dish's misconduct, neither the SLC Report nor the SLC's members undertook the crucial procedural step of addressing whether the decisions in those cases supported an ***inference*** that Defendants breached their fiduciary duties to ensure Dish's compliance with the DNC laws and the AVC under the standards set forth in NRS §78.138.

The SLC was not focused on Defendants' breaches of fiduciary duty in connection with Dish's failure to honor the terms of the AVC. Indeed, Lillis was not even aware that AVC non-compliance was a theory of liability advanced in the Complaint – he did not think "that was the subject of our investigation." 76JA017294-96(JH1:77-79). But Lillis agreed that in the AVC Dish "agreed to supervise its marketers, determine if they were compliant with federal Do Not Call laws, and discipline or terminate them if they failed to take steps to prevent the violations of law." 76JA017303(JH1:86).

SLC members acknowledged they often disputed facts found in *Krakauer*. For instance, Lillis agreed the *Krakauer* jury found SSN was Dish's agent, but the SLC disagreed: "in the SLC work, we did not conclude that SSN was an agent."

76JA017310-12(JH1:93-95).[6] The SLC also rejected *Krakauer*'s findings that "[d]espite the promises DISH made to the Attorneys General in the compliance agreement, DISH did not further investigate or monitor SSN's telemarketing or scrubbing process. In fact, DISH did nothing beyond telling SSN to use caution and to remove the individual complainants from its call lists." 76JA017328-30(JH1:111-13); 76JA017332(JH1:115).

Rather, the SLC found Defendants "weren't in noncompliance with the AVC," although it acknowledged that "if the behavior that Judge Eagles highlighted were true, based on our analysis ***we would have concluded that was a violation of the AVC***." 76JA017332(JH1:115). The SLC also rejected *Krakauer*'s findings that Dish did not adequately monitor "covered marketers," and that Dish's AVC violations were knowing and willful or even that Dish was "willful[ly] ignoran[t]." 76JA017334-35(JH1:117-18); 76JA017337-39(JH1:120-22).[7] Brokaw, however, inconsistently claimed the SLC accepted ***all*** of the *Krakauer* findings. 77JA017539 (Transcript of Proceedings July 7, 2020 ("JH2"):105).

When the SLC rejected a particular *Krakauer* finding, it did not analyze

[6] Lillis evasively testified "I wouldn't say we rejected [Krakauer's agency determination]. We just arrived at a different conclusion." 76JA017312(JH1:95). Federico contradicted him. 76JA017424-25(JH1:207-08).

[7] A "covered marketer" is a third-party retailer who can directly enter sales into Dish's order/entry application system (an "O/E retailer") or who averaged over 51 activations per month in the previous calendar year. 1JA000017(AVC:6).

whether the disputed conduct would have constituted a breach of fiduciary duty. 76JA017335(JH1:118); 76JA017338(JH1:121); 76JA017340(JH1:123). Nor did the SLC analyze whether Dish's inaction was attributable to the Defendants as being "the people in charge." 76JA017341(JH1:124). Indeed, no SLC member examined whether Defendants' knowledge of Dish's misconduct could be ***inferred*** from the factual findings in *Krakauer* or *Dish II*.

The SLC accepted some of the *Krakauer* findings, agreeing that Dish knew or should have known that SSN was violating the TCPA. 76JA017337(JH1:120). For instance, Lillis "accepted the fact that DISH knew SSN was violating the DNC," and that SSN had a long history of TCPA violations. 76JA017338(JH1:121-22); 76JA017341(JH1:124). Lillis agreed Dish "easily could have discovered" these violations though minimal monitoring efforts. 76JA017341(JH1:124). Federico accepted the *Krakauer* findings that SSN acted as Dish's agent, Dish had the right to control SSN, it "was aware of SSN's long history of TCPA violations," "DISH knew SSN was calling numbers on the [DNC] registry," knew SSN was making calls to persons on the DNC registry during and before the *Krakauer* class period, and Dish "took no action to monitor DISH's compliance with telemarketing laws and effectively acquiesced in SSN's use of unscrubbed lists." 77JA017444-45(JH2:10-11).

The SLC acknowledged the AVC's terms were broadly applicable, binding

"all executives in DISH, including DeFranco and Ergen." 76JA017304(JH1:87). Indeed, "[i]n their capacities as officers, Ergen and DeFranco formally received a copy of the 2009 AVC because in those roles ***they had managerial responsibilities for performing the obligations outlined in [the AVC]*** and were officers necessary to ensure DISH Network's compliance with the terms of [the AVC]." 76JA017308(JH1:91); *accord* 5JA000951-52(SLC Report:212-13). Lillis – who agreed that SSN undertook a "sustained and ingrained practice of violating the law" – acknowledged that the SLC "***did not*** determine" that "Mr. Ergen and Mr. DeFranco didn't know anything about [SSN's misconduct]," and concluded DeFranco "certainly" knew. 76JA017344-45(JH1:127-28). Indeed, Lillis admitted DeFranco was "aware that some retailers engaged in unscrupulous behavior." 76JA017351(JH1:134). Federico similarly observed that "Moskowitz, DeFranco, and Ergen … of course knew some of [the *Krakauer* misconduct].… [W]e found, for example, that some customers had written letters to Charlie [Ergen] directly complaining about all these darn calls they were getting." 76JA017414(JH1:197). The AVC, however, held everyone at Dish responsible for Dish's marketers, and Ergen and DeFranco "absolutely were responsible." 76JA017419(JH1:202). Nonetheless, Ergen and DeFranco "did nothing to go address SSN," even though under the AVC they, along with "the entire senior staff," had a responsibility to do something. 76JA017421(JH1:204); *accord* 77JA017439(JH2:4).

The SLC never analyzed whether that knowing failure to do anything was a violation of fiduciary duty. 76JA017334-35(JH1:117-18); 76JA017338(JH1:121); 76JA017340-41(JH1:123-24). Similarly, the SLC did not analyze whether DeFranco's knowledge supported a finding that he breached his fiduciary duty to Dish as to the TCPA ***or*** the AVC. 76JA017345-46(JH1:128-29). The SLC analyzed only whether "he somehow condone[d] knowing[] violation of the DNC laws." 76JA017345(JH1:128).

As to the *Dish II* findings, Lillis interpreted them to refer to Ergen and DeFranco because of DeFranco's position – he was "in charge of retail services and distributions," including hiring retailers – and Ergen's concerns about DNC violations. 76JA017347-48(JH1:130-31); 76JA017351(JH1:134). Lillis rejected *Dish II*'s finding that "DISH continued to show little or no regard for consumer complaints about the order entry retailers' practices," 76JA017353(JH1:136), while Federico said the opposite. 77JA017457-58(JH2:23-24).

But the SLC accepted as true that SSN made close to 400,000 calls to people on the DNC list between 2010 and 2011, and that Dish received so many complaints regarding SSN that it created a standard letter to brush off complaining consumers. 76JA017354(JH1:137); 77JA017458-61(JH2:24-27). Federico admitted that letter in effect told consumers complaining about DNC violations to "[g]o away, it's not our problem, go after [SSN]," 77JA017458(JH2:24), although Lillis denied it.

76JA017354-55(JH1:137-38). Federico termed it "a stupid letter" that could not "drive a change in the system," 77JA017458-59(JH2:24-25), and acknowledged the letter was in "direct conflict" with the AVC. 77JA017461(JH2:27). Nonetheless, the SLC did not analyze whether sending complainants a letter disavowing responsibility for SSN's conduct would be contrary to the promises in the AVC, and Lillis even disputed that the letter supported an inference that Dish would likely allow illegal calls absent deterrence, although he begrudgingly admitted such a letter "would be inconsistent with the spirit of [the] AVC." 76JA017355-57(JH1:138-40).

The SLC members also rejected factual findings from *Dish II*. While agreeing that activations were a "very important consideration," Lillis rejected the court's finding "Dish cared about very little else" in selecting retailers. 76JA017347(JH1:130). Federico also rejected that finding, suggesting the district court's holding concerned only "what was visible outside of DISH," without explaining why what was visible inside Dish supposedly was not presented in *Dish II*. 77JA017452-53(JH2:18-19).

While the SLC cited a passage from its report claiming the SLC accepted all of the findings in *Krakauer* and *Dish II*, 76JA017364-65(JH1:147-48), the SLC members' actual testimony admitting multiple factual disputes belied that lawyerly assertion. Indeed, when given the chance to reaffirm that passage, Lillis didn't bite:

> Q: For purposes of making its determinations, did the SLC proceed as the rulings and the DNC actions will stand ***and*** were well reasoned based upon the evidence presented and the legal standards applied?

A: Yes, we assumed they would stand.

76JA017364-65(JH1:147-48).[8] Lillis thus pointedly adopted the former, not the latter, assertion.

The SLC sought to explain its decision not to vindicate Dish's interests by asserting that Defendants relied on outside counsel's assessment that Dish's retailers were not agents. But even that purported fact was subject to doubt: Lillis explained that the basis for the SLC's conclusion that "the retailers were not agents of Dish … ***wasn't*** advice of our counsel." 76JA017321(JH1:104). While Lillis later contradicted himself, and claimed to have reviewed advice of outside counsel provided to Defendants before and after the AVC was entered that indicated that Dish's retailers were somehow not Dish's agents, Lillis did not claim that this purported advice was relevant to the duties imposed by the AVC. 76JA017323(JH1:106-07); 76JA017357-61(JH1:140-44).[9]

Those materials predated the *Krakauer* trial and therefore could have been offered in evidence based on Dish's determination of whether they were "viable evidence" of Dish's purported AVC compliance. 76JA017365(JH1:148);

[8] "DNC actions" refers to *Krakauer* and *Dish II*.

[9] Lillis cited language in Dish's retailer contracts purporting to disavow an agency relationship. 76JA017324(JH1:107). *Dish III* flatly rejected that argument, holding the "district judge got [agency] right" and while "[t]he contract asserts that it does not create an agency relation, ... parties cannot by ukase negate agency if the relation the contract creates is ***substantively*** one of agency." 954 F.3d at 975 (emphasis in original).

76JA017367-68(JH1:150-51).[10] Dish chose not to offer that evidence, and the *Krakauer* court relied on Dish's disregard of the AVC to support its treble-damages finding. 76JA017370-71(JH1:153-54).

The SLC members' testimony continued the SLC Report's theme that there was supposedly no evidence at all that Defendants knowingly violated the DNC laws, 76JA017320-22(JH1:103-05), observing that *Krakauer* and *Dish II* did not explicitly find that Defendants "knowingly caused or permitted Dish to violate the DNC laws or the AVC." 77JA017553(JH2:119). The SLC similarly claimed that "[n]o evidence suggested that [Defendants] believed that DISH was [not] complying with the 2009 AVC." 76JA017363-64(JH1:146-47); 76JA017367-68(JH1:150-51). But the SLC never undertook an analysis of the next procedural step – assuming *Krakauer* and *Dish II* did not explicitly hold that Defendants breached their fiduciary duties, do those cases inferentially support that proposition.

Additionally, the SLC undertook no analysis of Dish's ability to employ ***offensive*** collateral estoppel to the *Krakauer* and *Dish II* findings. Neither Lillis nor Federico even knew what collateral estoppel is. 76JA017349-50(JH1:132-33);

[10] Lillis sought to excuse Dish's failure to adduce supposed AVC-compliance evidence based on Dish's partially-successful motion to preclude use of the AVC to prove Dish was guilty of wrongdoing at the *Krakauer* trial. 76JA017367-70(JH1:150-53). But Dish's motion could not preclude it from offering AVC-compliance evidence for an entirely different purpose. *See* Fed. R. Evid. 105 (evidence admitted for a limited purpose).

77JA017455-57(JH2:21-23).[11]

3. The District Court's Ruling

On July 17, 2020, the district court, relying upon the hearing testimony and the summary-judgment briefing, granted the SLC's summary-judgment motion. 77JA017632(Order:23). Although the SLC filed a ***summary-judgment*** motion, 77JA017610(Order:1), the court applied the preponderance standard but acknowledged that if "[t]he evidence presented at the evidentiary hearing were evaluated under a summary judgment standard a different result would be reached." 77JA017614(Order:5 & n.3).

The court found SLC-members Lillis and Federico were independent, but declined to address Brokaw, 77JA017625-27(Order:16-18 & n.10), who *Dish I* held has "personal and professional ties with Ergen [that] represent the types of improper influences that could inhibit the proper exercise of independent business judgment," 401 P.3d at 1091. The district court held a majority of the SLC was independent. 77JA017627(Order:18).

The court concluded that Plaintiffs "have identified no relevant subject on which the SLC was unadvised," and there were no documents that the SLC failed to

[11] Led by SLC counsel, Federico testified the SLC considered the possible use of collateral estoppel against Defendants, but he actually referred to a brief and inaccurate discussion of the (remote) possibility that judicial – not collateral – estoppel could somehow be employed against Dish. 77JA017480-81(JH2:46-47) (citing 5JA01088-89(SLC Report:349-50)). The SLC Report never mentioned collateral estoppel or issue preclusion and provided no analysis of those concepts.

review. 77JA017619(Order:10); 77JA017621(Order:12). It further found that the SLC concluded that Defendants had an objectively reasonable belief they were complying with the law and that they believed their retailers were not their agents. 77JA017622-23(Order:13-14).

The court observed that "[t]he issues investigated [by the SLC] related to the Retailers' violations of the TPCA [sic] and the legal responsibility of DISH for supervision or control of those Retailers as well as the efforts to insure compliance with the 2009 AVC." 77JA017629(Order:20). Without addressing their conflicting testimony, the court held the SLC "members accepted as fact the findings made in the DNC actions." 77JA017629(Order:20); 77JA017631(Order:22). Although those findings were "damning," they "do not end the inquiry." 77JA017629(Order:20).

The court found "[t]he SLC inquired of the attorneys who during the Relevant Time Period had provided the white paper and advice related to the relationship of the Retailers and oversight obligations as part of its investigation and had the opportunity to test, from its perspective, the appropriateness of reliance on that advice." 77JA017629-30(Order:20-21). Relying on the SLC's review of extensive materials, the court "conclude[d] that the SLC is independent and has conducted a good-faith, thorough investigation." 77JA017631(Order:22). The court declined to address whether "the SLC's determination conflicted with the DNC Actions"

because that "would necessarily revisit the substance of the SLC's determinations." 77JA017631(Order:22). It did not, however, address whether the SLC analyzed the inferences that could be drawn from the DNC actions in a trial of the breach-of-fiduciary-duty claims, and offered no analysis at all of the AVC claim.

The court entered judgment on August 3, 2020, and an Amended Judgment on November 2, 2020. 77JA017659-61; 77JA017672-73.

VII. SUMMARY OF ARGUMENT

In granting the SLC's summary-judgment motion and deferring to the SLC's recommendation that Plaintiffs' meritorious claims be dismissed, the district court made multiple errors.

First, although the SLC filed a summary-judgment motion, the district court refused to apply the summary-judgment standard, employing a preponderance standard instead. *Dish I* did not mandate fact-finding under that standard, but rather adopted the holding in *Auerbach v. Bennett*, 393 N.E.2d 994 (N.Y. 1979), which makes clear that the issue is whether there is a "material issue of fact" as to the "adequacy" of the SLC's work. *Id.* at 1003; *Dish I*, 401 P.3d at 1085, 1088. Because the district court held the SLC ***did not*** satisfy the summary-judgment standard, 77JA017614(Order:5 n.3), it was error to grant the SLC's summary-judgment motion.

Second, the SLC was required to "determin[e]" the Defendants' "legal

liability" for their breaches of fiduciary duty, *see Auerbach*, 393 N.E.2d at 1002, and bore the burden of demonstrating its analysis of that issue was not "'so *pro forma* or halfhearted as to constitute a pretext or sham.'" *Dish I*, 401 P.3d at 1092. It failed to do so.

To "conduct a good faith investigation of reasonable scope, [an] SLC must investigate ***all*** theories of recovery asserted in plaintiffs' complaint" and "should explore all relevant facts and sources of information that bear on the central allegations in the complaint." *London v. Tyrrell*, No. 3321-CC, 2010 Del. Ch. LEXIS 54, at *54 (Del. Ch. Mar. 11, 2010). Plaintiffs allege that Defendants breached their fiduciary duties to Dish both by failing to ensure that Dish complied with the obligations imposed by the AVC and by also failing to ensure that Dish complied with the TCPA.

Dish's non-compliance with the AVC and the TCPA was established in *Krakauer* and *Dish II*. For instance, Defendants failed to cause Dish to comply with its "promise[]" in the AVC to "forty-six state attorneys general in 2009 that it would enforce TCPA compliance by its marketers." *Krakauer I*, 2017 U.S. Dist. LEXIS 77163, at *2(1JA000101-02). Despite that promise, on Defendants' watch "Dish did nothing to monitor, much less enforce, SSN's compliance with telemarketing laws. When it learned of SSN's noncompliance, Dish repeatedly looked the other way." *Id.*(1JA000101-02). In fact, despite the AVC's commitments, DeFranco

admitted "that the [AVC] did not change Dish's procedures at all." *Id.* at *36(1JA000112). Dish's claims of AVC compliance were "not credible," and any "belief [Dish was in compliance] was only possible because Dish ignored the facts and failed to investigate and monitor SSN's compliance." *Id.* at *32(1JA000110-11). Because "even a cursory investigation or monitoring effort by Dish would have uncovered the violations[,] … what Dish calls a mistaken belief is actually willful ignorance." *Id.*(1JA000110-11).

Nonetheless, the SLC repeatedly insisted there was no evidence supporting Defendants' liability for breach of fiduciary duty based upon Dish's grave misconduct. But the AVC claim was not "the subject of [the SLC's] investigation," 76JA017296(JH1:79), and even if the SLC analyzed the AVC claim at all, it never considered whether Defendants' knowledge of Dish's failures to honor the AVC's commitments could be ***inferred*** – like any other fact – from the facts found in *Krakauer* and *Dish II*. Nor did it ever consider whether the facts established in those cases would be deemed established in a trial of Defendants under the doctrine of offensive collateral estoppel. These procedural failures demonstrate that the SLC's investigation was "'so *pro forma* or halfhearted as to constitute a pretext or sham'" unworthy of business-judgment protection. *Dish I*, 401 P.3d at 1092.

The same is true as to Plaintiffs' allegations that Defendants breached their fiduciary duties by failing to cause Dish to comply with the TCPA. *Dish III* held

that "DISH had at least implied knowledge that the order-entry retailers were its agents and therefore would be liable for their actions," and "DISH ***knew*** that it had control over the order-entry retailers and knew, too, that they were making unlawful calls." 954 F.3d at 978. The SLC also failed to analyze whether those facts: (1) supported an inference of Defendants' knowledge through application of collateral estoppel; and (2) vitiated any purported reliance-on-advice-of-counsel-defense because Defendants "ha[d] knowledge concerning the matter in question that would cause reliance thereon to be unwarranted." NRS §78.138(2). That, too, is a fatal procedural deficiency.

Finally, the district court erred in holding that the SLC Report was supported by an independent majority of SLC members. Although Dish "ha[d] every opportunity to form a perfectly independent special litigation committee," *Booth Family Tr. v. Jeffries*, 640 F.3d 134, 143 (6th Cir. 2011), it chose one member – Brokaw – who had been held not disinterested in *Dish I*, 401 P.3d at 1091. Because there is nothing in the record directing the SLC members how to proceed if one member is not disinterested, and because the remaining SLC members fundamentally disagreed on the SLC's procedural approach to the *Krakauer* and *Dish II* findings, no independent majority supports the SLC's recommendation to dismiss the Complaint.

VIII. ARGUMENT

A. Standard of Review

This Court reviews dismissals of derivative claims based on deference to an SLC for abuse of discretion. *Dish I*, 401 P.3d at 1088; *but see id.* at 1096 ("[n]ormally, [this Court] give[s] *de novo* review to an appeal from an order terminating an action on motion without a trial") (Pickering, J., dissenting).[12] Regardless, "[w]hile review for abuse of discretion is ordinarily deferential, deference is not owed to legal error." *AA Primo Builders, LLC v. Washington*, 245 P.3d 1190, 1197 (Nev. 2010).

B. The District Court Erred in Failing to Apply the Summary-Judgment Standard to the SLC's Summary-Judgment Motion

This appeal is from the order granting the SLC's ***summary-judgment*** motion. 77JA017610(Order:1). Despite that procedural posture, the district court applied the preponderance standard, 77JA017614(Order:5), rather than the traditional summary-

[12] This Court should reconsider its adoption of the abuse-of-discretion standard. *See Dish I*, 401 P.3d at 1096-97 (Pickering, J., dissenting) (collecting cases applying *de novo* review to SLC-based dismissals and observing that the case cited by the majority is an "outlier"). Although this Court disavowed the discretionary second step of the Delaware test adopted in *Zapata Corp. v. Maldonado*, 430 A.2d 779, 789 (Del. 1981), in favor of the approach taken in *Auerbach*, "[u]nder both [*Zapata* and *Auerbach*], the district court determines whether the SLC is independent and conducted a good-faith, thorough investigation." *Dish I*, 401 P.3d at 1087-88. Delaware courts review rulings under *Zapata*'s first step – the portion that is identical to *Auerbach*'s test – *de novo*. *See Kahn v. Kolberg Kravis Roberts & Co., L.P.*, 23 A.3d 831, 840-41 (Del. 2011). Moreover, *Dish I* emphasized the relevance of demand-futility cases to its SLC analysis, *see* 401 P.3d at 1089 n.4, but the clear trend is for *de novo* review of those issues as well. *See, e.g.*, *Espinoza v. Dimon*, 797 F.3d 229, 235-36 (2d Cir. 2015); *Brehm v. Eisner*, 746 A.2d 244, 253-54 (Del. 2000).

judgment approach, which asks whether there is "a genuine issue of material fact." *Spencer v. Klementi*, 466 P.3d 1241, 1244 (Nev. 2020). "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1030-31 (Nev. 2005). The district court held there ***was*** such an issue, stating that "[i]f the evidence presented at the evidentiary hearing were evaluated under a summary judgment standard a different result would be reached." 77JA017614(Order:5 n.3). Because the summary-judgment standard applies to the SLC's summary-judgment motion, that finding is dispositive and the district court's order must be reversed.[13]

Dish I adopted the analysis in *Auerbach*, 393 N.E.2d 994. *See Dish I*, 401 P.3d at 1085, 1088. *Auerbach* makes clear that the summary-judgment standard applies to a motion to defer to an SLC's dismissal recommendation – that case turned on whether there was a "material issue of fact" as to the "adequacy" of the SLC's work. *See* 393 N.E.2d at 1003. *Auerbach* held that if the evidence "raise[s] a triable issue of fact as to the good-faith pursuit of [the SLC's] examination" – and here it did – the summary-judgment motion must be denied. *Id.* While *Dish I* mandated an evidentiary hearing, it did so "[p]ursuant to *Auerbach*," and thus did not signal its rejection of the very authority it adopted. 401 P.3d at 1088. *Dish I* nowhere

[13] *De novo* review applies to this "legal error." *Washington*, 245 P.3d at 1197.

embraced a preponderance standard. Rather, it warned that an SLC must be """above reproach."""" *Id.* at 1097.

Moreover, "courts which have considered the issue have concluded that judicial review of the independence, good faith, and investigative techniques of a special litigation committee is governed by traditional summary judgment standards." *Will v. Engebretson & Co.*, 261 Cal. Rptr. 868, 872 (Cal. App. 1989). Substantial authority vindicates *Will*'s conclusion. *See, e.g.*, *Booth*, 640 F.3d at 139-40; *Hasan v. CleveTrust Realty Inv's.*, 729 F.2d 372, 374 (6th Cir. 1984); *Boland v. Boland*, 31 A.3d 529, 561 (Md. 2011); *Day v. Stascavage*, 251 P.3d 1225, 1228-29 (Colo. App. 2010); *Janssen v. Best & Flanagan*, 662 N.W.2d 876, 889 (Minn. 2003). Because the district court found, 77JA017614(Order:5 n.3), that the SLC failed to meet the burden "needed to grant summary judgment ... th[is] derivative suit [should] proceed[] on its merits." *Janssen*, 662 N.W.2d at 889; *accord Booth*, 640 F.3d at 142-43; *Hasan*, 729 F.2d at 379-80; *Will*, 261 Cal. Rptr. at 874; *Kaplan v. Wyatt*, 484 A.2d 501, 508 (Del. Ch. 1984), *aff'd*, 499 A.2d 1184 (Del. 1985).

Under Delaware law, which this Court looks to for guidance in analyzing shareholder-derivative claims, *see Shoen v. SAC Holding Corp.*, 137 P.3d 1171, 1184 (Nev. 2006), *overruled in part on other grounds*, *Chur v. Eighth Jud. Dist. Ct. of Nevada*, 458 P.3d 336, 340 (Nev. 2020), an SLC motion to defer "is to be handled procedurally in a manner akin to proceedings on summary judgment." *Kaplan*, 484

A.2d at 507.[14] "[T]he SLC bears the burden of demonstrating that there are no genuine issues of material fact as to its independence, the reasonableness and good faith of its investigation, and that there are reasonable bases for its conclusions," and "***[i]f the Court determines that a material fact is in dispute on any of these issues it must deny the SLC's motion***." *London*, 2010 Del. Ch. LEXIS 54, at *38; *accord Sutherland v. Sutherland*, 958 A.2d 235, 238-39 (Del. Ch. 2008).

While Plaintiffs merely request that this Court follow established law in affirming that summary-judgment standards apply to the SLC's summary-judgment motion, that approach also makes a great deal of sense. The SLC process is plainly susceptible to abuse, as then-Justice Pickering observed in *Dish I*: "the SLC procedure ... vests SLC members with 'enormous power to seek dismissal of a derivative suit brought against their director-colleagues,' a power rife with the potential for abuse and the cynicism and mistrust such abuse engenders." 401 P.3d at 1095 (Pickering, J., dissenting). For that reason, SLC jurisprudence focuses on attempting to foster the integrity of the process: "The composition ***and*** conduct of a special litigation committee … 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***." *Biondi v. Scrushy*, 820 A.2d 1148, 1166 (Del. Ch. 2003),

[14] Under Delaware law summary-judgment standards apply to the first step in the SLC-motion-to-defer analysis, the step that this Court recognizes is identical to the *Auerbach* analysis. *See Dish I*, 401 P.3d at 1087-88.

aff'd sub nom. In re HealthSouth Corp. S'holders Litig., 847 A.2d 1121 (Del. 2004); *see also In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 940 (Del. Ch. 2003); ("the independence inquiry is critically important if the special litigation committee process is to retain its integrity, a quality that is, in turn, essential to the utility of that process").

In light of those authorities and the SLC's heavy burden, adopting a preponderance standard rather than the traditional summary-judgment requirement of pointing to a material question of fact will undercut the integrity of the process and defeats the purpose of requiring the SLC to bear its burden. A hand-picked SLC that has unfettered access to evidence and the ability to choose what evidence it places in its report – and what evidence to bury – is overwhelmingly likely to be able to satisfy a preponderance standard in such an asymmetrical process. When a plaintiff with access to only limited discovery is able to point to material issues of fact despite those procedural disadvantages – as here – that should suffice to permit plaintiffs to seek to vindicate the shareholders' interests, as many courts have held. *See supra* at 34-35. The circumstances here – where a hand-picked SLC has flatly rejected the conclusions of the *Krakauer* jury and court, the *Dish II* court, and the Fourth and Seventh Circuits – are plainly the sort that would make any shareholder suspicious and justify adherence to the many authorities mandating summary-judgment review as a means of safeguarding the integrity of the SLC process.

Moreover, this Court recognizes that demand-futility case law is relevant in SLC analysis, *see Dish I*, 401 P.3d at 1089 n.4, and that body of law establishes that "a plaintiff [must] allege[] facts with particularity which, taken as true, support ***a reasonable doubt*** that the challenged transaction was the product of a valid exercise of business judgment." *Aronson v. Lewis*, 473 A.2d 805, 815 (Del. 1984). The reasonable-doubt standard also applies here, *see Booth*, 640 F.3d at 142-43; *Boland*, 31 A.3d at 565; *Oracle*, 824 A.2d at 947, and the district court's finding of material questions of fact satisfies it. 77JA017614(Order:5 n.3).[15]

C. The SLC's Investigation Was *Pro forma* and Halfhearted

1. The *Auerbach* Standards Apply

Dish I adopted the *Auerbach* standard, placing substantial burdens on shareholders victimized by wayward corporate fiduciaries and mandating judicial deference to special-litigation-committee recommendations ***if*** the SLC demonstrates it has satisfied certain criteria. *See* 401 P.3d at 1085, 1088. The SLC is entitled to no presumption and bears the burden of proof to show there is no genuine issue of material fact that "the SLC is independent ***and*** conducted a good-faith, thorough investigation." *Id.* at 1087; *accord Hasan*, 729 F.2d at 376.

Because "the SLC procedure … vests SLC members with 'enormous power to seek dismissal of a derivative suit brought against their director-colleagues,'" *Dish*

[15] The following arguments mandate reversal regardless of whether the summary-judgment standard applies.

I, 401 P.3d at 1095 (Pickering, J., dissenting), courts must be cognizant of "the potential for structural bias" when directors are called upon to evaluate whether to accuse their colleagues of significant misconduct. *See Desaigoudar v. Meyercord*, 133 Cal. Rptr. 2d 408, 419 (Cal. App. 2003); *accord Hasan*, 729 F.2d at 376-77. Accordingly, this Court recognizes that "'the SLC has the burden of establishing its own independence by a yardstick that must be "like Caesar's wife" – "above reproach."'" *Dish I*, 401 P.3d at 1090.

The SLC also bears the burden of proving that it conducted a good faith and thorough investigation, and "employed reasonable procedures in its analysis." *Id.* at 1087. It must show: (1) "that the areas and subjects to be examined are reasonably complete ***and*** [(2)] there has been a good-faith pursuit of inquiry into such areas and subjects." *Auerbach*, 393 N.E.2d at 1003. Based upon the *Auerbach* standard embraced by this Court, even assuming the SLC was independent, it "may terminate a derivative action on motion '***only*** if [its members]' … can 'show that they have pursued their chosen investigative methods in good faith,' and have adopted 'methodologies and procedures best suited to the conduct of an investigation of facts ***and the determination of legal liability***.'" *Dish I*, 401 P.3d at 1095 (quoting *Auerbach*, 393 N.E.2d at 1001-03) (Pickering, J., dissenting); *accord Hasan*, 729 F.2d at 376. Whether the SLC's "methodologies and procedures" undertaken in order to "investigat[e]" the "facts ***and*** … determin[e] … legal liability" pass muster

is subject to judicial review under *Auerbach* which recognized that "the courts are well equipped by long and continuing experience and practice to make [such] determinations. In fact they are better qualified in this regard than are corporate directors in general." 393 N.E.2d at 1002-03. As *Dish I* adopted *Auerbach*, *see* 401 P.3d at 1085, 1088, that standard applies here.

Ultimately, "'[p]roof … that the investigation has been so restricted in scope, so shallow in execution, or otherwise so *pro forma* or halfhearted as to constitute a pretext or sham, consistent with the principles underlying the application of the business judgment doctrine, would raise questions of good faith or conceivably fraud which would never be shielded by that doctrine.'" *Id.* at 1092. Thus, even if the SLC's investigation appears thorough, if evidence "raise[s] a triable issue of fact as to the good-faith pursuit of [the SLC's] examination," the motion must be denied. *Auerbach*, 393 N.E.2d at 1003.

Absent these indicia of integrity, objectivity, and trustworthiness, a Nevada trial court cannot, as a matter of law, defer to an SLC's business judgment and adopt as its own the SLC's findings. *See Dish I*, 401 P.3d at 1088. In such instances, material issues of disputed fact related to the independence, good faith, and/or thoroughness of the SLC and/or its investigative process or work product preclude granting summary judgment. This case presents precisely those issues and it was therefore error to grant the SLC's motion.

2. The Decisions Condemning Dish's Conduct Support a Strong Inference that Defendants Breached Their Fiduciary to Duty to Require Dish to Honor the AVC, but the SLC Never Analyzed that Issue

a. Introduction

To "conduct a good faith investigation of reasonable scope, [an] SLC must investigate all theories of recovery asserted in plaintiffs' complaint" and "should explore all relevant facts and sources of information that bear on the central allegations in the complaint." *London*, 2010 Del. Ch. LEXIS 54, at *54; *accord In re Oracle Corp. Derivative Litig.*, No. 2017-0337-SG, 2019 Del. Ch. LEXIS 1381, at *45-*46 (Del. Ch. Dec. 4, 2019).[16] "If the SLC fails to investigate facts or sources of information that cut at the heart of plaintiffs' complaint this will usually give rise to a material question about the ... good faith of the SLC's investigation." *London*, 2010 Del. Ch. LEXIS 54, at *54-*55. "[A]lthough the court should not question the SLC's substantive conclusions, ***it should 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." *Boland*, 31 A.3d at 566; *accord Seidl v. Am. Century Cos.*, 799 F.3d 983, 992 (8th Cir. 2015).

"[T]he touchstone of good faith in the context of a special litigation committee

[16] These Delaware decisions, addressing the first step of SLC review which is identical under Delaware law and *Auerbach*, are persuasive. *See Shoen*, 137 P.3d at 1184; *see also Cohen v. Mirage Resorts, Inc.*, 62 P.3d 720, 726-27 (Nev. 2003) (Nevada corporate laws are modeled after Delaware law).

report is its demonstrated willingness to deal openly and honestly with ***all*** relevant and material information." *See Sutherland v. Sutherland*, 968 A.2d 1027, 1030 (Del. Ch. 2008). Ultimately, the SLC's investigation is fatally flawed "if it simply accepts defendants' version of disputed facts without consulting independent sources to verify defendants' assertions." *London*, 2010 Del. Ch. LEXIS 54, at *56.

The SLC here is not entitled to judicial deference as it abandoned its independent adjudicative function by disregarding established legal facts to reach a preordained result. Simply put, the SLC's investigation was so "'*pro forma* [and] half-hearted as to constitute a pretext or sham.'" *Dish I*, 401 P.3d at 1092. The SLC failed to investigate whether Dish's derivative claims could succeed against DeFranco and the other Defendants in light of the adjudicated facts from the *Krakauer* verdict and treble damages order, as well as the decision in *Dish II*, ***and the facts that could be inferred from those adjudications***. It was error to grant summary judgment in favor of the SLC given that its "report ... seems to suggest that the SLC itself applied a deferential standard to the Board's previous actions, rather than stepping into the shoes of the corporation and making an independent decision." *Boland*, 31 A.3d at 568. And "the mere length of the report or volume of items considered will not win the day for the SLC." *Id.* at 569.

The SLC's disregard of the facts adjudicated in *Krakauer* and *Dish II* – in particular Defendants' failure to cause Dish to comply with its "promise[]" to "forty-

six state attorneys general in 2009 that it would enforce TCPA compliance by its marketers," *Krakauer I*, 2017 U.S. Dist. LEXIS 77163, at *2(1JA000101-02) – raises genuine issues of material fact regarding whether the SLC conducted a thorough, independent, and good-faith investigation rather than crafting its investigation to fulfill a preordained conclusion that Plaintiffs' claims have no merit. Granting the SLC's motion was error.

Before addressing the merits of this procedural challenge to the SLC's recommendation, it is equally important to emphasize what this argument ***does not*** address – it does not speak to whether the SLC, had it actually fulfilled its duties, would have chosen to pursue Dish's meritorious claims against Defendants, or even what weight the SLC should have ascribed to the inferences that it failed to assess. While Plaintiffs certainly believe this Court ***should*** reach those issues – as a Delaware court would under *Zapata*, 430 A.2d at 789 – *Dish I* forecloses that inquiry. *See* 401 P.3d at 1087-88.

Rather, Plaintiffs argue that the SLC's failure even to consider the compelling inferences of the director Defendants' breaches of fiduciary duty in connection with Dish's failure to comply with the AVC that could be drawn from the *Krakauer* and *Dish II* adjudications was itself a ***procedural*** deficiency that reveals the SLC's failure to undertake the good-faith analysis of the director Defendants' "legal liability" required by *Auerbach*, 393 N.E.2d at 1002. The same is true as to the

SLC's flawed analysis of Plaintiffs' TCPA-based claims of breaches of fiduciary duty. *See infra* at 60-63. Those failures are akin to determining whether a baseball team won a game without ever checking to see how many runs the opposing team scored, and demonstrate "'that the investigation has been so restricted in scope, so shallow in execution, or otherwise so *pro forma* or halfhearted as to constitute a pretext or sham.'" *Dish I*, 401 P.3d at 1092. "'[C]onsistent with the principles underlying the application of the business judgment doctrine, [that failure] raise[s] questions of good faith or conceivably fraud which would never be shielded by that doctrine.'" *Id.*

b. *Krakauer* and *Dish II*

The *Krakauer* jury heard sworn testimony and weighed the relevant evidence at trial, including DeFranco's testimony about how he and Dish did nothing more to impose lawful telemarking practices at Dish after entering the AVC. *See* 79JA018074-75. The *Krakauer* jury rejected Dish's witnesses and evidence that Dish was supposedly in compliance with the TCPA and rendered a verdict against Dish for TCPA violations. *See* 1JA000097-99; *see also* 81JA018447-50.

The *Krakauer I* trial court, Judge Eagles, issued a blistering assessment of Dish's disregard of its duties under the TCPA and the AVC – based largely on the same evidence reviewed by the SLC here – and ***held*** that "[w]hile ***Dish promised*** forty-six state attorneys general in 2009 that it would enforce TCPA compliance by

its marketers, ***Dish did nothing*** to monitor, much less enforce, SSN's compliance with telemarketing laws. When it learned of SSN's noncompliance, ***Dish repeatedly looked the other way***." 2017 U.S. Dist. LEXIS 77163, at *2(1JA000101-02). In short, "the record is silent about any efforts Dish undertook to comply with the promises and assurances it made" in the AVC. *Id.* at *19(1JA000106-07), *24(1JA000108).

Defendant DeFranco confirmed Dish's insouciance, "testif[ying] that the [AVC] did not change Dish's procedures at all." *Id*. at *36(1JA000112). Indeed, "[w]hen individuals complained, Dish disclaimed responsibility for the acts of its marketers, including SSN, and made no effort to determine whether SSN was complying with telemarketing laws, much less to enforce such compliance." *Id.* at *7-*8(1JA000103-04); *accord Dish II*, 256 F. Supp. 3d at 987 (describing Dish's standard "go away" letter disavowing responsibility and re-directing consumers to Dish's retailer SSN).

Krakauer I held the AVC imposed "affirmative[]" duties on Dish (2017 U.S. Dist. LEXIS 77163, at *19(1JA000106-07)), regardless of whether Dish clung to the fiction that its retailers were not its agents: "Dish represented to and promised forty-six state attorneys general that it would require its marketers to comply with telemarketing laws and would affirmatively investigate complaints against those marketers." *Id.* at *16(1JA000106). In the AVC, "Dish represented that it had

control over its third-party marketers, including OE Retailers like SSN. Dish agreed to supervise its marketers, determine if they were complying with federal do-not-call laws, and discipline or terminate them if they failed to take steps to prevent violations of the law." *Id.* at *18(1JA000106). The court thus found that DeFranco's testimony that Dish complied with the AVC was "***patently inaccurate***, as Dish's compliance department never investigated whether a marketer had violated telemarketing laws." *Id.* at *20(1JA000107). Indeed, despite the AVC, what Dish operated was "a compliance department in name only" – it "was not set up to monitor marketers for [DNC] compliance." *Id.* at *21-*22(1JA000107-08). Even though the AVC promised Dish would do so, DeFranco, along with other Dish personnel, "testified that it was not feasible for Dish to monitor compliance of its marketers." *Id.* at *23(1JA000108).

Judge Eagles rejected Dish's protestations that it cleared the AVC's high bar as to SSN – "[f]irst, the testimony that Dish thought SSN was in compliance is ***not credible*** and is controverted by Dish's own documents." *Id*. at *32(1JA000110-11); *see also* 81JA018455-586 (Dish's SSN Retailer Compliance File, which reflected SSN's repeated DNC violations); 81JA018588-99 (Judgment by Consent and Stipulated Permanent Injunction against SSN relating to DNC violations, March 21, 2005). "Second, even if some Dish employees did think this, ***that belief was only possible because Dish ignored the facts and failed to investigate and monitor***

SSN's compliance." *Krakauer I*, 2017 U.S. Dist. LEXIS 77163, at *32(1JA000110-11).

Indeed, Dish knew "of SSN's long history of TCPA violations" and specifically "knew SSN was calling numbers on the Registry and that SSN was using lists of numbers that it had not scrubbed," but "it simply did not care whether SSN complied with the law or not." *Id.* at *24-*25(1JA000108-09), *28(1JA000109-10). "[E]ven a cursory investigation or monitoring effort by Dish would have uncovered the violations. Under these circumstances, ***what Dish calls a mistaken belief is actually willful ignorance***." *Id.* at *32(1JA000110-11). The court therefore held that "[Dish] took no action to monitor Dish's compliance with telemarketing laws and effectively acquiesced [to third-party retailer] SSN's use of unscrubbed lists." *Id*. at *25(1JA000108-09). Judge Eagles therefore awarded treble damages against Dish for knowing and willful TCPA violations. *Id.* at *2(1JA000101-02), *34-*37(1JA000111-12). *Krakauer II* affirmed, holding, in language disregarded by the SLC, that "Dish fails to recognize that repeated expressions of ignorance as to a widespread problem ***can evince more than simply negligence; they can also be a sign that the violations are known, tolerated, and even encouraged***." 925 F.3d at 662-63.

c. The SLC Never Analyzed Whether the *Krakauer* and *Dish II* Cases Supported an Inference that Defendants Breached Their Fiduciary Duties as to the AVC

Plaintiffs' Complaint alleges Defendants breached their fiduciary duty by failing to cause Dish to comply with the AVC. 4JA000702-04(¶¶55-57); 4JA000706(¶¶64-67). The SLC's analysis is procedurally deficient because it failed to "explore all relevant facts and sources of information that bear on th[ose] central allegations in the complaint," *London*, 2010 Del. Ch. LEXIS 54, at *54, namely whether the *Krakauer* and *Dish II* cases support an inference that Defendants breached their fiduciary duties in connection with the AVC. That procedural deficiency is dispositive: "If the SLC fails to investigate facts or sources of information that cut at the heart of plaintiffs' complaint this will usually give rise to a material question about the ... good faith of the SLC's investigation," *id*. at *54-*55, and demonstrates "'that the investigation has been so restricted in scope, so shallow in execution, or otherwise so *pro forma* or halfhearted as to constitute a pretext or sham,'" thus precluding business-judgment protection. *See Dish I*, 401 P.3d at 1092.

The district court failed to address these issues, offering no analysis of the AVC-fiduciary-breach theory, and saying only that it would not address whether "the SLC's determination conflicted with the DNC Actions" because that "would necessarily revisit the substance of the SLC's determinations."

77JA017631(Order:22). But the instant challenge does not implicate "the substance of the SLC's determinations," 77JA017631(Order:22), because it speaks to issues the SLC (and the district court) never addressed.[17]

Rather than undertaking that procedure and analyzing the available inferences, the SLC's Report and its members repeated a mantra – there was supposedly ***no evidence*** supporting an inference of a breach of fiduciary duty. The SLC members noted that the *Krakauer* and *Dish II* courts did not explicitly find that Defendants "knowingly caused or permitted Dish to violate the DNC laws or the AVC," 77JA017453(JH2:119), but that facile observation does not indicate that the SLC took the procedural step of analyzing why those cases do not support an inference of Defendants' responsibility even though they did not explicitly adjudicate that question.

The SLC Report stated that "***[n]o evidence*** suggested that [Defendants] believed that DISH was not complying with the 2009 AVC," 4JA000762(SLC Report:23), a claim that SLC members repeated during the evidentiary hearing: "***[n]o evidence*** suggested that [Defendants] believed that DISH was [not] complying with the 2009 AVC." 76JA017363-64(JH1:146-47); 76JA017367-68(JH1:150-51). But again the SLC never undertook an analysis of the next procedural step –

[17] This "legal error" is reviewed *de novo*. *Washington*, 245 P.3d at 1197.

assuming the DNC actions did not explicitly hold that Defendants breached their fiduciary duties, do those cases inferentially support that proposition.

The SLC similarly undertook no analysis of Dish's ability to employ offensive collateral estoppel as to the *Krakauer* and *Dish II* findings at a trial of the fiduciary-duty claims. The terms "collateral estoppel" and "issue preclusion" do not appear in the SLC's Report, and neither Lillis nor Federico even knew what it was. 76JA017349-50(JH1:132-33); 77JA017455-57(JH2:21-23). This procedural deficiency, too, demonstrates "'that the investigation has been so restricted in scope, so shallow in execution, or otherwise so *pro forma* or halfhearted as to constitute a pretext or sham." *Dish I*, 401 P.3d at 1092.

The gist of the *Krakauer* and *Dish II* decisions was that Dish was aware of substantial evidence of SSN's misconduct, and simply chose not to do anything about it. "While ***Dish promised*** forty-six state attorneys general in 2009 that it would enforce TCPA compliance by its marketers, ***Dish did nothing*** to monitor, much less enforce, SSN's compliance with telemarketing laws. When it learned of SSN's noncompliance, ***Dish repeatedly looked the other way***." *Krakauer I*, 2017 U.S. Dist. LEXIS 77163, at *2(1JA000101-02). *Krakauer I* condemned DeFranco's testimony claiming AVC compliance as "patently inaccurate." *Id.* at *20(1JA000107).

Dish knew "of SSN's long history of TCPA violations" and specifically

"knew SSN was calling numbers on the Registry and that SSN was using lists of numbers that it had not scrubbed," but "it simply did not care whether SSN complied with the law or not." *Id.* at *24-*25(1JA000108-09), *28(1JA000109-10). The *Dish II* court reached the same conclusion, finding Dish was "repeatedly put on notice" of violations, but routinely looked the other way because the risks "'seem[ed] to be greatly outweighed by the results.'" 256 F. Supp. 3d at 858, 929.

Krakauer I found that "even a cursory investigation or monitoring effort by Dish would have uncovered the violations. Under these circumstances, ***what Dish calls a mistaken belief is actually willful ignorance***." 2017 U.S. Dist. LEXIS 77163, at *32(1JA000110-11). *Krakauer II* agreed, finding "Dish fails to recognize that repeated expressions of ignorance as to a widespread problem can evince more than simply negligence; they can also be a sign that the violations are known, tolerated, and even encouraged." 925 F.3d at 662-63. Thus, Dish's failure to address SSN's many violations and Dish's multiple claims of ignorance constitute evidence of ***knowing*** violations. *Id.* But rather than analyze whether that evidence supported an inference of that the AVC violations were "known, tolerated, and even encouraged," *id.* at 663, ***by Defendants***, the SLC simply claimed there was no evidence, *see supra* at 49, revealing its investigation to be "'*pro forma* or halfhearted.'" *Dish I*, 401 P.3d at 1092. Even worse, Lillis testified the AVC claim was simply not "the subject of [the SLC's] investigation." 76JA017296(JH1:79).

The SLC members' own testimony confirmed that there was abundant evidence for it to analyze, but it simply failed to do so. Federico accepted the *Krakauer* findings that Dish "was aware of SSN's long history of TCPA violations," "DISH knew SSN was calling numbers on the [DNC] registry," knew SSN was making calls to persons on the DNC registry during and before the *Krakauer* class period, and "took no action to monitor DISH's compliance with telemarketing laws and effectively acquiesced in SSN's use of unscrubbed lists." 77JA017444-45(JH2:10-11). SLC member Lillis acknowledged that "if the behavior that Judge Eagles highlighted were true, based on our analysis ***we would have concluded that was a violation of the AVC***." 76JA017332(JH1:115). But the SLC did not analyze whether that conduct would have constituted a breach of fiduciary duty. 76JA017335(JH1:118); 76JA017338(JH1:121); 76JA017340(JH1:123).

Nor did the SLC analyze whether Dish's inaction was attributable to the Defendants as being "the people in charge." 76JA017341(JH1:124). Indeed, none of the three SLC members examined whether Defendants' knowledge of Dish's misconduct could be ***inferred*** from the factual findings in *Krakauer* (or in *Dish II*), even though Lillis agreed Dish "easily could have discovered" these violations though minimal monitoring efforts. 76JA017341(JH1:124).

The SLC was aware of – but did not consider – substantial evidence supporting an inference of DeFranco's and Ergen's knowledge of the terms of the

AVC and Dish's failure to honor them. The AVC bound "all executives in DISH, including DeFranco and Ergen." 76JA017304(JH1:87). "In their capacities as officers, Ergen and DeFranco formally received a copy of the 2009 AVC because in those roles they had managerial responsibilities for performing the obligations outlined in [the AVC] and were officers necessary to ensure DISH Network's compliance with the terms of [the AVC]." 76JA017308(JH1:91); *accord* 5JA000951-52(SLC Report:212-13).

Lillis acknowledged that the SLC "***did not*** determine" that "Mr. Ergen and Mr. DeFranco didn't know anything about [SSN's misconduct]," ***and concluded that DeFranco "certainly" knew***. 76JA017344-45(JH1:127-28). Indeed, Lillis admitted that DeFranco was "aware that some retailers engaged in unscrupulous behavior." 76JA017351(JH1:134). Federico similarly observed that "Moskowitz, DeFranco, and Ergen … of course knew some of [the *Krakauer* misconduct]," and "some customers had written letters to Charlie [Ergen] directly complaining about all these darn calls" 76JA017414(JH1:197). The AVC held everyone at Dish responsible for Dish's marketers, and Ergen and DeFranco "***absolutely were responsible***." 76JA017419(JH1:202). Nonetheless, Ergen and DeFranco "did nothing to go address SSN," even though under the AVC they, along with "the entire senior staff," had a responsibility to do something. 76JA017421(JH1:204); *accord* 77JA017438(JH2:4).

The SLC never analyzed whether those ***knowing*** failures to comply with the AVC were violations of fiduciary duty. 76JA017334-35(JH1:117-18); 76JA017338(JH1:121); 76JA017340-41(JH1:123-24). Similarly, the SLC did not analyze whether DeFranco's knowledge supported a finding that he breached his fiduciary duty to Dish as to the AVC. 76JA017345-46(JH1:128-29).

The SLC also failed to analyze the findings in *Dish II* that "Dish created a situation [that] unscrupulous [retailers]" could exploit, 256 F. Supp. 3d at 408, which Lillis interpreted to refer to Ergen and DeFranco because of DeFranco's position – he was "in charge of retail services and distributions," including hiring retailers – and Ergen's concerns about DNC violations. 76JA017347-48(JH1:130-31); 76JA017350-52(JH1:133-35).

Dish II found Dish crafted a "standard" letter "essentially" saying "go away, it's not our problem, go after [SSN]," 256 F. Supp. 3d at 987, and Federico acknowledged that the letter was in "direct conflict" with the AVC. 77JA017461(JH2:27). But the SLC did not analyze whether sending consumers a letter disavowing responsibility for SSN's conduct would violate the AVC. 76JA017355-57(JH1:138-40). The SLC members' testimony thus confirms that there was evidence of breaches of fiduciary duty in connection with the AVC, but the SLC's procedures did not require analysis of it.

That Nevada law requires a "breach involv[ing] intentional misconduct, fraud

or a knowing violation of law," NRS §78.138(7)(b)(2), is no excuse for the SLC's failure to analyze whether *Krakauer* and *Dish II* support an inference of a breach of Defendants' fiduciary duties. Nevada courts have long recognized that mental states are subject to proof by inference. *See Powell v. State*, 934 P.2d 224, 227 n.6 (Nev. 1997) ("Intent may be proven by circumstantial evidence. It rarely can be established by any other means.").

First, *Krakauer II* held that "Dish fails to recognize that repeated expressions of ignorance as to a widespread problem can evince more than simply negligence; they ***can also be a sign that the violations are known***, tolerated, and even encouraged." 925 F.3d at 662-63. Thus, the evidence offered in *Krakauer* supports a finding of a knowing violation under NRS §78.138(7)(b)(2), yet the SLC failed to analyze whether that inference could be drawn as to Defendants who ***to this day*** continue to "express[]" their "ignorance as to a widespread problem" occurring on their watch. *See Krakauer II*, 925 F.3d at 662-63. The SLC procedurally erred by failing to analyze this compelling inference of Defendants' knowing misconduct despite *Krakauer II*'s approval of it.

Second, *Krakauer I* held that because "'even a cursory investigation or monitoring effort by Dish would have uncovered the violations[,] … what Dish calls a mistaken belief is actually ***willful ignorance***.'" 2017 U.S. Dist. LEXIS, at *32(1JA000110-11). Willful ignorance – or willful blindness – is equivalent to

knowledge. *See Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011). There are "two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact," *id*. at 769, and *Krakauer I* made clear both were established – it found "willful ignorance." *See* 2017 U.S. Dist. LEXIS 77163, at *32(1JA000110-11); *see also id.* at *2(1JA000101-02) ("[w]hen [Dish] learned of SSN's noncompliance, Dish repeatedly looked the other way"). The SLC was required to analyze whether an inference of willful ignorance could be drawn as to Defendants, and its no-evidence finding makes clear it failed to follow that procedure.

Finally, the SLC committed yet another procedural error by failing to analyze the applicability of offensive collateral estoppel and the inferences that could be drawn if issue preclusion applied to the *Krakauer* and *Dish II* findings. "Issue preclusion ... bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). Nevada courts follow *Taylor* as to federal decisions, *see Bower v. Harrah's Laughlin, Inc.*, 215 P.3d 709, 719 (Nev. 2009), and *Taylor* provides that nonparty preclusion is justified where there exists a "pre-existing 'substantive legal relationship[]' between the person to be bound and a party to the judgment," where

the nonparty was "'adequately represented by someone with the same interests who [wa]s a party' to the suit," or where the nonparty "'assume[d] control' over the litigation in which that judgment was rendered." *Taylor*, 553 U.S. at 894-95.

Those criteria are satisfied as to all Defendants, especially DeFranco. First, Defendants and Dish shared a "pre-existing 'substantive legal relationship[].'" *Id.* at 894. As Dish's co-founder, senior Director, Executive Vice-President, and head of compliance, DeFranco was the chief architect of Dish's telemarketing practices and was directly responsible for creating, directing, and enforcing those practices. *See* [redacted] 4JA000774(SLC Report:35); 4JA001055-56(SLC Report:316-17).

Second, Defendants and DeFranco shared "'the same interests'" as Dish throughout the *Krakauer* litigation. *Taylor*, 553 U.S. at 894. As head of Dish's "Retail Services," DeFranco admittedly had authority to change Dish's telemarketing practices relating to its third-party retailers, yet did nothing to change Dish's unlawful telemarketing practices even after entering the AVC. *Krakauer I*, 2017 U.S. Dist. LEXIS 77163, at *19-*20(1JA000106-07); 4JA000774(SLC Report:35); 5JA001012(SLC Report:273); 79JA018074-75. Because of his deep involvement in Dish's telemarketing practices and purported TCPA-compliance

efforts, DeFranco testified for Dish during the *Krakauer* trial.[18] This provided DeFranco the opportunity to protect and promote Dish's defenses related to the TCPA claims, as well as his own. Due in large part to DeFranco's testimony, the *Krakauer* jury found Dish liable for TCPA violations. *Krakauer I*, 2017 U.S. Dist. LEXIS 77163, at *2(1JA000101-02).

Even after the jury's verdict, DeFranco was provided the additional opportunity to attempt to minimize potential damages during the treble-damages phase by, for instance, offering additional evidence to show that Dish did not "knowingly" or "intentionally" violate the TCPA, but neither DeFranco nor Dish proffered any additional evidence to suggest DeFranco's testimony was inaccurate or incomplete, thus suggesting there was no such evidence supporting Dish's position. *Krakauer I*'s "willful[] and knowing[]" finding – the basis for its treble-damages award – was largely based on DeFranco's testimony that neither he nor Dish did anything to bring Dish's telemarketing practices into TCPA compliance, even after entering the AVC. 2017 U.S. Dist. LEXIS 77163, at *37(1JA000112).

Third, DeFranco "assumed control over" the *Krakauer* litigation. *Taylor*, 553 U.S. at 894. DeFranco's responsibilities included guiding Dish's TCPA-compliance efforts and generally overseeing Dish's business operations. 4JA000774(SLC

[18] *See* 79JA018078; 79JA018093; 79JA018097.

Report:35). He testified for Dish in the *Krakauer* trial but the court held his testimony was either not credible or demonstrated Dish's non-compliance with the TCPA and the AVC. *Krakauer I*, 2017 U.S. Dist. LEXIS 77163, at *2(1JA000101-02), *19-*20(1JA000106-07).

It is therefore highly unlikely that Defendants, especially DeFranco, will be permitted to re-litigate issues resolved in *Krakauer* and *Dish II*. Yet the SLC analyzed neither the question of issue preclusion nor the inferences that could be drawn from facts established via collateral estoppel. That procedural deficiency, too, demonstrates the SLC's investigation was "'*pro forma* or halfhearted.'" *Dish I*, 401 P.3d at 1092.

At the evidentiary hearing, the SLC suggested it did analyze collateral estoppel, but pointed to analysis of judicial estoppel, not offensive collateral estoppel. 77JA017480-81(JH2:46-47) (citing 5JA001088-89(SLC Report:349-50)). Judicial estoppel is "an 'extraordinary remedy'" to be "'cautiously applied only when "a party's inconsistent position [arises] from intentional wrongdoing or an attempt to obtain an unfair advantage."'" *Delgado v. Am. Family Ins. Grp.*, 217 P.3d 563, 567 (Nev. 2009). There is nothing "unfair" about a corporation seeking a remedy against a faithless fiduciary who led the corporation into massive adverse judgments in federal court. *Id.* Regardless, the question here is procedural and whether the SLC considered the remote possibility of judicial estoppel is beside the

point – its evaluation of Dish's AVC claim is procedurally deficient because it provided ***no analysis*** of the applicability of offensive collateral estoppel under applicable Supreme Court precedent.

3. The SLC Failed to Analyze Whether the Decisions in *Krakauer* and *Dish II* Supported an Inference that Defendants Breached Their Fiduciary Duties in Connection with the TCPA

In addition to Plaintiffs' claims that Defendants breached their fiduciary duties to Dish by failing to cause it to comply with the AVC, the Complaint also alleges a breach-of-fiduciary-duty theory based upon Defendants' failure to cause Dish to comply with the TCPA. 4JA000706(¶¶64-66). The district court rejected this claim, pointing to the SLC's scrutiny of "the white paper and advice related to the relationship of the Retailers and oversight obligations" purportedly received by Defendants and declining to "revisit the substance of the SLC's determinations." 77JA017629-31(Order:20-22). But as was the case with the AVC arguments, the instant challenge does not "revisit the substance of the SLC's determinations," but rather demonstrates that the SLC's investigation was "'so *pro forma* or halfhearted as to constitute a pretext or sham,'" *Dish I*, 401 P.3d at 1092, because it identifies a procedural deficiency in the SLC's analysis – it failed to address the effects of the prior adjudications on the viability of Dish's TCPA breach-of-fiduciary-duty claims against Defendants.

Under collateral-estoppel principles, *see supra* at 56-60, Dish would be able

to seek issue preclusion on the findings made in *Krakauer* and *Dish II*, including the determinations in both cases that Dish's retailers were – as a factual matter – Dish's agents and that those agents were acting pursuant to authority granted by Dish. *See Krakauer I*, 2017 U.S. Dist. LEXIS 77163, at *5(1JA000102-03) (jury findings on both issues); *accord Dish III*, 954 F.3d at 975 (district court "got it right" in finding that retailers were Dish's agents); *Krakauer II*, 925 F.3d at 660 ("it was entirely reasonable for the jury to conclude both that SSN was acting as Dish's agent, and that SSN was acting pursuant to its authority when making the calls at issue in this case"). Because "[u]nder traditional agency law, an agency relationship exists when a principal 'manifests assent' to an agent 'that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act,'" *Krakauer II*, 925 F.3d at 659-60, the agency findings in *Krakauer* and *Dish II* embrace all of those facts, and those facts thus come within the ambit of offensive collateral estoppel and would be considered to be established in a trial of Dish's breach-of-fiduciary-duty claims.

Additionally, *Dish III* held:

> The district court found that DISH had ***at least implied knowledge that the order-entry retailers were its agents*** and therefore would be liable for their actions. The district court concluded that ***DISH knew that it had control over the order-entry retailers*** and knew, too, that they were making unlawful calls. ***That was enough for DISH to be aware that it could be liable***. A large national corporation with the ability to hire sophisticated counsel is deemed to know basic principles of agency law.

954 F.3d at 978; *see also Krakauer II*, 925 F.3d at 661 ("Dish wanted to exercise extensive control over SSN's conduct without taking on responsibility for that conduct, and that is what the law does not permit."). For a finding of agency, there are "two key aspects: (1) the principal and agent agree that the agent acts for the principal; and (2) ***the agent is subject to the control of the principal***." *Dish II*, 256 F. Supp. 3d at 921. Accordingly, collateral estoppel would not only enable Dish to demonstrate that its retailers actually were Dish's agents, Dish would also be able to draw an inference that Defendants were aware of the existence of the only fact demonstrating the retailers' – and SSN's – status as agents that could possibly be in dispute, namely Dish's control over its retailers.

Thus, Dish could offer evidence at trial supporting an inference not only that the retailers, including SSN, were its agents, ***but also that Defendants knew it***, thus satisfying – when taken together with Defendants' knowledge of its retailers' (and SSN's) wrongdoing, *see Krakauer I*, 2017 U.S. Dist. LEXIS 77163, at *32(1JA000110-11) – Nevada's requirement of a "breach involv[ing] intentional misconduct, fraud or a knowing violation of law." NRS §78.138(7)(b)(2). The SLC failed to address this issue.

Indeed, while the district court cited "the white paper and advice related to the relationship of the Retailers and oversight obligations" Defendants supposedly received, 77JA017629-30(Order:20-21), evidence Dish could offer at trial

demonstrates that Defendants' ***knew*** facts demonstrating the existence of an agency relationship with its retailers, thus vitiating that purported advice – "a director or officer is not entitled to rely on ... information, opinions, reports, books of account or statements ***if the director or officer has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted***." NRS §78.138(2). This issue, too, was not addressed by the SLC, and "[i]f the SLC fails to investigate facts or sources of information that cut at the heart of plaintiffs' complaint this will usually give rise to a material question about the ... good faith of the SLC's investigation." *London*, 2010 Del. Ch. LEXIS 54, at *54-*55. The SLC's investigation does not merit deference.

D. The SLC Report Was Not Supported by an Independent Majority of SLC Members

This Court does "not presume an SLC to be independent nor require the derivative plaintiff to bear the burden of proof." *Dish I*, 401 P.3d at 1090. "Because [Dish] ha[d] every opportunity to form a perfectly independent special litigation committee, [this Court should] require that it do so." *Booth*, 640 F.3d at 143.

The district court did not rule on whether SLC-member Brokaw was disinterested, 77JA017627(Order:18), but *Dish I* held Brokaw "maintain[ed] close, personal relationships with [Defendant] Ergen and Ergen's family," and those "personal and professional ties with Ergen represent the types of improper influences that could inhibit the proper exercise of independent business judgment." 401 P.3d

at 1091. Those ties "remain the same" and "remain of concern." 77JA017627(Order:18 n.11). Accordingly, Brokaw's presence on the SLC offers no support for the district court's holding that the SLC was independent and properly constituted. 77JA017627(Order:18).

Dish I affirmed because one member – Lillis – was independent and "[t]he resolutions appointing Lillis to the SLC provided that 'any and all actions or determinations of the [SLC] ... must include the affirmative vote of Mr. Lillis and at least one (1) other committee member in order to constitute a valid and final action or determination of the SLC.'" 401 P.3d at 1091. *Dish I* approved this unique resolution of that independence issue. *Id.*

Despite Dish's hubris in re-appointing Brokaw – already identified as interested in *Dish I* – there is no indication that the SLC's resolution in this case, in contrast to that in *Dish I*, accounts for an SLC member who is not disinterested. Moreover, the testimony at the evidentiary hearing revealed that the purportedly disinterested members – Lillis and Federico – took entirely different procedural approaches to the analysis. Lillis repeatedly contradicted his colleagues – and the SLC Report – by refusing to accept facts adjudicated in *Krakauer* and *Dish II*. For instance, he rejected the conclusions in the litigated cases that (1) the retailers were Dish's agents, 76JA017310-12(JH1:93-95), (2) Dish "did not further investigate or monitor SSN's telemarketing or scrubbing process," and did not adequately monitor

"covered marketers," 76JA017328-32(JH1:111-15), and (3) Dish's AVC violations were knowing and willful or even that Dish was "willful[ly] ignoran[t]." 76JA017334-35(JH1:117-18); 76JA017337-39(JH1:120-22).

In contrast, Federico claimed "we accept *Krakauer*, … every single word of it." 76JA017390(JH1:173). Brokaw made a similar claim. 77JA017539(JH2:105). The district court, erroneously disregarding Lillis's testimony, found "the [SLC] members accepted as fact the findings made in the DNC actions." 77JA017629(Order:20).

But there is nothing in the record directing the SLC members how to proceed if one member is not disinterested – as here – ***and*** further nothing as to how the SLC should proceed when its two purportedly disinterested members – Lillis and Federico – take diametrically opposed approaches to their task. The SLC Report itself provides no answers – it conceals the fundamental differences among the SLC members. Under these circumstances, "[t]he composition and conduct of [the] special litigation committee" could not "instill confidence in the judiciary and ... stockholders of the company that the committee can act with integrity and objectivity." *Biondi*, 820 A.2d at 1166. The court abused its discretion in deferring to the SLC.

IX. CONCLUSION

On the basis of the foregoing, this Court should reverse.

X. 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 2016, font size 14-point, Times New Roman. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 13,997 words. Finally, I hereby certify that I have read this appellate 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on

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

Dated this 26th day of March 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of March 2021, I submitted the foregoing APPELLANTS' OPENING BRIEF for filing and service via the Court's eFlex electronic filing system.

Judy Estrada, an employee of H1 Law Group