

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 SPECIAL
LITIGATION COMMITTEE OF DISH
NETWORK CORPORATION,

Respondents.

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Supreme Court No. 81704

District Court No.
A-17-763397-B

JOINT APPENDIX
Vol. 76 of 85
[JA017218-JA017434]

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TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

PLUMBER'S LOCAL UNION NO. 519.
PENSION TRUST FUND, et al. .

Plaintiffs .

vs. .

CHARLES ERGEN, et al. .

Defendants .

.

CASE NO. A-17-763397-B
A-17-764522-B

DEPT. NO. XI

**Transcript of
Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

EVIDENTIARY HEARING - DAY 1

MONDAY, JULY 6, 2020

COURT RECORDER:

JILL HAWKINS
District Court

TRANSCRIPTION BY:

FLORENCE HOYT
Las Vegas, Nevada 89146

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

JA017218

APPEARANCES:

FOR THE PLAINTIFF:

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ERIK W. LUEDEKE, ESQ.
RANDALL J. BARON, ESQ.

FOR THE DEFENDANTS:

IAN MCGINN, ESQ.

FOR THE SLC:

J. STEPHEN PEEK, ESQ.
ROBERT CASSITY, ESQ.
EMILY BURTON, ESQ.
BARR FLINN, ESQ.
CHRISTOPHER MILTENBERGER, ESQ.

1 LAS VEGAS, NEVADA, MONDAY, JULY 6, 2020, 10:11 A.M.

2 (Court was called to order)

3 THE COURT: Did everybody pick a chair with a blue
4 sticker on it?

5 MR. BARON: Yes, Your Honor.

6 THE COURT: Okay. Try to remember to stay socially
7 distant so we don't get in trouble with the chief judge. I
8 had a lawyer take off his mask while examining, and we got
9 scolded.

10 MR. PEEK: And what?

11 THE COURT: We got scolded.

12 MR. PEEK: Oh. Scolded. I thought you said you got
13 covid. I was like --

14 THE COURT: No. We were scolded.

15 Mr. Peek, you had a motion on an OST that's
16 scheduled for tomorrow.

17 MR. PEEK: Yes, Your Honor, I did.

18 THE COURT: I couldn't set it for this morning
19 because of when it was submitted to us.

20 MR. PEEK: I understand, Your Honor.

21 THE COURT: But I understand the issue needs to be
22 addressed before we get too far down today's path.

23 MR. PEEK: It does, Your Honor.

24 THE COURT: Mr. Baron, are you okay with me
25 addressing the issue now?

1 MR. BARON: I am perfectly okay with that, Your
2 Honor.

3 THE COURT: All right. Then it'll be advanced to
4 today. We don't have a hearing tomorrow now.

5 Mr. Peek, you're up.

6 MR. PEEK: Thank you, Your Honor. You may recall
7 that we have already and previously filed our report. We
8 filed it under seal.

9 THE COURT: Yes.

10 MR. PEEK: It is available to the Court. It is
11 available within the record.

12 THE COURT: But now I'm at a different stage of the
13 proceedings.

14 MR. PEEK: I know you're at a different stage, Your
15 Honor, and I appreciate that you're at a different stage. And
16 that is why we marked both an unredacted and a redacted
17 version in case you did not agree with my request.

18 THE COURT: Okay.

19 MR. PEEK: We will not be showing any of the
20 redacted exhibits or portions of the redacted report to any of
21 the witnesses, I mean, that language that is going to be
22 redacted. So it's not as though it's going to come out in the
23 open courtroom. And I understand the difference between
24 sealing in a courtroom during a live hearing, a trial, if you
25 will, versus sealing just to file with the court. But I would

1 ask Your Honor that we be allowed to retain that sealing so
2 that the exhibit unredacted does not become available to the
3 public when they look at the record.

4 THE COURT: To the extent you are seeking to have me
5 admit the redacted version for purposes of today's hearing and
6 me rely upon the redacted version for purposes of the decision
7 I make the answer is yes, of course I'll do that. If,
8 however, you want me to rely on the unredacted version or
9 anything that's contained in it for purposes of my decision in
10 the evidentiary hearing, I think you have to admit the
11 unredacted version, and then it will lose its protections.
12 But that's up to you. It's a strategy decision, and I'll
13 leave that to you at some point in time.

14 MR. PEEK: Your Honor, I'll consult with my counsel
15 on that, because I took the position, as you note, that you
16 already have as part of the record --

17 THE COURT: It is part of the record.

18 MR. PEEK: -- an unredacted version when it was
19 submitted to the court, and --

20 THE COURT: Absolutely. It's under seal, and for
21 pretrial motions there's a different standard, as you remember
22 from the Wynn-Okada case --

23 MR. PEEK: I do.

24 THE COURT: -- that applies. I am now at a
25 decision-making standpoint for final resolution of the case

1 from the purposes of the Special Litigation Committee, and for
2 that reason if you want me to rely on the sealed version for
3 purposes of my decision today, as opposed to us getting to
4 today, I would be happy to admit it, but it will lose its
5 protections.

6 MR. PEEK: I'm going to have a --

7 THE COURT: Absolutely.

8 MR. PEEK: -- just a brief moment, Your Honor.

9 Because the same thing applies to the motion with respect to
10 many of the exhibits proposed by --

11 THE COURT: I know. That's why we're talking about
12 this first before we get started.

13 MR. PEEK: I know. And I appreciate the fact that
14 you --

15 THE COURT: Do you want a break to talk about it
16 without me watching?

17 MR. PEEK: I think a break would be appropriate,
18 Your Honor, because I'm going to not only consult with my co-
19 counsel, but I'm going to consult with the company.

20 THE COURT: Ten minutes?

21 MR. PEEK: That would be fine, Your Honor.

22 THE COURT: Ten minutes enough?

23 MR. BARON: Your Honor, before we do that can I --
24 and maybe it'll also sort of affect how things are going. I
25 actually have some procedural questions, as well, about how

1 we're doing this. So could I ask those so I understand what's
2 happening? In our understanding there was full briefing on a
3 motion for summary judgment, evidence was submitted by them,
4 evidence was submitted by us. You know, I looked -- you
5 know, Mr. Peek and I had a series of emails a couple weekends
6 ago, not all that pleasant, but you know, in that he
7 acknowledged --

8 THE COURT: You should be nice to each other.

9 MR. BARON: We're always nice to each other. But in
10 connection with those he acknowledged that we're plowing new
11 ground. The idea of this --

12 THE COURT: Well, not exactly. There's a Nevada
13 case that says I'm supposed to have an evidentiary hearing
14 before I make a decision. Now, tell me in what world I have
15 an evidentiary hearing on a motion for summary judgment, but
16 the Nevada Supreme Court said I'm supposed to, so I'm going
17 to.

18 MR. BARON: Yeah. And that was next my point. In
19 that decision by the Nevada Supreme Court they said they
20 accepted the arguments of counsel, the briefing, and the
21 discussions over the testimony as evidence. So, again, I'm
22 sort of in that same boat. So my question is are we
23 resubmitting all of the evidence that was part of the summary
24 judgment briefing for your decision, or is all of that and the
25 briefing and the arguments made in the briefing part of -- I

1 mean, are we just throwing that away and starting afresh, or
2 is that all part of the record that the Court considers in its
3 ruling on summary judgment?

4 THE COURT: So I will tell you what I've done in
5 other cases, because this isn't the first time it's happened.

6 MR. BARON: Okay.

7 THE COURT: It is my position that you have as part
8 of the record all the briefs that you've already filed.
9 That's my position. However, if you want to be really, really
10 clear, because sometimes the people in Carson City don't
11 recognize that those things were actually part of your record,
12 then you add them to the record again today. And while we may
13 then have duplicates of exhibits, nobody will ever say you
14 didn't have it as part of your record. But I'm just a
15 District Court judge who's charged with making factual
16 findings and making determinations based upon the law as it is
17 given to us by the Nevada Supreme Court. Just a judge.

18 MR. BARON: I'd say that was very helpful. because
19 that's exactly what unintelligible] I was in, and for Mr.
20 Peek's, you know, analysis in discussion with his counsel --

21 THE COURT: There's reality, and then there's what
22 we hope happens.

23 MR. BARON: And then there's Carson City.

24 THE COURT: Yeah. I didn't say that. That was you.

25 MR. PEEK: I do not want to make light of Carson

1 City, Your Honor, and --

2 THE COURT: We all think they do a great job. The
3 seven of them as individuals are wonderful people. All right.

4 MR. BARON: And then I wanted -- so in the evidence
5 that we are submitted and that we submitted in connection with
6 our summary judgment was the unredacted SLC reports. So --
7 and we --

8 THE COURT: It's not yet admitted. The fact that
9 you've submitted it to Dulce does not make it a part of the
10 record. If someone offers it, even if there's an objection
11 and I don't admit it, it becomes part of the record.

12 MR. BARON: Exactly. I just wanted to --

13 THE COURT: I'm not there yet.

14 Mr. Peek, I'll give you 10 minutes to consult. I
15 think I answered Mr. Baron's procedural questions.

16 MR. PEEK: I think you did, Your Honor. And I'll
17 address it also in my opening, as well.

18 THE COURT: Yeah. Well, you know. We do the best
19 we can with --

20 MR. PEEK: With all due respect, the exchanges
21 between Mr. Baron and I were not unpleasant. They were just
22 me trying to educate him on Nevada law in Jacksonville.

23 THE COURT: I actually have both cases here that you
24 were involved in. Did my little marks so that I remember how
25 questions are procedural, as opposed to substantive.

1 MR. PEEK: I don't know which other case. I would
2 hope it'd be the Wynn case.

3 THE COURT: That would be your Wynn versus Okada
4 case.

5 MR. PEEK: Yes.

6 THE COURT: Yeah. That'd be -- both of them in the
7 same volume.

8 MR. PEEK: It was cited in Jacksonville.

9 THE COURT: See, I've got 133 Nev. I have pages 369
10 and 438. I actually have the book out, but only
11 electronically.

12 MR. PEEK: Thank you, Your Honor.

13 THE COURT: 'Bye.

14 (Court recessed at 10:19 a.m., until 10:30 a.m.)

15 THE COURT: Anything we need to talk about, or are
16 you read to go, Mr. Peek?

17 MR. PEEK: There are two things that we need to talk
18 about, Your Honor, because we have resolved the inquiry from
19 the Court, and we would be withdrawing Exhibit 101, which is
20 the unredacted version -- excuse me, the redacted version,
21 thank you.

22 THE COURT: You're withdrawing the redacted version?

23 MR. PEEK: We're withdrawing the redacted version,
24 and we will be offering Exhibit 102, which is the unredacted
25 version with the appendices as part of that.

1 THE COURT: So Dulce will mark it with a W, and --

2 MR. PEEK: There is, Your Honor, also within the
3 body of the motion to seal the issue that we have addressed
4 with respect to exhibits proposed by the plaintiff of the
5 summaries of interviews.

6 The Court may not recall this, but we did submit and
7 I believe we have a stipulation to that effect the summaries
8 of the witness interviews to the plaintiff when they made
9 their request for at that time 56(f) relief, not 56(d), and
10 with the understanding that they were work product and that we
11 are not waiving and they acknowledge that we are not waiving
12 the work product privilege. So we still have that same
13 objection, Your Honor, with respect to the exhibits that they
14 offer, and I'm not going to go over each one, because it's
15 just one category.

16 THE COURT: And they haven't been offered, so I'm
17 not dealing with that yet.

18 MR. PEEK: Okay. We'll deal with it at the time.

19 THE COURT: If they get offered.

20 MR. PEEK: Thank you, Your Honor.

21 THE COURT: So this is your motion for summary
22 judgment with an evidentiary hearing. Would you like to make
23 an opening statement, Mr. Peek?

24 MR. PEEK: I would, Your Honor.

25 THE COURT: Go ahead. You do not have a timer on

1 you today, since it's evidentiary hearing.

2 MR. PEEK: I know that, Your Honor, because I know
3 that my opening is longer than 10 minutes.

4 THE COURT: Okay. Go.

5 SLC'S OPENING STATEMENT

6 MR. PEEK: Thank you. At the outset of this hearing
7 we believe it is important to highlight the standards by which
8 the Court will consider the evidence presented at this hearing
9 in support of the SLC motion. In Jacksonville the Nevada
10 Supreme Court established the relevance standard.

11 THE COURT: That being In re DISH Network Derivative
12 Litigation?

13 MR. PEEK: Yes, Your Honor.

14 THE COURT: That's what it's called in 133 Nev. now.

15 MR. PEEK: In re DISH Litigation, 133 Nev.Adv.Op.

16 THE COURT: No. It's actually -- they've got a book
17 now.

18 MR. PEEK: Inaudible].

19 THE COURT: It's at Number 438.

20 MR. PEEK: Thank you. The Court should defer to the
21 SLC's business judgment if two requirements are satisfied,
22 first, the SLC is independent; and, second, the SLC conducted
23 a good-faith, thorough investigation.

24 First, however, I want to address a surprising
25 argument that the plaintiffs have started to make concerning

1 the nature of the SLC's burden at this evidentiary hearing.
2 Initially the SLC moved for summary judgment. The parties
3 then agreed instead to conduct an evidentiary hearing as
4 contemplated by Jacksonville. As the Court has noted and we
5 submit again, it is clear that the Court should make factual
6 findings at this evidentiary hearing. For the Court to defer
7 to the SLC determination the SLC bears the burden of proof to
8 establish by a preponderance of the evidence that the SLC was
9 independent and conducted a good-faith, thorough
10 investigation.

11 Plaintiffs knew the asserted position is that for
12 the Court to defer to the SLC's determination the SLC must
13 establish that there is no genuine issue of material fact
14 concerning the SLC's independence and good-faith thoroughness.
15 According to plaintiffs, if there's even a scintilla of
16 contrary evidence, simply evidence to defeat summary judgment
17 in favor of the SLC, the Court may not resolve the issue and
18 the Court may not defer to the SLC and the SLC's process is at
19 an end the plaintiffs may immediately proceed with their
20 claims on the merits.

21 This position of the plaintiffs is surprising.
22 First, it is an odd position for a party who jointly requested
23 an evidentiary hearing, which they did with us, and this was
24 not their position previously. Second, it is an odd position
25 because plaintiffs are proposing the same Delaware standard

1 that was explicitly rejected by the Nevada Supreme Court in
2 Jacksonville.

3 Plaintiffs' statements in their proposed findings of
4 fact and conclusions of law that the Jacksonville court
5 adopted this Delaware standard is wrong. Plaintiffs'
6 statement that this standard had been adopted in Auerbach is
7 also wrong. The Nevada Supreme Court did not say that, and
8 Auerbach also did not say that, and plaintiffs cite only a
9 Delaware case in support of this standard, which is London
10 versus Tyrell.

11 But this is not Delaware, and we are bound by the
12 Nevada precedent in Jacksonville. The Jacksonville court
13 could not more clearly have rejected the notion that a
14 derivative plaintiff may proceed with its claims merely by
15 raising a genuine, but unresolved, issue. The court in
16 Jacksonville could not have made clearer that it was rejecting
17 the summary judgment-like standard proposed by plaintiffs. It
18 wrote, "Jacksonville and our dissenting colleague argue that
19 de novo review is required analogizing to standards of review
20 applicable to summary judgment motions under NRCP 56 and
21 motions to dismiss under NRCP 12(b)(5). We disagree with the
22 parties' and our dissenting colleague's argument regarding
23 standards applicable to summary judgment proceedings." That's
24 the quote from Jacksonville.

25 The Supreme Court further wrote, quote, "A

1 shareholder must not be permitted to proceed with derivative
2 litigation after an SLC requests dismissal unless and until
3 the District Court determines at an evidentiary hearing that
4 the SLC lacked independence or failed to conduct a thorough
5 investigation in good faith."

6 The court also wrote that, quote, "The standard we
7 adopt from Auerbach involves assessing the weight and
8 credibility of the evidence and reaching conclusions that
9 depend greatly upon factual determinations," end quote.

10 Under Jacksonville the Court is to weigh the
11 evidence to make factual determinations, applying the usual
12 burden, presumption of evidence. And those determinations are
13 reviewed on appeal as they were in Jacksonville for abuse of
14 discretion, not de novo review.

15 Because the Supreme Court so clearly established the
16 nature of the SLC's burden in Jacksonville, plaintiffs
17 incorrectly describe Auerbach, the case from which the Supreme
18 Court derived the independence and good-faith thoroughness
19 standard. In that case, and this is important, the New York
20 Court of Appeals did not say that courts should defer to SLCs
21 only if they establish that there is no genuine issue
22 concerning their independence and good-faith thoroughness.
23 Auerbach, rather, merely affirmed the grant of an SLC's own
24 motion for summary judgment because there was no genuine
25 issue. Auerbach went on to say, though, that if there had

1 been such a -- if there had been a genuine issue, such issue
2 would, quote, "require a trial of any material issue of fact
3 as to the adequacy or appropriateness of the motion -- of the
4 modus operandi of that committee." So Auerbach, upon which
5 our standard in Jacksonville is premised also required an
6 evidentiary hearing if there had been a genuine issue.

7 Plaintiffs cannot claim surprise that the Court
8 weighs evidence to make factual findings at this evidentiary
9 hearing. That is the law plainly established by Jacksonville.
10 Indeed, as far back as Shoen our Supreme Court has required an
11 evidentiary hearing before derivative plaintiffs can assume
12 control of a corporation's claims. Plaintiffs understand that
13 law. They understood that law at one point in this case.

14 In our opening brief we argued, as had the SLC in
15 Auerbach that there was no genuine issue concerning the SLC's
16 independence and good-faith thoroughness. And we sought
17 summary judgment on that grounds. But we also explain in our
18 brief, quote, "In the event that the Court nonetheless finds
19 that there is a genuine issue of material fact precluding
20 summary judgment, consistent with Jacksonville, the Court
21 should then hold an evidentiary hearing and make final factual
22 determinations as to the SLC's independence and the good-faith
23 thoroughness of its investigation."

24 In response to our motion plaintiffs move for 56(f)
25 discovery decreased at a Jacksonville evidentiary hearing. In

1 their motion plaintiffs explain without this discovery the
2 Court has no evidentiary basis to properly assess whether the
3 SLC has met the high burden required to terminate derivative
4 claims. Plaintiffs then cited not Tyrell in that opposition
5 on which it now relies for this summary judgment-like burden,
6 but Jacksonville. And in their request for 56(f) relief
7 plaintiffs quoted the portion of Jacksonville that I've
8 previously quoted about the Court, quote, "assessing the
9 weight and credibility of the evidence," and, quote, "reaching
10 conclusions that depend greatly on factual determinations."

11 When quoting Jacksonville in seeking discovery the
12 plaintiffs correctly articulated the SLC's burden, which was
13 to persuade the Court by a preponderance of the evidence to
14 weigh the evidence in the SLC's favor. Thereafter we provided
15 discovery, and following voluminous discovery the parties
16 jointly moved for this evidentiary hearing. Jointly moved
17 this Court for evidentiary hearing. Plaintiffs requested this
18 evidentiary hearing. In the joint motion the parties set
19 forth the applicable burden, citing Jacksonville, and in doing
20 so quoted the part about plaintiffs not being able to proceed,
21 quote, "unless and until the District Court determines at an
22 evidentiary hearing that the SLC lacked independence or failed
23 to conduct a thorough investigation in good faith."

24 The Court granted that joint motion, and we are here
25 today on that joint motion. Only then did plaintiffs change

1 gears and start arguing in their opposition, despite
2 Jacksonville's clear mandate, that the SLC's burden at this
3 evidentiary hearing was to show the absence of any genuine
4 issue concerning the independence of the SLC or the good-faith
5 thoroughness of its investigation.

6 In our reply we explain that we believe that the
7 Court could have granted summary judgment in favor of the SLC,
8 but since discovery had been taken in an evidentiary hearing
9 the best course of action was for the Court to proceed to the
10 evidentiary hearing contemplated by Jacksonville and make
11 factual findings on the issue of independence and good-faith
12 thoroughness.

13 We argue that the plaintiffs were wrong about the
14 nature of the burden. We made crystal clear the burden that
15 applies today, which is that the Court should make factual
16 determinations based upon a, quote, "preponderance of the
17 evidence." Plaintiffs can argue for a different standard all
18 they want; however, not only does Jacksonville require a
19 hearing at which the Court weighs evidence to make factual
20 determinations, but the plaintiffs requested an evidentiary
21 hearing.

22 Now the Jacksonville two requirements on deference
23 to the SLC independence and good-faith thoroughness. First
24 independence. To establish independence the SLC must show
25 that the SLC as a whole was independent. An SLC as a whole is

1 independent if a majority of the SLC members are independent.
2 Plaintiffs seem to agree with that. And it's clearly the case
3 here. Mr. Lillis and Mr. Federico are unquestionably
4 independent, as we've shown in our briefing and as the
5 evidence will show during this hearing.

6 Moreover, the evidence will also show that Mr.
7 Brokaw was independent with respect to the issues before the
8 SLC. Starting with Mr. Lillis, this Court and the Supreme
9 Court have already found Mr. Lillis's independence in
10 Jacksonville from nearly all of the other same director
11 defendants named in this case. Nothing concerning his
12 relationship with those directors has changed.

13 As for Mr. Federico, he is independent here for the
14 same reasons that Mr. Lillis was found independent in
15 Jacksonville. Their only relation -- the two's only relation
16 to any of the defendants was their contemporaneous service
17 with the director defendants, or in Mr. Federico's case two of
18 the director defendants on the board of a company controlled
19 by Charlie Ergen. In Mr. Lillis's case that was DISH. And
20 Mr. Federico's service on the EchoStar board with two director
21 defendants does not change the independence analysis. And for
22 the Court's edification, those two directors on EchoStar are
23 Bartoff and Ergen, which overlap with DISH.

24 Finally, Mr. Brokaw similarly has no relationship
25 with any director defendant outside of contemporaneous service

1 on the board of directors save for a claimed social
2 relationship with the Ergens. And as we expect the Court will
3 appreciate from the testimony, Mr. Brokaw was fully capable of
4 exercising and did exercise his business judgment independent
5 of any personal interest of the Ergens. And, not
6 surprisingly, the plaintiffs spend very little time on the
7 issue of SLC's independence and do so only at the end of their
8 brief in opposition to the summary judgment and in their
9 findings of fact, conclusions of law proposed to the Court.

10 Now to good-faith thoroughness. A SLC's
11 determination merits deference if the committee's
12 investigation was procedurally thorough. I emphasize
13 "procedural" because this is a procedural issue. Stated
14 differently, the procedures must not be so deficient as to
15 demonstrate bad faith. The Supreme Court made this very clear
16 in Jacksonville as it explained in Jacksonville, the good-
17 faith thoroughness requirement concerns the, quote,
18 "appropriateness and sufficiency of investigative procedures
19 chosen and pursued by the committee."

20 There's no doubt that the SLC's investigation was
21 procedurally thorough. As we demonstrated in our report and
22 in the briefing and as the Court will hear today and tomorrow,
23 the SLC members invested hundreds of hours, met numerous
24 times, received legal advice, reviewed thousands of documents,
25 including the key documents on which plaintiffs base their

1 opposition, interviewed numerous persons from within and
2 outside DISH, deliberated thoroughly before making their
3 decision, and revised multiple drafts of what was ultimately a
4 comprehensive report. This alone establishes good-faith
5 thoroughness, mandating deference to the SLC's independent
6 business judgment.

7 As the Supreme Court made clear in Jacksonville, an
8 SLC's investigation need not be perfect. What the good faith
9 aspect of good-faith thoroughness means is that consistent
10 with the business judgment rule the investigation simply
11 cannot be, quote, "so restricted in scope, so shallow in
12 execution, or otherwise so pro forma or half hearted as to
13 unintelligible] a pretext or sham. The procedures cannot be
14 so deficient as to demonstrate bad faith." The SLC's
15 investigation easily clears this hurdle. Because the SLC was
16 independent, the court should defer to the SLC's business
17 judgment and dismiss the claims as not in DISH's best
18 interest.

19 I want to now turn to the relevancy of substance,
20 which is the theory upon which plaintiffs rely. Plaintiffs'
21 opposition brief and proposed findings of fact and conclusions
22 of law primarily make arguments that are not subject to review
23 on this motion to defer. Plaintiffs' arguments primarily
24 concern the substance of the SLC determination and whether
25 those determinations are reasonable. Jacksonville does not

1 permit the Court to review the SLC's substantive
2 determinations. Defendants argue that the SLC determinations
3 are substantively wrong, so wrong that they could not have
4 been made in good faith. Plaintiffs say that this is so
5 because the SLC's substantive determinations conflict with or
6 do not deal fairly with the determinations made by the court
7 in Krakauer. It should be clear that plaintiffs are attacking
8 the substance of the SLC's determinations, not its process.
9 If plaintiffs agree that the SLC's determination concerning
10 Krakauer were correct, they could not be arguing that they
11 were in bad faith.

12 To be clear, the SLC determination with respect to
13 Krakauer were correct, but for purposes of this motion it does
14 not matter whether they were correct or not. Plaintiffs'
15 argument and all of plaintiffs' questioning to support it is
16 not subject to review in this proceeding. Jacksonville's
17 good-faith thoroughness requirement does not concern
18 substance, it does not concern the merits of the SLC's
19 determinations. In Nevada only process matters. There's no
20 review of substance for good faith.

21 As previously explained, the Jacksonville court said
22 the requirement concerned only process, quote,
23 "appropriateness and sufficiency of the investigative
24 procedures, the good-faith referenced in the good-faith
25 thoroughness requirement concerns only procedural good faith."

1 Jacksonville held the inquiry into whether the SLC made its
2 determination in good faith and on an informed basis focuses
3 on the process used by the SLC, rather than the substantive
4 outcome of the process. Courts look to indicia of the SLC's
5 investigatory thoroughness such as what documents were
6 reviewed and which witnesses interviewed. The Jacksonville
7 court clearly ruled out any inquiry into substance. It wrote,
8 quote, "None of the issues relevant to deferring to an SLC
9 concerns the substantive merits of the plaintiff's claims or
10 the SLC determination." It also wrote, quote, "The substance
11 of the substantive --" excuse me, "The substantive aspects of
12 the SLC decision to terminate a shareholder's derivative
13 action are beyond judicial scrutiny. Under the business
14 judgment rule adopted in Jacksonville the court defers to the
15 SLC's substantive determination even if it disagrees with
16 them." The court explained that, quote, "Nevada's business
17 judgment rule prevents courts from substituting their own
18 notions of what is or is not sound business judgment."

19 In unintelligible] any review of the substance of
20 the SLC's determination for good faith the court cited Wynn
21 Resorts for its articulation of the business judgment rule.
22 And I'm glad that the Court has it out. In Wynn --

23 THE COURT: Because you and I lived through both
24 cases, so --

25 MR. PEEK: You and I lived through that, we did,

1 Your Honor.

2 In Wynn, which issued before and roughly
3 contemporaneously and which was cited by the Jacksonville
4 court the court held in Wynn, quote, "We determine that
5 Nevada's statutory business judgment rule precludes courts
6 from reviewing the substantive reasonableness of a board's
7 business decision." And you'll recall that the substantive
8 determination we requested was the advice given by counsel.

9 The Wynn Resorts court explained, quote, "It is
10 apparent that the legislature adopted a great portion of the
11 model Act, with the exception of its, 'reasonableness
12 standard' for judging whether a director's conduct should be
13 protected." It then concluded and held, while a, quote,
14 "reasonableness review of a director's action could be useful
15 -- or would be useful in determining good faith, doing so
16 would thoroughly undermine the legislature's decision to
17 reject the model Act's substantive component."

18 In arguing that the SLC's conclusion regarding
19 Krakauer was unfair or dishonest plaintiffs are asking the
20 Court to assess the reasonableness of the substance of the
21 SLC's conclusions. In doing so they're asking the Court to
22 disregard Jacksonville, Wynn Resorts, and the Nevada
23 Legislature. There's no support for plaintiffs' argument.
24 Plaintiffs only cite inapplicable out-of-state cases,
25 particularly from Delaware. That's the London versus Tyrell

1 and others. Plaintiffs are effectively asking this Court to
2 apply the second step of the Delaware Zappata standard. The
3 second step in Zappata rejected by Jacksonville allows a
4 court, even if finds that the SLC was independent and used
5 good-faith investigative procedures, to reject the SLC's
6 determination if the Court finds its substance unreasonable or
7 incorrect. In Jacksonville the Supreme Court expressly
8 rejected the second step of Zappata in favor of the Auerbach
9 standard, which permits no reasonableness review. There is no
10 substantive good-faith review under Nevada law.

11 To make it appear that they are addressing
12 procedural fairness plaintiffs sometimes use procedural
13 terminology. Plaintiffs say that the SLC, quote,
14 "disregarded" or, quote, "ignored" the Krakauer trebling
15 decision. But the SLC obviously did not disregard or ignore
16 the Krakauer trebling decision.

17 THE COURT: And you're saying trebling,
18 T-R-E-B-L-I-N-G, for Flo's benefit --

19 MR. PEEK: I am, Your Honor.

20 THE COURT: -- not "troubling," "trebling,"
21 multiplied by three.

22 MR. PEEK: Yes, Your Honor. Thank you for that
23 correction through my mask. I know it's hard to articulate.

24 There is no dispute that the members of the SLC
25 reviewed, considered, and discussed the Krakauer decision at

1 length, and you will not only read it in our report, but
2 you'll also hear testimony from our three witnesses on this
3 subject matter. The SLC's report contains whole sections
4 considering the Krakauer decision and its significance.
5 Because the evidence has and will show that the SLC as a whole
6 was independent and conducted a good-faith thorough
7 investigation, we will be asking this Court at the conclusion
8 of the evidentiary hearing to defer to the SLC's determination
9 that plaintiffs' claims should be dismissed. Thank you.

10 THE COURT: Thank you.

11 Mr. Baron.

12 MR. BARON: I will wait for him to leave the podium
13 so it's appropriately socially distanced.

14 PLAINTIFF'S OPENING STATEMENT

15 MR. BARON: May it please the Court. While I think
16 that the proceeding that we are undertaking is unique and I
17 think it is still being worked out, the Nevada Supreme Court
18 did not ever use the term "preponderance" on that evidentiary
19 standard. It was defendants that moved for summary judgment.
20 Therefore, if they had moved and this evidentiary hearing is
21 in support of that summary judgment motion, as how I
22 understood it, but I don't think it matters. I think that
23 where the burden, and they don't deny that the burden is upon
24 the defendants or the SLC to establish that they undertook the
25 appropriate investigation that led to their conclusion to

1 dismiss it doesn't matter whether or not the Court followed a
2 summary judgment standard or holds them to their burden of
3 proof.

4 I will note, however, that the court in
5 Jacksonville, or I call it DISH I, I guess --

6 THE COURT: That's what I call it, too.

7 MR. BARON: Okay. Can I call it DISH I from here on
8 out?

9 THE COURT: You can.

10 MR. BARON: -- in DISH I specifically quoted
11 Auerbach and said, "The SLC must demonstrate that there is no
12 material --" or "The SLC must, one, demonstrate the areas and
13 subjects to be examined are reasonably complete, meaning not
14 that they just talked to witnesses and not that they just
15 reviewed documents, but that they actually did so in a
16 complete manner, and that there has been a good-faith pursuit
17 of inquiry into such areas and subject matters." And that's
18 at DISH at 1088 and '89, specifically saying, Auerbach.

19 The court went on to note that even if it appears
20 thorough, if the evidence raises a --" I'm sorry. I misspoke.
21 Auerbach specifically says that even if it appears reasonable,
22 if they have a, quote, "raises a triable issue of fact as to
23 the good-faith pursuit of the SLC's examination, the motion
24 must be denied."

25 So, again, the question is not whether or not they

1 can just simply check boxes, have 50 interviews, 200,000
2 documents. It is whether or not they inquired into the
3 appropriate standard.

4 So the way we view is with their burden that the
5 issue before the Court will be binary, have defendants
6 established, because it is their burden, that the SLC should
7 be given deference, have they done their job, or have the
8 defendants failed to establish by demonstrating that the SLC's
9 investigation was not thorough and in good faith and thus
10 should not be given deference. It is that simple conclusion.
11 If looking at what they did does not meet the standards of a
12 thorough and good-faith investigation, meaning that they
13 actually looked at what needed to be looked at, then deference
14 isn't to be given to them.

15 Our view is that the evidence will establish that
16 the SLC did do a check-the-box investigation. They hired Mr.
17 Peek again. They looked at a lot of documents. They talked
18 to some people. And they wrote a 300-and-something-page
19 report. But our view is that the issues of what they should
20 have done is to determine whether or not -- what in fact were
21 plaintiffs' allegations; whether those allegations established
22 a breach of fiduciary duty; if they established a breach of
23 fiduciary duty, whether that breach was the responsibility of
24 any of the named defendants, in particular Mr. Ergen and Mr.
25 DeFranco, who were the co-founders of the company and the

1 managing directors; and whether or not that is evidence of
2 wilful or knowing conduct on their part. This Special
3 Litigation Committee did not do that. They did not do that in
4 a manner that is consistent with the way the courts work and
5 evidence and scieneter is established. Scieneter is established
6 by both direct and indirect evidence and circumstantial
7 evidence, and inferences are to be drawn from direct evidence.

8 The Special Litigation Committee did not undertake,
9 they did not even try to undertake that inquiry. What you
10 will see through their testimony here today, and I think it is
11 replete in their report, that what they did not do is a good-
12 faith and thorough examination of the issues and the claims
13 that were presented to them and that they had to decide
14 whether or not there was a substantial likelihood of a viable
15 claim going forward. That was their -- it's their burden to
16 prove that. They cannot do that simply by checking the boxes.
17 Thank you, Your Honor.

18 THE COURT: Thank you.

19 Mr. Peek, your first witness.

20 MR. PEEK: Thank you, Your Honor. We call as our
21 first witness Chuck Lillis. And he'll be examined by Mr.
22 Flinn, Your Honor.

23 THE COURT: Does anyone want the exclusionary rule
24 invoked?

25 MR. BARON: No, Your Honor.

1 MR. PEEK: No, Your Honor.

2 CHARLES LILLIS, SLC'S WITNESS, SWORN

3 THE CLERK: Please be seated and please state and
4 spell your name for the record.

5 THE WITNESS: My name is Charles Lillis.

6 MR. FLINN: Good morning, Your Honor.

7 THE COURT: 'Morning.

8 DIRECT EXAMINATION

9 BY MR. FLINN:

10 Q So I'd like to start by talking a bit about your
11 background. Okay?

12 A Okay.

13 Q Where did you attend college?

14 A University of Washington and the University of
15 Oregon.

16 Q The University of Washington, was that
17 undergraduate?

18 A Undergraduate and Master's and a Ph.D. in Oregon.

19 Q Ph.D. in Oregon. Would you please describe in
20 general terms the development of your career through today
21 providing some dates along the way.

22 A After I got my Ph.D. I taught at the university
23 level for a few years. Then I worked at DuPont Corporate.
24 Then I was the dean of the three business schools of the
25 University of Colorado. Then I went -- actually I went --

1 before I was the dean of the business schools I worked at GE
2 for four and a half years in Connecticut. Then I was the dean
3 of the business schools at Colorado. Then I went to work for
4 a company called US West. Then I became CEO and chairman of
5 the company called MediaOne, a Fortune 100 company. We sold
6 that company to AT&T in 2000. And then in 2004 we started a
7 new company called Castle Pines Capital, which we sold to
8 Wells Fargo in 2011 or '12. And then since then I've been
9 primarily an investor and on boards and --

10 Q Super. Thanks. Let's talk about some of those
11 boards. Have you served on boards of corporations other than
12 DISH?

13 A Yes. I've served on a number of both public and
14 private corporate boards.

15 Q What public -- what boards of public corporations
16 have you served on?

17 A Well, I've served on MediaOne where I was chairman.
18 I served on Medco Health Solutions, SuperValu, Washington
19 Mutual, Charter Communications, Williams Companies.

20 Q How about the private boards?

21 A Private boards, I currently serve on one called
22 SomaLogic. And I served on several private investors that no
23 one's ever heard of but -- private boards.

24 Q Okay. Perfect. When were you a member of the DISH
25 board?

1 A I'm sorry?

2 Q When were you a member of the DISH board?

3 A I joined the DISH board in late 2013, November or
4 December, and I left the DISH board in May of 2020.

5 Q Why did you join the DISH board?

6 A I had been in the business of enhanced cable
7 competition for what is now what satellite does, what DISH
8 did. And I knew that business very well. I knew the
9 entertainment, telephone, data business well. And I thought
10 it would be interesting to see it from the satellite side.
11 And I knew someone that -- DISH had been after me for several
12 to join. And it was close to home so I didn't have to travel
13 much. So I thought it'd be interesting.

14 Q Great. Did you mention at your deposition in this
15 case that at the time you joined the SLC you believed that the
16 DISH board didn't support anything that violated the law?

17 A I don't remember whether I said that in the
18 deposition. I wouldn't join the board if I thought they
19 violated the law, the company did. So I may well have said
20 it.

21 Q Would you have stayed on the DISH board if you
22 believed that they supported violations of the law?

23 A No. Of course not.

24 Q Were you on any committees of the DISH board?

25 A I was on Audit and Compensation at various times.

1 Q So I think you mentioned that you left the DISH
2 board in May of 2020; is that right?

3 A Yes.

4 Q Just recently.

5 A I'm sorry?

6 Q That was just recently?

7 A Yes.

8 Q Why did you leave?

9 A I just -- I'm trying to do less board work and less
10 other things and run mostly our family business investments.

11 Q Let's talk a little bit about your independence Mr.
12 Lillis. Were you on the Special Litigation Committee in the
13 prior DISH case which we sometimes refer to as Jacksonville?

14 A Yes, I was.

15 THE COURT: Or DISH I.

16 MR. FLINN: Or DISH I.

17 THE COURT: Okay. Mr. Peek and I have a problem
18 about Shoen 2, so -- you know, we were both on that.

19 MR. FLINN: I heard you make that correction to Mr.
20 Peek. I put that in my notes and I'd still say it with
21 Jacksonville.

22 THE COURT: Yeah. It's okay. Because you guys
23 prepped for Jacksonville.

24 MR. FLINN: Yeah, it kind of sticks in your head
25 after a while.

1 THE COURT: I know, yeah. Well, I got lots of cases
2 involving the Jacksonville Firefighters.

3 MR. FLINN: Okay. Oh, wow. Okay. That can become
4 confusing.

5 BY MR. FLINN:

6 Q Were you found independent from all of the DISH
7 directors who were defendants in that case?

8 A Yes.

9 Q Were you found independent from Mr. Ergen and Mr.
10 DeFranco in that case?

11 A Yes.

12 Q Since you did your Special Litigation Committee work
13 in that case has your relationship with any of the director
14 defendants changed?

15 A No.

16 Q Do you recall the time periods in which DISH and its
17 retailers made the marketing calls that gave rise to the
18 liability in Krakauer and U.S. versus DISH?

19 A I'm sorry. Ask the question again.

20 Q Do you recall the time periods in which the DISH
21 Net's retailers made the marketing calls that were found to
22 have violated the DNC laws in Krakauer and U.S. versus DISH?

23 A Well, I believe it was the period 2006 to 2011, as I
24 recall.

25 Q It does -- for Krakauer it was 2010 to 2011?

1 A Yes.

2 Q That sound right? And for U.S. versus DISH?

3 A It was actually --

4 Q Do you recall it starting earlier?

5 A I think 2006, as I recall. But I'm not --

6 Q Either way, you recall these periods ending in

7 2011 --

8 A Yes.

9 Q -- is that right? And you joined the DISH board in

10 2013, I think you mentioned?

11 A Yes, that's correct.

12 Q Okay. So you were on the DISH board during the time

13 when the calls were made that were held to be violations in

14 those cases?

15 A I was not, no.

16 Q Now, were you named as a defendant in this case?

17 A No.

18 Q Apart from your role as a director, do you have any

19 social relationships with anyone on the DISH board?

20 A With anyone on the DISH board I do not.

21 Q So you have no social relationship with any of the

22 directors who are defendants in this case?

23 A I would say not a social relationship. I know Carl

24 Vogel but not -- I really -- years go by that I don't see him

25 other than at board meetings.

1 Q And outside of DISH have you ever had a business
2 relationship with any of the defendant directors?

3 A I've never had a personal business relationship. I
4 was on Charter's board when Carl Vogel was CEO of Charter.

5 Q Okay. So other than that --

6 A Other than that, no.

7 Q -- other than that relationship no business
8 relationships?

9 A None.

10 Q And outside of DISH have you ever had any
11 relationship at all with any of the defendant directors?

12 A No.

13 Q Was the amount of compensation that you received as
14 a director of DISH, including any compensation that you
15 received as a member of the Special Litigation Committee, ever
16 a material portion of your income or net worth?

17 A No.

18 Q You were a member of the Special Litigation
19 Committee that addressed the claims asserted by plaintiffs in
20 this case; right?

21 A Yes.

22 Q Okay. At the outset of your work on the SLC did you
23 believe that you could act as a member of the SLC in DISH's
24 best interest independent of any personal interest of the
25 director defendants?

1 A Yes, I did.

2 Q Why?

3 A I don't believe there was -- well, the charter was
4 for the SLC that we could seek any information we wanted to
5 and go to any source. And I didn't feel ever anything that
6 caused me to feel differently. So I think we were able to
7 seek any information, talk to anybody we wanted to.

8 Q Thank you. Did your view that you could act
9 independently ever change during your investigation?

10 A No.

11 Q Early in the SLC's investigation did you assess the
12 independence of the other members of the Special Litigation
13 Committee?

14 A Yes. Well, I knew because I've been on the board
15 with George Brokaw for four or five years, I had observed his
16 behaviors at board meetings with DISH and there was no doubt
17 in my mind that he was able to be very independent. He
18 routinely asked very tough questions of everybody. I didn't
19 know Tony. So, as I recall me -- I asked you or some counsel
20 to provide some information to me about his background and
21 what he had done and whatever information you could. And then
22 as I looked at that I just couldn't imagine he wouldn't be
23 independent, so -- and he has proven to be, I think, quite
24 independent.

25 Q And in your view did Mr. Federico and Mr. Brokaw act

1 independently during the investigation?

2 A I would say yes.

3 Q Why do you say that?

4 A Well, I think they both routinely -- well, first
5 they did all their work, they read everything, they
6 participated in every way, they asked very tough questions,
7 they didn't take casual answers to tough questions, they kept
8 digging, they asked questions in areas I didn't. I thought
9 they were very independent.

10 Q Mr. Lillis, let's talk about the beginning of the
11 SLC. And, Brian, would you bring up Exhibit 106, please.

12 THE CLERK: Proposed.

13 THE COURT: Is there an objection --
14 Please don't bring it up here.

15 Is there an objection to 106?

16 MR. BARON: No, Your Honor.

17 THE COURT: 106 will be admitted.

18 (Plaintiffs' Exhibit 106 admitted)

19 THE WITNESS: Will I see it here?

20 THE COURT: Hopefully, sir. Ramsey did turn it on.

21 THE MARSHAL: Did it come on?

22 THE WITNESS: It did not. It's probably operator
23 error on my part.

24 THE COURT: Ramsey is coming to help.

25 THE WITNESS: Okay. Thank you.

1 THE COURT: It's power. Power who helps. Okay.
2 You ready, sir?
3 THE WITNESS: I am ready. Thank you.
4 THE COURT: If you need them to blow up any portion,
5 you let us know and they'll do their best to make it big
6 enough for us all to see.
7 THE WITNESS: Yes, I will. Thank you.
8 BY MR. FLINN:
9 Q Can you see that, Mr. Lillis?
10 A I can, yes.
11 Q Okay. And what is this document?
12 A This looks like the original claim by the
13 plaintiffs, against what I would now call the director
14 defendants, that they -- they, the director defendants should
15 be held liable for potential losses that might come to the
16 company from two different cases, Krakauer and U.S. versus
17 DISH.
18 Q Thank you. And following the filing of this
19 complaint did the DISH board establish the SLC?
20 A Yes.
21 Q Okay. Would you please turn to Exhibit 107, Brian.
22 THE CLERK: Proposed.
23 THE COURT: Any objection to 107?
24 MR. BARON: No, Your Honor.
25 THE COURT: 107 will be admitted. Thank you.

1 (Plaintiffs' Exhibit 107 admitted)

2 MR. FLINN: Thank you, Your Honor.

3 THE COURT: It's better to offer them before we go
4 to them.

5 MR. FLINN: I'm sorry, Your Honor.

6 THE COURT: It's okay. We'll get you trained.

7 BY MR. FLINN:

8 Q Can you see --

9 A I see it. Yes, I see it.

10 Q And what is this?

11 A This is the consent or the action taken by the board
12 to create the Special Litigation Committee.

13 Q Okay. And this document appoint you to the Special
14 Litigation Committee?

15 A I believe it did.

16 Q Did you approve the anonymous written consent?

17 A Yes, I'm sure I did.

18 Q Did you read it before you approved it?

19 A Of course. Yes.

20 Q Would you -- let's turn to page 2 please. And can
21 we blow up the last resolution on that page please.

22 A Yes, I see it.

23 Q By this document did the DISH board delegate it's
24 powers concerning this litigation to the SLC?

25 A Yes.

1 Q Does this section set forth some of the authority
2 that the board delegated to the SLC?

3 A Yes, I would say it did. Yes.

4 Q Would you look at item 3 please. And with the
5 preamble to the resolution in that item, it states that the
6 board delegates to the SLC the power and authority of the
7 board to -- 3, determine whether it is in the best interest of
8 the corporation and/or to what extent it is advisable for the
9 corporation to pursue any or all of the claims asserted in the
10 derivative litigation taking into consideration all relevant
11 factors as determined by the SLC.

12 A Yes.

13 Q As a member of the SLC did you understand that you
14 had that authority?

15 A Yes, I did.

16 Q And if you look at item 4, there together with the
17 preamble to that resolution it states that the board delegates
18 to the SLC the power and authority of the board to, and then
19 in 4, prosecute or dismiss on behalf of the corporation any
20 claims that were or could have been asserted in the derivative
21 litigation. As a member of the SLC did you understand that
22 the SLC also had that authority?

23 A Yes, I did.

24 Q Did the SLC exercise these authorities in
25 subsections 3 and 4?

1 A Yes, I would say we did.

2 Q As part of its work did the SLC evaluate the
3 likelihood that DISH would prevail on the claims asserted in
4 the complaint?

5 A Yes, we did.

6 Q Did you have an understanding concerning what DISH
7 would need to prove to prevail in the claims?

8 A Yes, I would say I did.

9 Q Okay. What was that understanding?

10 A I think at the most fundamental level it would -- we
11 would have to find some kind of proof that the director
12 defendants knowingly caused DISH to violate DNC laws or in
13 some way condone the violation of those DNC laws.

14 Q Did the SLC investigate that issue?

15 A We investigated that issue I'd say thoroughly.

16 Q Did the SLC look for proof of knowledge by the
17 director defendants, the knowledge that you were just
18 describing?

19 A We looked for proof of knowledge. If I understand
20 your question, I would answer it this way. I would say we
21 looked for any indication that any of the director defendants
22 in any way condoned or caused or supported DISH to violate DNC
23 laws. I'd say -- I hope that's a reasonable answer.

24 Q Thank you. Did you know when you began your
25 investigation what the result of the investigation would be?

1 A Please ask the question again.

2 Q Yeah. Did you know when you started your
3 investigation what the ultimate result of the investigation
4 would be?

5 A I did not.

6 Q And about how many months did your -- well,
7 actually, let's talk about -- we're going to go to
8 thoroughness now.

9 A Okay.

10 Q About how many months did your investigation take?

11 A Well, we started -- and my memory may be flawed
12 here, but I think we started in April and we wrote our report
13 in November or December. So six or seven, eight months.

14 Q Got it. Could you describe at a very high level the
15 basic stages of the investigation?

16 A Well, at the onset I think we tried to make sure we
17 understood the environment here, I mean, what kind of
18 information would we like to see and understand to reach our
19 conclusion, what were those sources. Some of that was
20 internal, some of that would be external. Who would we like
21 to talk to, how would we get a look at -- I mean, there were
22 10,000 emails that may have been related, so how would we look
23 at 10,000 emails. So we went through a process of kind of
24 scoping the task, I'd say. And then we started gathering
25 information that was readily available, and that kind of

1 caused us to re-scope the task a few times. Then we started
2 talking to -- doing interviews with people of who we thought
3 would have knowledge of what's relevant. And then that
4 usually opened to other people we thought we should talk to,
5 and other documents. So it was that kind of thing.

6 And then five or six months, four or five, six
7 months into it we started having meetings where we tried to
8 understand what conclusions we were beginning to reach. And
9 that often caused us to go ask another set of questions that
10 we hadn't thought of in the first round. So it was that kind
11 of iterative process and then several -- our report we drafted
12 in several stages and then reviewed and then finally put the
13 stages together. I'd say that's the best I can do with it.

14 MR. FLINN: That's great.

15 And, Your Honor, we offer Demonstrative Exhibit 110.

16 THE COURT: I'm not taking any demonstrative
17 exhibits. You can use it for demonstrative purposes.

18 MR. FLINN: Oh. I see. I'm just using it for
19 demonstrative purposes. Thank you.

20 THE COURT: If you want to give Dulce one, we'll
21 mark it for purposes of your record as D110. But you've got
22 to give it to her electronically.

23 MR. PEEK: We have, Your Honor.

24 THE COURT: And she says she got it. Okay. Mr.
25 Cassity, good work.

1 MR. FLINN: Brian, would you bring up 110, please.

2 BY MR. FLINN:

3 Q Can you see that, Mr. Lillis?

4 A Yes, I see it.

5 Q Okay. Can you read it?

6 A Yes. In spite of things, yes, I can.

7 Q Okay. And to your recollection does that set forth
8 the basic chronology of the investigation at a high level?

9 A Yes, I think it does. It lists the dates and
10 people, when we interviewed people. The green line is
11 indicative of the fact we gathered a lot of documents over a
12 pretty long period of time. We had, as you can see here, a
13 series -- 10 SLC meetings. I don't think that 10 SLC meetings
14 counts the meetings that we had when we were doing interviews.
15 Which in many cases all three of us were there, so -- and they
16 were kind of like meetings. But, yes, I think that's a good
17 description.

18 Q Okay. It shows that the investigation began in
19 April of 2018 and concluded in November; is that right?

20 A Yes. I think that's right.

21 Q Okay. And I think as you said, those -- the names
22 that are listed under the dates, what does that indicate?

23 A I think the way this is put together it's the dates
24 -- so if we look at any one of these on -- let's see. Let's
25 look at -- you moved it from what I was looking at.

1 MR. FLINN: Yeah. Brian, can you move it to the
2 right, please.

3 THE WITNESS: How about August 24th -- or 28th. On
4 that date we interviewed DeFranco, Goodbarn, and Moskowitz.

5 BY MR. FLINN:

6 Q Okay. Thank you. About how many hours did you
7 personally spend on the investigation?

8 A I don't know, but I would say it's in the hundreds.

9 Q How much time did you see Mr. Federico invest in the
10 investigation?

11 A Well, since a lot of our work was done together, in
12 my presence he did a lot of hours of work. And then, of
13 course, we have a lot of hours of work we did on our own. So
14 I would guess all three of us were in the hundreds of hours.

15 Q And how much time did you see Mr. Brokaw invest in
16 the investigation?

17 A I would say about the same thing. Yeah, hundreds of
18 hours I'd say.

19 Q Did the SLC meet from time to time? During your
20 investigation and convention you had meetings?

21 A Yes. In fact, it shows some dates of meetings here.

22 Q Okay. And I think you earlier testified there were
23 about 10 meetings; is that right?

24 A I think so, yes.

25 Q Okay. Putting aside those that were in connection

1 with interviews; right?

2 A Yes.

3 Q All right. And what sorts of things were discussed
4 during those meetings? Can you give us some examples?

5 A I would say each one was a little -- I would say we
6 would often look at information we had or interviews we had
7 just done, so we'd look back briefly. We would talk about
8 what we had learned at that point, sort of are there any
9 general conclusions. We would often think of something we
10 wanted to look at that we hadn't thought of before. And then
11 we'd do some planning about the next meeting. We'd look at
12 the minutes of the last meeting, and so it was a variety of
13 things. But I would say it was often work where we were kind
14 of constantly redefining what we needed to know.

15 Q Got it. You mentioned minutes. Were minutes of the
16 meetings prepared?

17 A Yes.

18 MR. FLINN: Your Honor, I offer Exhibit 108.

19 THE COURT: Any objection to 108?

20 MR. BARON: No objection.

21 THE COURT: 108 admitted.

22 (Plaintiffs' Exhibit 108 admitted)

23 MR. FLINN: Would you take a minute please, Brian,
24 to highlight the heading of that part of the document. After
25 that maybe scroll down for five or six pages.

1 BY MR. FLINN:

2 Q You can see this, Mr. Lillis?

3 A Yes, I can. Thank you.

4 Q Are these the minutes of the meetings?

5 A Yes, I would --

6 Q And did you review them when they were prepared?

7 A Yes. I'm sure I did.

8 Q Did you approve them?

9 A I'm sure we did.

10 Q Do they accurately describe the general contents of

11 the meetings?

12 A Well, without reading each one of them very

13 carefully, I would say they did in each case. But --

14 Q I understand. And let's talk about documents for a

15 minute. Early in the investigation did the SLC obtain some of

16 the more basic documents relevant to the investigation?

17 A Yes. I would say we sought and reviewed -- that's

18 what I would -- I hope this addresses your question. We

19 looked at board minutes, we looked at board agendas, we looked

20 at --

21 Q Let's get back -- let's actually get back a step

22 from that. Did you look for example at the complaint?

23 A Yes. I'm sorry. I started at the wrong place.

24 Q How about the decision in Krakauer?

25 A We looked at the complaint. We read and studied the

1 Krakauer decision repeatedly. We looked at the AVC 2009. We
2 -- yeah, so we looked at a lot of different --
3 Q The decision in U.S. versus DISH?
4 A Yes.
5 Q Did you look at that at the outside of the
6 investigation?
7 A Yes.
8 Q Okay. Actually let's take a moment to talk about
9 Krakauer and U.S. versus DISH and their relationship to the
10 SLC investigation, okay.
11 A Okay.
12 MR. FLINN: Your Honor, we offer Exhibit 102.
13 THE CLERK: Proposed.
14 THE COURT: Any objection to 102?
15 MR. BARON: No, Your Honor.
16 THE COURT: 102 be admitted.
17 (Plaintiffs' Exhibit 102 admitted)
18 MR. FLINN: Would you please bring that up at
19 page 51, line 2.
20 BY MR. FLINN:
21 Q Do you see that, Mr. Lillis?
22 A Yes, I do.
23 Q And what is this?
24 A This appears to be the jury verdict sheet in the
25 Krakauer case.

1 Q Okay. And would you please turn to --
2 MR. FLINN: Your Honor, we offer 104.
3 THE COURT: Any objection to 104?
4 MR. BARON: No, Your Honor.
5 THE COURT: 104 will be admitted.
6 (Plaintiffs' Exhibit 104 admitted)
7 MR. FLINN: Please bring up 104.
8 BY MR. FLINN:
9 Q Can you read -- can you see that, Mr. Lillis?
10 A Yes, I do.
11 Q And what is that please?
12 A This appears to be Judge Eagles phonetic] opinion
13 relative to the Krakauer case.
14 MR. FLINN: Your Honor, we offer Exhibit 105.
15 THE COURT: Any objection to 105?
16 MR. BARON: No, Your Honor.
17 THE COURT: 105 will be admitted.
18 (Plaintiffs' Exhibit 105 admitted)
19 BY MR. FLINN:
20 Q What is that, Mr. Lillis?
21 A And this appears to be the judge's -- similarly the
22 judge's decision and findings in the U.S. versus DISH case.
23 Q Did you personally read the Krakauer decision?
24 A I did.
25 Q Did you personally read the U.S. versus DISH

1 decision?

2 A I read large parts of U.S. versus DISH, but I don't
3 believe I read the entire thing.

4 Q Did the SLC assess whether the courts in Krakauer
5 and U.S. versus DISH had already addressed the same issue that
6 the SLC was investigating?

7 A No.

8 Q Did the SLC discuss the significance of the Krakauer
9 and U.S. versus DISH decisions for purposes of its
10 investigation?

11 A Yes, we did. I would say we discussed them at
12 length.

13 Q Okay. How frequently did the SLC discuss those
14 decisions?

15 A Well, we discussed Krakauer a number of --

16 Q Mr. Lillis, I want to get back to the question I
17 asked earlier. Because I want to make sure you understood the
18 question properly. Did you -- and I'm not asking you -- well,
19 the question was this, all right, did the SLC discuss whether
20 the courts in Krakauer and U.S. versus DISH had addressed the
21 same issue that the SLC was looking at. I'm not asking you
22 whether they did address the same issue, I'm asking you
23 whether you --

24 A Yes. I think you asked it the other way the other
25 time but --

1 Q My apologies.

2 A Okay. Yes, we did ask the question, did they

3 address the same issue that we -- we asked that a dozen times.

4 Q Okay. I'm not going to take this to the next step

5 because I don't want to ask you about substance. Okay?

6 A Okay.

7 Q How frequently did the SLC discuss the Krakauer and

8 U.S. versus DISH decisions?

9 A We discussed it frequently. I don't know -- many

10 times.

11 Q Okay. Did you address the Krakauer and U.S. versus

12 DISH decisions in your report?

13 A Yes. We did.

14 Q So the SLC did not ignore or disregard those

15 decisions?

16 A Not at all. I think we accepted them for what they

17 were and studied them and tried to make sure we understood

18 them.

19 Q Did the SLC consider the 2009 AVC during its

20 investigation?

21 A Yes, we did.

22 Q Did the SLC assess the impact of the 2009 AVC on the

23 issue that the SLC was investigating?

24 A Yes, I'd say we did.

25 Q And did the SLC discuss the 2009 AVC?

1 A Yes, we did.

2 Q How frequently did the SLC discuss the 2009 AVC?

3 A Well, we discussed it many times, so I would say I
4 don't know how many, but many times.

5 Q And did the SLC address it in its report?

6 A Yes, we did.

7 Q Did the SLC ignore the 2009 AVC in its
8 investigation?

9 A No.

10 Q We spoke about some of the basic relevant documents
11 that the SLC reviewed early in its investigation. After it
12 reviewed those documents, did the SLC request to see more
13 documents?

14 A Yes.

15 Q Let's talk about some of them. Did the SLC request
16 to see email exchanged with the director defendants on DNC
17 issues?

18 A Yes.

19 Q Why did you request those documents?

20 A We were of the opinion that if there was any
21 indication of lack of support for DNC or anything about
22 ignoring it or condoning it or whatever, we thought over that
23 long period of years, because we looked for more years than
24 were required by the complaint, we thought we would see some
25 indication of noncompliance if it existed in some part of that

1 email traffic because there were -- I think -- I think 10,000
2 emails were screened and we looked in detail at, pick some
3 number, 1,500. And we thought if there was any one place we
4 might see an indication of noncompliance, knowing
5 noncompliance or condoning it, I thought we'd see it in the
6 email traffic.

7 Q Did the SLC request to see documents providing legal
8 advice to the director defendants concerning DNC issues?

9 A Yes.

10 Q Now, without disclosing the content of that legal
11 advice, why did you request to see the advice?

12 A I'd say for two or three reasons. It became clear
13 to us very early on that the question of our retailers' agents
14 surfaced. It was something I hadn't thought about before I
15 was on the SLC, so I think that was -- and then I think there
16 were these long negotiations between the company and the 2009
17 AVC agreement, 46 states. And then there were ongoing
18 negotiations between the company and the FTC on interpretation
19 of DNC laws and issues relative to those. And in many of
20 those cases outside counsel provided advice to the company,
21 and so we wanted to hear -- we wanted to understand what that
22 flow of information was like and what kind of advice,
23 etcetera.

24 Q Did the SLC request to see documents exchanged among
25 DISH management concerning DNC issues?

1 A Ask it again. I'm sorry.

2 Q Did the SLC request to see documents exchanged among
3 DISH management concerning DNC issues?

4 A Yes. I mean, many --

5 Q And why did you request that?

6 A I'm sorry?

7 Q Why did you request those documents?

8 A Well, we knew that there were activities underway,
9 particularly between the retail sales and services part of the
10 company and the legal part of the company. And we knew that
11 those -- their exchanges sometimes took the form of sort of
12 statements to retailers and sometimes policy decisions and
13 sometimes responses to external advice. And so we looked at a
14 lot of different kinds of documents. I'd say the predominant
15 document, though, was reflected in email traffic.

16 Q Okay. Did the SLC request to see any testimony from
17 Krakauer or U.S. v. DISH?

18 A We looked at Mr. DeFranco's testimony.

19 Q Why were you looking at Mr. DeFranco's testimony?

20 A Well, Mr. DeFranco was the only director who
21 testified at Krakauer. And he had a central role in the
22 company because he ran at various times almost everything, but
23 he ran retail services. And where he or people who worked for
24 him dealt daily with retailers, including the retailer SSN
25 that was so central to the Krakauer case.

1 Q Did the SLC request to see any documents referenced
2 in the Krakauer and U.S. v. DISH decisions?

3 A Documents referenced?

4 Q Emails?

5 A Well, if it was emails we did, but I don't know of
6 any other -- I just don't recall any other documents. But we
7 certainly saw a lot of email traffic around it.

8 Q Did the SLC request to see any documents from
9 outside advisors to DISH concerning DNC issues?

10 A Yes.

11 Q And what outside advisors were those, to your
12 recollection?

13 A Well, certainly at least two different legal
14 advisors, legal firms were -- law firms were advisors. One
15 company that -- I can't remember the name, but they dealt with
16 helping companies, retailers as well as companies like DISH,
17 be in compliance with DNC, so we looked at communications and
18 documents from them. We certainly looked at external audit
19 documents and their participation in the company. So, a
20 variety of sources.

21 Q Okay. You mentioned earlier that you were
22 investigating an issue relating to the knowledge of the board;
23 right?

24 A Yes.

25 Q Why were you looking at documents with external

1 advisors, then?

2 A Well, for a variety of reasons. One is we were
3 trying to understand the linkage between director defendants
4 -- trying to understand whether director defendants in some
5 way knowingly violated DNC. We looked at every -- we tried to
6 look at every communication those director defendants had into
7 the company and with people in the company. In addition, if
8 there was a place we would have seen evidence of DNC related
9 -- violations of DNC related risk, we thought we might see it
10 in the form of external auditors' comments or concerns, or we
11 might see it in the form of something in the quarterly SEC
12 return. So we looked at a lot of different external
13 possibilities.

14 MR. FLINN: Brian, would you please turn to
15 Exhibit 102.

16 And, Your Honor, this has already been admitted.

17 THE COURT: It is.

18 MR. FLINN: And specifically page 14-124. Would you
19 please, Brian, highlight the title of that document. You've
20 got it right there.

21 THE WITNESS: Yes, I see it.

22 MR. FLINN: Okay. And if you could please just
23 scroll down to the next page, please. It's going to be on the
24 Definitions. Yeah, and just stop there for a moment, please.

25 //

1 BY MR. FLINN:

2 Q Do you see that, Mr. Lillis?

3 A Yes, I do.

4 Q And what is this, please?

5 A This is a list of documents that the SLC requested.
6 Some are categorized as board materials and some as legal
7 materials.

8 Q Was this the SLC's only request for documents during
9 the investigation?

10 A No.

11 Q There were subsequent requests?

12 A Well, I think at almost every interview and every
13 meeting we would think of some other document or some other
14 evidence we'd like to look -- potential evidence that we'd
15 like to look at that I don't think is on this list.

16 Q Okay. And during the investigation, about how many
17 documents did you personally review?

18 A Oh, I don't know. Hundreds. I don't know the
19 answer.

20 Q Do you have a sense of how many -- well, a lot of
21 documents?

22 A A lot.

23 Q Okay. Do you have a sense of how many documents the
24 SLC's counsel reviewed during the investigation?

25 A A lot. I don't know. I would say if you include

1 emails --

2 Q Yes.

3 A -- thousands.

4 Q Okay. And were there any documents that you believe
5 were relevant to your investigation that you did not obtain
6 and review?

7 A No.

8 Q So no one withheld any documents from the SLC?

9 A No, I don't think anyone did.

10 Q We'll get to the interviews in just a moment, but
11 before we do let's talk for a moment about any issues on which
12 you personally may have been particularly focused, okay?
13 Issues on which you were focused.

14 A Yeah.

15 Q Just setting it up. I'll ask the question now.
16 Were you personally interested in the views of the director
17 defendants and DISH's management concerning whether the
18 retailers were agents of DISH?

19 A Yes.

20 Q Would you please explain why you were interested in
21 that issue?

22 A Well, it was clear to me that -- from a variety of
23 places, for example, discussions relative to the 2009 AVC,
24 discussions between the company and the FTC, discussions with
25 external lawyers who were FTC specialists, if you will, that

1 this question of are the retailers that are used by DISH
2 independent or are they agents of the company? And that's a
3 very complicated question, I guess, but the evidence was
4 overwhelming that we saw that the director defendants and --

5 Q Okay. Mr. Lillis, I don't want you to state your
6 conclusions --

7 A Okay.

8 Q -- because we want to stay out of substance. I'm
9 just asking you why you were looking at it.

10 A Well, that's -- we looked at it because I think
11 whether or not the retailer was an agent would influence the
12 degree to which a DNC violation could have been managed by
13 DISH.

14 Q Were you personally interested in what information
15 was available to director defendants concerning DNC law
16 violations?

17 A Yes.

18 Q And why were you interested in that?

19 A Well, of course the director defendants were the
20 defendants in the case

21 Q Yeah.

22 A And it was -- we were interested in when anyone in
23 the company, including director defendants, would be aware of
24 DNC violations by anyone, the company or retailers, and when
25 they would be aware of that and how they would be aware of it.

1 Q Were you interested in the relative importance to
2 DISH of the retail channels?

3 A Yes. And we sought -- that's an area where we, as
4 we went through the process, we decided to seek more
5 information. I think at sort of the most superficial level
6 the question is are the retail channels where DNC violations
7 are occurring of fundamental financial importance to the
8 company. That was the question.

9 Q And why did it matter to you whether there were --
10 why was that relevant to your investigation why they were of
11 -- what did you say, fundamental importance?

12 A Well, I would say if the retail -- if a particular
13 retail channel, and there were lots of different retail
14 channels and lots of different accesses to the market being
15 used, but if some kind of retail channel was producing a huge
16 percentage of the revenue and profitability of the company, I
17 just thought that might lead us to some lack of concern with
18 violation of DNC.

19 Q And the last question before we get into the
20 interviews. Were you interested in whether DISH had taken
21 reserves for potential liability in U.S. v. DISH?

22 A Yes.

23 Q Why?

24 A Well, once again, if there were reserves created
25 that would indicate knowledge of risk at a certain financial

1 level, and so we were interested in when would those reserves
2 have been formed, were they formed, was it a reflection of
3 materiality of financial risk; those kinds of questions.

4 Q Okay. So for the issues that you've just now
5 testified that you were interested in, was your interest in
6 them satisfied by the end of the investigation?

7 A Yes, I would say it was.

8 Q You got the information you needed in order to come
9 to a conclusion relating to them?

10 A Yes, we did. Uh-huh.

11 Q All right, now to the interviews. Did the SLC --
12 you had mentioned earlier you conducted interviews during the
13 investigation; right? The SLC conducted interviews; right?

14 A Yes.

15 Q Okay. And why did the SLC conduct interviews?

16 A Well, I guess for several reasons. One is if --
17 there's an interesting ability when you can look at both email
18 traffic over a large number of years and you can see it
19 between director defendants and you can see it between
20 director defendants and employees, other employees of the
21 company, and you can see that email traffic between director
22 defendants, employees of the company and external bodies. In
23 that combination, candidly, it would be really hard to hide
24 somebody who was supportive of violating DNC in some knowing
25 way. But it allowed us as we then interviewed the director

1 defendants to hear their view of the roles of the other
2 director defendants and other people in the company, as well
3 as we had the email traffic to kind of cross check with. So
4 it's a combination of how you look for a potential lack of
5 appropriate concern with DNC.

6 Q Thank you. Who decided who the SLC would interview?

7 A We on the SLC decided who we should interview. I
8 would say that the list of who we wanted to interview kind of
9 was an evolving thing. We'd hear something about some aspect
10 or some advice and then we'd decide we wanted to interview
11 that person.

12 Q About how many interviews did the SLC conduct?

13 A I think we did 20 or 22 or 23, something like that.

14 Q I'd like to show you Demonstrative Exhibit Number
15 111. Just take a minute to look at that, please. Does this
16 set forth a comprehensive list of the persons interviewed by
17 the SLC?

18 A I believe it is a comprehensive list. Yes.

19 Q Was the SLC able to interview every person who the
20 SLC believed would have information relevant to the
21 investigation?

22 A We were able to interview everyone except one person
23 who was ill that we were not able to interview, but we were
24 able to interview everyone else.

25 Q And the person who was ill was Mr. Clayton?

1 A Yes.

2 Q And he subsequently passed away; right?

3 A Yes.

4 Q So no interviews were refused?

5 A No interviews were refused.

6 Q Let's look at --

7 THE COURT: Hold on a second, sir. Before you get
8 off this exhibit, can you tell me if looking at this exhibit
9 refreshes your recollection about the outside counsel whose
10 name you couldn't remember?

11 THE WITNESS: Well, yes. They're both -- thank you.
12 They're both listed here. Kelley Drye and then Mac Murray &
13 Shuster, both.

14 THE COURT: Do those include the name you couldn't
15 remember earlier of the legal advisors that you were
16 interested in getting the information from?

17 THE WITNESS: Okay. I misspoke, so let me -- the
18 company I couldn't remember was not a legal advisor. It was
19 PossibleNOW, which is a compliance vendor.

20 THE COURT: Okay.

21 THE WITNESS: So they may be a legal firm, but that
22 isn't how we knew them, so.

23 THE COURT: Thank you. I was just trying to make
24 sure I filled in the blank that I had in my notes before we
25 got off the document that would help you.

1 THE WITNESS: Okay. Thank you. I need help, so
2 good.

3 MR. FLINN: Thank you, Your Honor. We're always
4 appreciative of that.

5 BY MR. FLINN:

6 Q Was the -- we see there that the SLC interviewed the
7 director defendants; right?

8 A Yes.

9 Q And the SLC -- it indicates the SLC interviewed
10 Stanton Dodge; right?

11 A Yes.

12 Q And that interview did take place; correct?

13 A We interviewed Stanton Dodge. And what was your --

14 Q And Stanton -- sorry?

15 A We did interview Stanton Dodge.

16 Q Yes.

17 A And what was your next question?

18 Q Well, you answered the question.

19 A Okay.

20 Q So here's the next question. He was the general
21 counsel of DISH, is that right?

22 A He's the former general counsel. Yes.

23 Q Got it. And the SLC interviewed some internal
24 lawyers; right?

25 A Yes, we did.

1 Q Mr. Blum?

2 A Yes.

3 Q And Mr. Kitei?

4 A Yes.

5 Q They're internal lawyers. They were interviewed by

6 the SLC; right?

7 A Lori Kalani was an internal lawyer at one point.

8 Q Okay. And did the SLC interview members of retail

9 services?

10 A Yes. Well, clearly we interviewed DeFranco. Ahmed

11 was part of the retail services. So was Blake Van Ernst. I

12 guess those are the ones I see here.

13 Q Okay. And I think you mentioned earlier you

14 interviewed lawyers from Kelley Drye?

15 A Yes.

16 Q Why did you interview the people from KPMG?

17 A Well, KPMG are the outside auditors and, you know,

18 we knew from looking at the normal audit reports and minutes

19 from board meetings and from audit committee meetings, we knew

20 that KPMG was of course very closely involved. But we didn't

21 see any indication from KPMG during the period that's under

22 question here that they had any concern with Do Not Call

23 violations. So we just wanted to make sure that we hadn't

24 missed something. We just wanted to hear it from the horse's

25 mouth, if you will.

1 Q And the Court had a question about PossibleNOW. Can
2 you say why you interviewed somebody from PossibleNOW?

3 A Yes. PossibleNOW may have many businesses, but the
4 one we were primarily aware of and interested in is they had
5 developed programs and gave advice to people and trained in
6 how to insure you're compliant with DNC laws. And they had
7 been helpful to DISH Corporation in understanding what kind
8 of programs could help any company, but including retailers
9 be compliant. And they had worked with some of the DISH
10 retailers and DISH had encouraged the retailers to use
11 PossibleNOW through a variety of sources -- means. So we just
12 wanted to get a first-hand understanding of what they did and
13 how they went about it and what their experiences were.

14 Q Okay. Did you attend the interviews?

15 A I don't remember whether I did. I read a lot of
16 stuff about PossibleNOW, but I don't remember whether I was
17 at that interview or not.

18 Q Okay. I think I meant to be asking more broadly,
19 did you attend the -- all the interviews listed on that sheet?

20 A The vast majority of them, yes.

21 Q Okay. And did you find them helpful?

22 A Yes. Very.

23 Q Would you provide some examples of interviews that
24 you found helpful and explain why?

25 A Well, I don't know that these are the most important

1 ones, but here are ones that come to mind. When we interview
2 someone like Carl Vogel, a director defendant, Carl was one
3 of the people that periodically would hear directly from a
4 customer of a retailer and the customer thought the retailer
5 had violated their DNC, so Carl was in a flow of
6 communication. And then we would look -- we had looked at
7 email traffic from Carl to various people in primarily retail
8 services but also legal about what are we going to do here.
9 You know, this is a problem, let's get moving on this. So we
10 just wanted to -- we wanted to connect those boxes. We wanted
11 to hear from Carl. Here's what the email traffic said what
12 happened here. We heard the same -- for the same incident we
13 would ask somebody in retail services. And that's -- I mean,
14 I think that's a reasonable example. Each one is a little
15 different, but.

16 Q Did you ask questions personally?

17 A Did I ask --

18 Q Ask questions at the interviews?

19 A Yes, of course.

20 Q Did you personally ask questions?

21 A Yes.

22 Q Okay. And were the interviewees asked about emails?

23 A Yes.

24 Q Were they questioned about testimony that had been
25 referenced in Krakauer and U.S. v. DISH?

1 A Well, certainly some of them were. DeFranco, of
2 course, was questioned about testimony in Krakauer. So I'd
3 say generally, yes, and they were generally shown emails that
4 we had been looking at that involved them and we asked them to
5 explain what is it we don't know about this flow of traffic,
6 yes.

7 Q Did any interviewee refuse to answer any questions?

8 A No.

9 Q In your view, did the SLC and its counsel fail to
10 ask any relevant questions of any interviewee?

11 A I think we asked every question we could think of
12 with people we interviewed.

13 Q Was there any information that the SLC believed was
14 relevant to its investigation that the SLC did not obtain and
15 consider?

16 A I can't think of any information that I consider
17 relevant that we didn't obtain.

18 Q Did DISH or any other person refuse to provide
19 documents or interviews that the SLC requested?

20 A No. I can't think of a case of that.

21 Q What about the plaintiffs? Did the SLC request an
22 interview with the plaintiffs?

23 A We discussed interviewing plaintiffs. I think we
24 may have asked, but we didn't interview any of the plaintiffs.

25 Q During the investigation did you or any other member

1 of the SLC avoid looking into any issue relevant to your
2 investigation?

3 A I don't think so. No.

4 Q Did you ignore any evidence?

5 A I don't believe we did.

6 Q Did the SLC members deliberate about what they were
7 learning during the interviews -- excuse me, during the
8 investigation?

9 A Yes, on many occasions.

10 Q Can you give us a sense -- well, you just said many
11 occasions. Did the SLC sometimes deliberate in person rather
12 than telephonically?

13 A Yes.

14 Q And at what stages of the investigation did you meet
15 in person, to the best of your recollection?

16 A I don't know how to define it, but we met four or
17 five times in person. In the time when we were considering
18 developing our report, we met, I recall that. But we met in
19 person for a variety of reasons.

20 Q Did the SLC members discuss the relevant documents?

21 A Yes.

22 Q And did they discuss the interviews that the SLC
23 took?

24 A Yes.

25 Q Did the SLC ultimately determine whether the

1 evidence supported the claims addressed by the complaint?

2 A Yes.

3 Q Did the SLC ultimately determine whether it would be
4 in DISH's best interest to pursue the claims set forth in the
5 complaint?

6 A Yes.

7 Q And what was that ultimate determination?

8 A We determined it wasn't in the best interest.

9 Q Did the SLC prepare a report?

10 A Yes.

11 MR. FLINN: Okay. Brian, would you please turn to
12 Exhibit 102. And this has already been admitted. Just the
13 first page.

14 BY MR. FLINN:

15 Q Do you see that, Mr. Lillis?

16 A Yes, I do.

17 Q And what is this, please?

18 A This is the -- our committee report.

19 Q Would you please describe the process by which the
20 report was prepared?

21 A Yes. I would say the outline of the report was
22 first suggested by counsel. We reviewed that outline. We
23 talked about any recommendations we had as members about what
24 should be included that may or may not have been included.
25 Then sort of part -- it was drafted by counsel in various

1 pieces and as the pieces were drafted we, the SLC, would
2 review those, each piece, and make suggested adjustments or
3 changes, editorial, content, whatever. And then as those
4 pieces were finalized, it was put together as an entire report
5 and we went through the same process again. So I'd say it was
6 an iterative sort of piece of the report at a time.

7 Q Was there any part of the report that you did not
8 read before it was finalized?

9 A No.

10 Q Was there any part of the report that you did not
11 understand before it was finalized?

12 A No. I think I understood it.

13 Q Was there any part of the report with which you
14 disagreed?

15 A No.

16 Q Did you review all or nearly all of the exhibits of
17 the report before it was finalized?

18 A I'm sure I did.

19 Q Did you sign the report?

20 A Yes.

21 Q And as you sit here today, do you stand behind the
22 report?

23 A I do.

24 MR. FLINN: I have no further questions, Your Honor.

25 THE COURT: So this is where we're going to break

1 for lunch. We'll see you guys back here at 1:15.

2 MR. PEEK: Thank you, Your Honor.

3 MR. FLINN: Thank you, Your Honor.

4 MR. BARON: Thank you, Your Honor.

5 (Court recessed from 11:59 a.m. until 1:15 p.m.)

6 THE COURT: Mr. Lillis, if you'd come on back up,
7 please. I'd like to remind you you're still under oath.

8 MR. FLINN: Sorry, Your Honor. I have one final
9 question for Mr. Lillis just to get clarified.

10 THE COURT: Not yet. Wait until he gets up here.

11 MR. FLINN: I promise.

12 THE COURT: You're still under oath, sir, okay?

13 THE WITNESS: Yes. Thank you.

14 THE COURT: You had another question you'd like to
15 ask?

16 MR. FLINN: One more question.

17 THE COURT: At least.

18 MR. FLINN: Okay.

19 DIRECT EXAMINATION (Continued)

20 BY MR. FLINN:

21 Q Mr. Lillis, it's been brought to my attention that
22 while you were testifying earlier today we were throwing
23 around the term DNC.

24 THE COURT: Do Not Call.

25 //

1 BY MR. FLINN:

2 Q It's an acronym and I wanted to make sure --

3 COURT RECORDER: Judge, would you mind waiting a
4 second?

5 THE COURT: Hold on, we've got a problem.

6 COURT RECORDER: It's going now.

7 THE COURT: Okay. So you want him to tell you what
8 Do Not Call is, DNC?

9 MR. FLINN: I wanted to clarify that that is what he
10 understood it to mean.

11 BY MR. FLINN:

12 Q Did you understand that Do Not Call and DNC are the
13 same thing?

14 A Yes. I understood it.

15 MR. FLINN: Thank you, Your Honor.

16 THE WITNESS: Thank you, Your Honor.

17 MR. PEEK: I didn't want it to be Democratic
18 National Committee, Your Honor.

19 THE COURT: Okay. All right, Mr. Baron.

20 MR. BARON: Oh, did we switch over to us already?

21 (Colloquy regarding technical issues)

22 THE COURT: You don't need all of the exhibits to
23 ask questions, do you?

24 MR. BARON: No. And, in fact -- Is it working yet,
25 Benny?

1 MR. PEEK: We'll manage your exhibits until you get
2 it working, Benny.

3 MR. BARON: All right, that's fine.

4 CROSS-EXAMINATION

5 BY MR. BARON:

6 Q So it was nice to know you were at University of
7 Colorado. Go Buffs. My wife and I are alumni. Let me just
8 start and make sure I understand. The Special Committee
9 wasn't operating independently, you guys were all collectively
10 making decisions as to the approach and ultimately the
11 conclusions were all collective conclusions; correct?

12 A Well, we were acting independently of the board, if
13 you will, but we were acting jointly, the three of us.

14 Q Yes. So there's not something that you can testify
15 to as far as what the process was, what you looked at, how you
16 reached conclusions that another member of the SLC can't
17 testify to; correct?

18 A I would say that's true, subject only to memory
19 differences.

20 Q Okay. And again, while you brought your own
21 experiences, you ultimately decided the process you were going
22 to do and ultimately the conclusions were a collective
23 decision, is that right?

24 A Yes. I'd say that's right.

25 Q I'd like to sort of move past the volume of work and

1 I accept the fact that you guys looked at a lot of documents,
2 talked to a lot of people, wrote a really long report. But
3 I'd really like to sort of focus on what your investigation
4 was or was not investigating. So, first off, the complaint,
5 Exhibit 1 of 6 that they put up before --

6 MR. BARON: Can you put that up for a moment?

7 BY MR. BARON:

8 Q This is the complaint that was drafted by our firm
9 on behalf of our clients and set forth theories of liability.
10 As you understood it, the Special Committee was given
11 authority to determine whether the claims set forth in this
12 complaint or any other claims were viable; correct?

13 A We were charged with assessing the claims that were
14 in the complaint and as they referenced the director
15 defendants, yes.

16 Q Or any other potential complaints, even if it wasn't
17 in there. That was what the Special Committee resolution
18 said, you were to investigate the claims in the derivative
19 complaint or any other possible claims?

20 A I wouldn't say that. That wasn't my understanding.
21 My understanding was we would examine the ones that were in
22 the derivative complaint.

23 Q So before -- so as your process started, did you sit
24 down and read the entirety of the complaint? They're pretty
25 long.

1 A I think we did, yes.

2 Q Okay. You did?

3 A I believe I did, yes.

4 Q And did you come to an understanding as to what the
5 theory of that complaint was?

6 A Yes, I'd say I did.

7 Q What is your understanding of what the theory of
8 liability was? Not just what we wanted to prove, but what was
9 our theory of liability in that complaint?

10 A I think the theory of the liability was that these
11 director defendants, as members of the board of DISH, in some
12 way, either through mismanagement or whatever or improper
13 intent, whatever it was, exposed the company to violations of
14 the DNC and they should therefore be held liable.

15 Q Let me put it my way and see if you agree with this.

16 A I'm sure yours is better.

17 Q It's what I do for a living. That the managing
18 officers and directors of DISH Network harmed the company by
19 as much as \$340 million, resulting from willful failure to
20 comply with the assurance of voluntary compliance with the
21 AVC and its agents for violations of the Do Not Call Log. Is
22 that what you understood our theory to be?

23 A That is not what I understood it to be. I don't
24 think it was a question -- it is -- I agree that these
25 individuals should be held responsible for losses that may be

1 incurred as a product of two cases, but I don't think it was
2 about the AVC because I don't think that's a DNC law. So it
3 was about DNC law.

4 Q Well, again, do any of you make that decision? How
5 did you make the decision that the theory of our case was not
6 the theory that you were going to investigate? Or did you
7 not? Did you ever consider or did anybody ever talk about the
8 fact that one of the key components in our complaint was that
9 Mr. Ergen and Mr. DeFranco, among others, but primarily those
10 two breached their fiduciary duties in part by failure to
11 comply with the AVC? Is that a theory that you investigated?

12 A Well, we certainly -- I don't know if I can answer
13 it exactly the way you posed it. We certainly investigated
14 the relevance of the 2009 AVC and we investigated the extent
15 to which the company was in compliance with the 2009 AVC, but
16 that wasn't what the complaint was about.

17 Q All right. Just so we're clear, you did not
18 investigate the theory of potential breach of fiduciary duty
19 for failure to comply with an agreement with 46 out of the 50
20 Attorneys General in the United States, is that correct?

21 A That isn't what I said. I said we certainly
22 examined the adherence on the part of the company to the AVC.
23 We examined it in detail and repeatedly. But because it is
24 not a DNC law, we were charged with understanding whether
25 these people knowingly violated DNC.

1 Q Well, so just indulge me for a second. If the Court
2 interprets our complaint to include a theory of liability for
3 breach of fiduciary duty for failure to comply with the
4 obligations set forth in the AVC, would you agree that that
5 is not the subject of your investigation?

6 A I don't think that was the subject of our
7 investigation.

8 Q Now, also in our complaint, did you understand that
9 while we named a number of officers and director defendants
10 or officers, that much of the focus in that complaint was
11 specifically about Mr. Ergen and Mr. DeFranco, who were the
12 co-founders and really the managing directors, people who
13 actually had day-to-day management of the company? Did you
14 understand that, again, through reading our complaint?

15 A Could you just ask it one more time?

16 Q Absolutely.

17 A Thank you.

18 Q Did you understand through reading our complaint
19 that the focus of our allegations, while against all of the
20 directors, was really against the co-founders, Mr. Ergen and
21 Mr. DeFranco, because those were the people who were on the
22 ground managing the company?

23 A I did not draw that opinion from the complaint.

24 Q Okay. Did you understand that the foundation of our
25 complaint was based upon really four documents or four items,

1 which would have been the AVC in 2009, the Krakauer jury
2 verdict, which was in January of 2017, the Krakauer or treble
3 damages opinion from May 2017, and the U.S. v. DISH opinion,
4 which was in June of 2017? Did you understand that that was
5 really the four cornerstones of that complaint?

6 A Well, I understood those were all important. Once
7 again, I think because the AVC was not a DNC law, I probably
8 thought of it differently, but.

9 Q Now, in your investigation of the facts, did you
10 take the approach or the SLC take the approach that if a judge
11 -- for example, if Judge Catherine Eagles made findings of
12 fact in her treble damages opinion, you would accept those
13 facts as being absolute; those are facts that are judicially
14 determined and you're going to take them as true?

15 A I would say that's true. We accepted her decision
16 as true for her -- from her trial and we didn't challenge
17 that. We accepted it.

18 Q You were not out there seeking to rebut her or the
19 jury's findings of facts; correct?

20 A I was not, no.

21 Q And so if there's anything in the report that
22 indicates that it's contrary, it's not a finding of a
23 disagreement in those findings of fact. Is that correct?

24 A Uh, let me --

25 Q If there are words in the report which seem to

1 indicate that you think that maybe what the judge found in
2 either Krakauer or U.S. v. DISH, you're not seeking to say we
3 disagree and we disavow those as being the facts?

4 A We were not seeking to do that.

5 Q And that will be the same for Judge Sue Myerscough's
6 opinion in U.S. v. DISH. What she determined as findings of
7 fact in that case, you accept it as absolute truth, that is
8 what happened; correct?

9 A We accepted those as findings of fact in her case.

10 Q And true as to that is what happened?

11 A Well, we accepted based on -- I'm not trying to play
12 word games here, I'm just trying to make sure. We accepted
13 what the judges in both cases said was what they believed were
14 the findings of fact.

15 Q That's not the same question. So in the judicial
16 system, you know, we have things that are called allegations
17 and, you know, ideas and information, but once a judge or a
18 jury makes a finding of fact, then it becomes the fact. Did
19 you operate in the Special Litigation Committee based on that
20 concept?

21 A Yes.

22 Q And with regard to the AVC, you operated that the
23 AVC said what it said and you weren't questioning the words
24 within the AVC; correct?

25 A That's correct.

1 Q And to the extent that either of the judges -- in
2 this case, Judge Eagles herself interpreted what the AVC
3 meant, you weren't questioning that. That again became a fact
4 that you accepted; correct?

5 A In her ruling, yes, I'd say that's right.

6 Q All right.

7 MR. BARON: Now let's pull up -- are we still with
8 these guys? All right. If you could, can you pull up
9 Plaintiff's Exhibit 2, which is our copy of the AVC.

10 THE CLERK: Proposed.

11 THE COURT: Any objection to the admission of 2?

12 MR. FLINN: No, Your Honor.

13 THE COURT: It will be admitted.

14 (Plaintiffs' Exhibit 2 admitted)

15 THE COURT: Come on, Mr. Baron. I've got to give
16 you a hard time, too. Got to keep up.

17 MR. BARON: Well, I was assuming that since it was
18 already admitted that we didn't need to.

19 THE COURT: It's not admitted.

20 MR. BARON: All right. That's okay.

21 BY MR. BARON:

22 Q All right. I'm showing you what's been marked as
23 Exhibit 2. And you actually did read this, it's also a long
24 document, and understood what it meant?

25 A Yes.

1 Q All right. And just so that we're clear, you
2 understood that prior to -- or prior to the 1:29:05] exhibit
3 that 46 out of 50 states' Attorneys General were opposing
4 conduct that was happening at DISH or through its third
5 parties; correct? There were concerns?

6 A Please ask that question once more.

7 Q Sure. You understood that what led to the AVC was
8 that 46 out of the 50 states' Attorneys General were concerned
9 that DISH's third party telemarketers were violating the Do
10 Not Call Lists; correct?

11 A I would say this. The AVC dealt with a lot of
12 different violations by DISH around dealing with customers
13 and many of them have nothing to do with DNC, but DNC was
14 discussed and was part of the consideration.

15 Q Okay. And if you could take a look for a moment at
16 subsection 1.6. Now, did you understand from this section
17 that it was the Attorneys General's belief that DISH
18 controlled the conduct, practices and procedures of its third
19 party retailers?

20 THE COURT: As expressed in this agreement?

21 MR. BARON: As expressed in the agreement.

22 THE COURT: Okay.

23 THE WITNESS: May I just read this briefly?

24 MR. BARON: Absolutely.

25 THE WITNESS: Yes, I read this.

1 BY MR. BARON:

2 Q And you understood that at the time that you were
3 initiating your investigation?

4 A I understood this. Yes.

5 Q And you also -- and if you take a look at the bottom
6 of 1.7, starting with, "The Attorneys General assert" on
7 page 2. Do you see that at the very bottom?

8 A Yes, I see that.

9 Q And again, it says the Attorneys General were of the
10 opinion, as either actual or apparent agents of DISH Network,
11 that DISH was responsible for the conduct of the third
12 parties. Again, was that your understanding as to what this
13 AVC represented, that the Attorneys General were of that
14 belief?

15 A The Attorneys General were of the belief, but DISH
16 disavowed that in the AVC. They disagreed.

17 Q Oh, no. I'm saying that the Attorneys General were
18 of the opinion even before the AVC that the third party
19 retailers were agents of DISH. You understood that to be
20 true?

21 A I understood that to be true.

22 Q And that as part of DISH or a part of the AVC, what
23 DISH did agree to was to now be responsible for the conduct of
24 its third parties, to actually treat them as agents from 2009
25 forward; correct?

1 A That is not correct.

2 Q Turn to again Krakauer. It's Exhibit 2. I'm sorry,
3 Exhibit 1. And that's our Exhibit 1, our version of Krakauer.

4 THE CLERK: Proposed.

5 THE COURT: Any objection?

6 MR. BARON: I'm just -- I'm going to -- I just
7 wanted to tell them first. So I'd like to move in Plaintiff's
8 Exhibit 1, which is the Lexis version of the Krakauer
9 decision.

10 THE COURT: Any objection to 1?

11 MR. FLINN: No objection, Your Honor.

12 THE COURT: It will be admitted.

13 (Parties' Exhibit 1 admitted)

14 BY MR. BARON:

15 Q So pulling up the Krakauer decision and looking at
16 star 18, which is on page -- okay, on page 6 of 12 under The
17 Compliance Agreement. Do you see under ii, The Compliance
18 Agreement, the first full paragraph where it says, "DISH
19 agreed to supervise"?

20 A I'm looking.

21 Q The first paragraph.

22 A Okay.

23 Q Do you see at the bottom?

24 A "In the summer of 2009."

25 Q "In the summer," and then the last sentence in

1 there. "DISH agreed to supervise its marketers, determine if
2 they were complying with federal Do Not Call laws and
3 discipline or terminate them if they failed to take steps to
4 prevent the violations of the law."

5 A Yes, I see that.

6 Q You accepted that as fact. That is what DISH agreed
7 to in connection with signing the AVC in 2009; correct?

8 A What document are you -- this isn't the judge's
9 ruling, or what am I looking at here?

10 Q It is the judge's ruling in Krakauer.

11 THE COURT: It's just a different version that's
12 printed for lawyers.

13 THE WITNESS: But it is the judge's -- it is the
14 judge's ruling?

15 MR. BARON: It is.

16 THE WITNESS: Okay. So then let me look at it
17 again. Could I read it again?

18 MR. BARON: Sure.

19 THE WITNESS: Okay.

20 THE COURT: It's called a reported decision, sir,
21 which means sometimes it's formatted and has different fonts
22 than what you remember seeing in the other exhibit.

23 THE WITNESS: Okay. Thank you.

24 THE COURT: Uh-huh.

25 THE WITNESS: I see this, yes.

1 BY MR. BARON:

2 Q All right. So again, you accept that it is a fact
3 that DISH, as part of the 2009 AVC, agreed to supervise its
4 marketers, determine if they were compliant with federal Do
5 Not Call laws, and discipline or terminate them if they failed
6 to take steps to prevent the violations of law; correct?

7 A Yes.

8 Q All right. And in your analysis, did you comport
9 your analysis with that fact, that as of 2009, whether or not
10 DISH believed it or not prior, as of 2009 DISH was to treat
11 the third parties as agents; correct?

12 A No. I disagree. They were doing this, what it says
13 in here, disciplining, coaching, getting people to help the
14 retailers be in compliance, but they were not accepting that
15 they were agents.

16 Q And you understood that by DISH, as far as
17 obligations, that expressly included obligations of people
18 like Mr. DeFranco and Mr. Ergen per the agreement; correct?

19 A The 2009 AVC applied to all executives in DISH,
20 including DeFranco and Ergen.

21 Q Okay. But it expressly referred to the executive
22 officers as having obligations and responsibilities, not just
23 DISH; correct?

24 MR. FLINN: Your Honor, objection. Relevance.

25 THE COURT: Overruled.

1 MR. PEEK: Your Honor, may we be heard on this?

2 THE COURT: No. Keep going.

3 THE WITNESS: I don't know the answer.

4 MR. BARON: Okay. Why don't you pull up, if you
5 would, Exhibit 2 again, the AVC at 8, paragraph 3.1.

6 BY MR. BARON:

7 Q Do you see under this section where it says,
8 Application of Assurance to DISH Network and its Successors
9 and 3.1 specifically says: "DISH Network's duties,
10 responsibilities and burdens and obligations undertaken in
11 connection with this assurance shall apply to DISH Network and
12 all of its subsidiaries, parents, affiliates, predecessors,
13 successors and assigns all of the foregoing, and the officers,
14 directors, employees, shareholders, agents, servants and
15 assigns." Do you see that?

16 A Yes, I do.

17 Q So it is correct that the AVC specifically applied
18 its duties and responsibilities that it agreed to with 46 out
19 of the 50 AGs to people like Mr. Ergen and Mr. DeFranco;
20 correct?

21 A Yes.

22 Q That's correct?

23 A Yes.

24 Q And you acknowledged in deposition and in your
25 report that Mr. Ergen and Mr. DeFranco were present when this

1 agreement was entered into. As the co-founders, they knew
2 about this agreement, they were present, they understood this
3 agreement; correct?

4 A I believe that's true, yes.

5 Q And you again in your report acknowledged that Mr.
6 DeFranco and Mr. Ergen were the people on the ground. They
7 were the people with the managerial obligations to perform
8 under this agreement; correct?

9 A It's very clear that Mr. DeFranco was in a job where
10 he had important relationships in managing retail channels.
11 But that --

12 Q You specifically found in your --

13 THE COURT: Mr. Baron, I need you to wait.

14 MR. PEEK: I think he was interrupted.

15 THE COURT: Mr. Peek, don't help.

16 Mr. Baron, I need you to focus on procedure because
17 I can't go into the substance. As part of the analysis I have
18 to make, I can only go into the procedure. So if you would
19 phrase your questions in that way as to the process that was
20 followed.

21 MR. BARON: Okay.

22 THE COURT: Thank you.

23 MR. BARON: Sure. I was doing okay up until that
24 point?

25 THE COURT: Yes. In my mind. I know Mr. Peek and

1 Mr. Flinn may have a different opinion. But I will give you
2 a little leeway because my questions that I've written down
3 track sort of how you're asking those. But once you crossed
4 over, I made sure and stopped that.

5 BY MR. BARON:

6 Q All right. Let me make sure I understand. In your
7 analysis of determining who knew what and where, did you
8 determine that it was Mr. DeFranco and Mr. Ergen who had
9 managerial level responsibility for performing the obligations
10 outlined in the AVC?

11 A I concluded that all -- that many of these director
12 defendants had responsibility, management responsibility.

13 Q My question is you also determined specifically
14 that Mr. DeFranco and Mr. Ergen had managerial level
15 responsibilities for assuring compliance with the AVC;
16 correct?

17 A I would not say I thought that specifically, no.

18 MR. BARON: Can we go to Exhibit 6, your SLC report,
19 at page 212 to 213.

20 THE CLERK: Proposed.

21 THE COURT: Any objection?

22 MR. PEEK: It's already in evidence, Your Honor, the
23 different --

24 THE COURT: I know, but this number isn't.

25 MR. FLINN: No objection, Your Honor.

1 THE COURT: So 6 isn't. We could cross-reference,
2 but we're not. Okay.

3 MR. BARON: Any objection?

4 MR. FLINN: No objection.

5 THE COURT: It's admitted.

6 (Plaintiffs' Exhibit 6 admitted)

7 MR. BARON: If you look at --

8 I.T. TECH: What page?

9 MR. BARON: 212, please.

10 BY MR. BARON:

11 Q Isn't it correct that in your report on page 212 at
12 the bottom it says, "In their capacities as officers, Ergen
13 and DeFranco formally received a copy of the 2009 AVC because
14 in those roles they had managerial responsibilities for
15 performing the obligations outlined in this Assurance and were
16 officers necessary to ensure DISH Network's compliance with
17 the terms of this Assurance." That's what's in your report;
18 correct?

19 A Well, I think that's true, but they weren't the only
20 ones that had responsibility.

21 Q That wasn't my question. My question was
22 specifically Ergen and DeFranco had management
23 responsibilities for assuring the compliance with the AVC;
24 correct?

25 A And my answer is they, among others, had

1 responsibility.

2 Q Now, I'd like you to take a look at Exhibit 23.

3 MR. BARON: I'd move that into evidence.

4 THE COURT: Any objection to 23?

5 MR. PEEK: Let me see what 23 is, Your Honor.

6 THE COURT: It's Mr. Flinn's witness, Mr. Peek.

7 MR. PEEK: No objection, Your Honor.

8 THE COURT: It's Mr. Flinn's witness, Mr. Peek.

9 MR. PEEK: I'm sorry, Your Honor.

10 MR. FLINN: I have no objection. My apologies.

11 THE COURT: It will be admitted.

12 (Plaintiffs' Exhibit 23 admitted)

13 MR. BARON: Mr. Peek doesn't want to be left out.

14 THE COURT: I'm going to give Mr. Peek a hard time
15 for his entire existence since I've been a judge.

16 MR. BARON: You can't put baby in a corner.

17 THE COURT: I don't know that.

18 MR. BARON: Huh?

19 THE COURT: Never mind. Keep going.

20 MR. PEEK: He's saying you're being snarky.

21 THE COURT: Keep going.

22 BY MR. BARON:

23 Q I'm showing you Exhibit 23. This is the jury
24 verdict sheet that was signed by the jury in the Krakauer
25 action. Did you ever look at this?

1 A Yes. I have seen it.

2 Q Okay. And as part of your investigation to
3 determine whether there was wrongdoing attributable to Mr.
4 Ergen and Mr. DeFranco, did you accept as fact the findings of
5 fact in this jury verdict?

6 A Please ask that question again.

7 Q In connection with your analysis of whether or not
8 liability could flow to Mr. Ergen and Mr. DeFranco, did you
9 look and accept the facts contained in this jury verdict?

10 A We accepted the facts in the Krakauer case,
11 including the jury verdict, but neither DeFranco nor -- I
12 mean, neither Ergen nor DISH directors were the ones that were
13 being charged in the Krakauer case.

14 Q Now, one of the facts found by the jury in this jury
15 verdict was specifically that SSN was acting as DISH's agent
16 when it made the telephone calls at issue from May 11, 2010
17 through August 1st, 2011; correct?

18 A That was the opinion of the judge, Judge Eagles.
19 Yes.

20 Q Well, that was also the fact that the jury found to
21 be true; correct? That's the first one, Number 1?

22 A Well, it's as reflected in her opinion. Yes.

23 THE COURT: That's not the question he's asking you,
24 sir. He's asking you on the jury verdict sheet which is on
25 the screen in front of you, was that the finding of the jury?

1 THE WITNESS: Can I just walk through the jury
2 verdict and refresh my memory here?

3 THE COURT: It's right on the screen, sir. There's
4 a big checkmark under Yes.

5 THE WITNESS: Okay. Yes. Correct. Correct.

6 THE COURT: Yeah.

7 BY MR. BARON:

8 Q So you accepted in your investigation the fact that
9 DISH -- SSN was DISH's agent from May 11, 2010 to August 1st,
10 2011; correct?

11 A We did not accept that in our committee, our Special
12 Litigation Committee effort, but we understood that that was
13 the opinion in the Krakauer case.

14 Q Okay. Explain this to me. Now, you have a judicial
15 finding of a fact, but you don't think that was true?

16 A I didn't say -- that's what they thought was true.
17 The judge thought that was true. We accepted that that's what
18 she thought was true and the jury.

19 Q Okay. So nowhere in your report do you say that you
20 were of the opinion that SSN was not DISH's agent for that
21 time period?

22 A We didn't think that any of the retailers were
23 agents of DISH as we dealt with it in the complaint that we
24 were dealing with.

25 Q And how is that not a rejection of what the jury

1 found?

2 A I think -- I don't think it's a rejection. I think
3 they were examining a very different question than we were.
4 They were examining the question of did DISH somehow cause
5 SSN to -- or allow SSN to violate DNC. We were looking at did
6 the director defendants knowingly cause DISH in some way or
7 condone DISH violations by retailers of the DNC. That's a
8 different question.

9 Q But in both you need to determine -- both of them
10 you had to determine whether SSN was an agent; correct?

11 A Well, we didn't determine anything in Krakauer.
12 But in the SLC work, we did not conclude that SSN was an
13 agent.

14 Q So the facts of the jury verdict were rejected by
15 the Special Committee? You said I don't think that's really
16 true.

17 A I wouldn't say we rejected it. We just arrived at
18 a different conclusion.

19 Q Again, as part of your investigation you understood
20 that the second question was that DISH was responsible to pay
21 \$400 per violation; correct?

22 A I don't recall the \$400 number.

23 Q You can look on page 2 of this document. Do you
24 see that?

25 A Okay, yes, I see it.

1 Q And you understood that in undertaking your
2 investigation?

3 A Did I understand it during our --

4 Q Yes.

5 A -- the SLC? Yes.

6 Q And you understood that that 400 was multiplied by
7 about 50,000 calls?

8 A Are you referring to the trebling damages?

9 Q No.

10 A No.

11 Q I'm just showing you that before you even trebled
12 it --

13 A Oh, yes. I did understand that.

14 Q -- it's 400 --

15 THE COURT: Only one of you can talk at a time.
16 Please be careful.

17 BY MR. BARON:

18 Q So 400 multiplied by 50,000 calls made to 18,000
19 different No Call customers; correct?

20 A I don't remember the arithmetic.

21 Q Will you accept my representation that that was it?
22 Oh, you don't have to.

23 A I just don't remember it. I'm sorry.

24 THE COURT: That's okay, sir. This is not a memory
25 test. If there is something that would refresh your memory,

1 counsel can provide you that to assist you. You do not have
2 to accept his representations.

3 THE WITNESS: Okay.

4 MR. BARON: You do not.

5 BY MR. BARON:

6 Q Now, you understood that what happened after this
7 finding and your investigation of determining who could be
8 responsible, after this finding of \$400 per call that Judge
9 Krakauer (sic) then took it upon herself to undertake an
10 analysis --

11 THE COURT: Judge Eagles?

12 MR. BARON: I'm sorry. Judge Eagles. What did I
13 say?

14 THE COURT: Judge Krakauer.

15 MR. BARON: Oh. I apologize.

16 THE COURT: I'm here to help keep the record
17 straight.

18 BY MR. BARON:

19 Q Judge Eagles made a determination to determine
20 whether or not the conduct was so egregious, knowing or
21 willful that would cause her to take that 400 and triple it
22 for each call; correct? You understand that that's what she
23 was doing?

24 A Yes, I do.

25 Q And that her decision was that consistent with the

1 jury's verdict these calls violated the TCPA and that SSN was
2 DISH's agent. The court finds that SSN and DISH willfully and
3 knowingly violated the TCPA. The court concludes that it is
4 appropriate to treble the damages against DISH.

5 MR. BARON: And that is again at Exhibit 1, if you
6 would pull up at star 1 and 2. If you go at the very
7 beginning on page 2 of 12, if you would. "Consistent with the
8 jury's verdict," right above Background.

9 THE WITNESS: Can it be highlighted so I can see it?

10 MR. BARON: It will be in a moment. Hopefully after
11 the break we will be able to figure it out so that we can pull
12 these things up a little faster. I feel like I'm old school.

13 MR. PEEK: Right at the top. Right at the top. I
14 think that's where he wants you to go.

15 MR. BARON: Right up to the left at the top.

16 THE COURT: Thank you for your assistance, Mr. Peek.

17 MR. BARON: I appreciate that.

18 BY MR. BARON:

19 Q Do you see, "Consistent with the jury's verdict that
20 these calls violated the TCPA and that SSN was DISH's agent,
21 the Court finds that SSN and DISH willfully and knowingly
22 violated the TCPA." Do you see that?

23 A Yes, I do.

24 Q And that was a fact that you understood and accepted
25 in your consideration of whether, in fact, Mr. Ergen and

1 DeFranco could also be held breaching their fiduciary duties;
2 correct?

3 A I certainly accepted this as fact from the court.
4 Yes.

5 Q And ultimately you understood that the Court then
6 trebled the damages and that got be damages upwards of \$60
7 million; correct?

8 A Yes.

9 Q Were you also aware in your analysis that -- or are
10 you aware now, because when you wrote the report it hadn't
11 been done, but that the Court of Appeals for the Fourth
12 Circuit upheld the findings of the Krakauer court?

13 A I believe I know that, yes.

14 Q And did you ever read that opinion?

15 A I have not.

16 Q Okay. Were you ever aware that they specifically
17 said that DISH and its -- DISH had its chance to convince the
18 jury and it lost; right? Did you know that?

19 A Well, I know that there was an appeal and so DISH
20 must have had the chance, but I haven't read the finding, the
21 decision at all.

22 Q And are you aware that DISH then tried to take that
23 up to the U.S. Supreme Court and the U.S. Supreme Court denied
24 cert? Were you aware of that?

25 A I'm not aware of that.

1 MR. BARON: Can we pull up TX105, please.
2 THE CLERK: Proposed.
3 MR. BARON: This was already marked and admitted.
4 THE COURT: Any objection?
5 MR. BARON: I think it was already admitted --
6 THE CLERK: Oh.
7 MR. BARON: -- by defendants.
8 THE CLERK: Oh, yes, it was. I'm so sorry, Mr.
9 Baron.
10 THE COURT: Mr. Baron, you were right. We were
11 wrong.
12 MR. BARON: Only once.
13 THE COURT: We will keep track.
14 BY MR. BARON:
15 Q Now, again, you were aware of this finding and this
16 ruling by the district court judge in the Central District of
17 Illinois prior to your going in depth into your investigation;
18 correct?
19 A I became aware of it as we started the
20 investigation.
21 Q Okay. And you understood that in this action four
22 Attorneys General, the Federal Government through the FTC was
23 suing DISH for a number of violations, including violations of
24 the Do Not Call Lists; correct?
25 A For a number of violations and I believe it included

1 some DNC, yes.

2 Q And were you aware that as part of the findings by
3 Judge Myerscough, she determined that the DNC laws had been
4 violated for years and years of careless and reckless conduct?
5 Were you aware that she made a factual finding that there were
6 years and years of careless and reckless conduct?

7 A I think I'd like to see that in there, if I can.

8 Q Sure.

9 A I just don't recall those terms.

10 MR. BARON: Can you pull up TX105 at 449 of 475.

11 BY MR. BARON:

12 Q Take a look at that, if you would. I will find you
13 the exact paragraph. If you go to the second full paragraph,
14 "The amount represents a significant penalty." Do you see
15 that?

16 A Yes, I do.

17 Q And do you see, "Do Not Call laws violations caused
18 by DISH over years and years of careless and reckless
19 conduct"? Do you see that?

20 A I do.

21 Q Okay. I know this is pretty deep in the opinion.
22 Is this the first time that you actually saw the finding of
23 fact that there were years and years of careless and reckless
24 conduct?

25 A I don't think it's the first time, but I don't

1 recall this particular sentence.

2 Q Did you accept that as a fact in your investigation
3 that indeed there were years and years of careless and
4 reckless conduct by DISH?

5 A I accepted the fact that this was the ruling of the
6 court.

7 Q That's not my question. My question is did you
8 accept that as a fact that that is absolutely true that there
9 were years and years of careless and reckless conduct prior to
10 the finding by that court?

11 A I don't know that I can say whether I did or not.
12 In our investigation we tried to find out.

13 Q So you did not accept that as a fact?

14 A I accepted the finding of the court.

15 Q That's not my question. My question is did you
16 accept it as an absolute fact that there were years and years
17 of careless and reckless conduct as part of your
18 investigation?

19 A I accepted the ruling of the court. That's the best
20 I can do.

21 Q Before we go into some more of the findings of those
22 courts, I want to ask you a question.

23 MR. BARON: Could you pull up Exhibit 6? That's the
24 SLC report, at page 351. Go to the very bottom paragraph.
25 351, please.

1 THE COURT: And thank you so much for helping him.
2 I know he hasn't said it, but thank you.

3 MR. BARON: I'll take him out for a beer later.

4 THE WITNESS: I'm sorry, can we highlight what you
5 want me to read here?

6 THE COURT: Can we blow it up?

7 MR. BARON: Okay. 351, the very bottom paragraph,
8 could you blow that up for me, please.

9 BY MR. BARON:

10 Q Do you see where it says, "The SLC does not believe,
11 in the exercise of its business judgment, that it would be in
12 DISH's best interest for DISH to attempt to prove (1) that it
13 knowingly violated the DNC laws at the behest of its board,
14 and (2) that the retailers are its agents." Do you see that?

15 A Yes, I do.

16 Q What did that mean?

17 A Well, we didn't find any evidence. I mean, let me
18 just -- we knew that there were violations of DNC at some
19 point in history by DISH and by retailers, but we didn't find
20 that DNC laws were knowingly violated in particular by the
21 defendant directors. We just didn't find the evidence of
22 that. And so it wouldn't have made sense to claim that we
23 did.

24 THE COURT: Can you say that again for me?

25 MR. BARON: Yeah. I'm confused too.

1 THE COURT: No, wait.

2 I just need you to say it again, sir, because I
3 didn't follow it and you may have misspoken.

4 THE WITNESS: I'm sorry?

5 THE COURT: Could you repeat your answer for me,
6 please, because I think you missed something and I want to
7 make sure before we all get --

8 THE WITNESS: Okay. So as I read the paragraph,
9 "The SLC does not believe, in the exercise of its business
10 judgment, that it would be in DISH's best interest for DISH to
11 attempt to prove that it knowingly violated the DNC laws."
12 And I'm saying we didn't see any evidence that the director
13 defendants knowingly supported or violated the DNC laws. So
14 it wouldn't have made sense to try to prove that.

15 THE COURT: And the second part of it? Number 2.

16 THE WITNESS: Our analysis was there were a number
17 of pieces of information available to the company that the
18 company relied on that strongly indicated that retailers were
19 not the agents of DISH. So it didn't seem to us that that --
20 that we could make that case.

21 THE COURT: Sir, are you saying that's based upon
22 the advice of counsel issues that were referenced in some of
23 the report and the pleadings I have here?

24 THE WITNESS: I don't think I can say it -- well,
25 it wasn't advice of our counsel.

1 THE COURT: Okay. Thank you.

2 BY MR. BARON:

3 Q So are you saying that you did not in your
4 investigation want to prove that either, one, it was a knowing
5 violation on behest of the board, or two, that the --
6 unintelligible], or that you just -- or that you already
7 proved that those were not true? I'm just not really sure
8 which one were you set --

9 A Okay. So those are two questions. We did not set
10 out to prove that there weren't violations. We didn't set out
11 to do that. We tried to discover if there were -- if there
12 was evidence that would support the claim that the director
13 defendants knowingly violated or caused the company to violate
14 DNC laws. We did not find evidence to that effect.

15 Q Okay. But this doesn't say that. This says SLC
16 does not believe in the exercise of its judgment that it would
17 be in DISH's best interest for DISH to attempt -- so in going
18 forward to attempt to prove that. So why is it that you
19 believe that it wasn't in DISH's best interest to go forward
20 to attempt to prove that? That was your words, no mine.

21 A Yeah. And I'm saying because we didn't see any
22 evidence that would support that DISH violated, knowingly
23 violated the DNC laws, in particular the DISH directors.

24 Q And then with point two, you just disagreed with
25 what the jury found?

1 A Disagreed with?

2 Q What the jury found in Krakauer that the retailers
3 were its agents.

4 A We found something different, but I didn't -- I
5 accepted what the jury found. We investigated a different
6 issue.

7 THE COURT: Sir, can you explain for me --

8 Just stop, Mr. Baron, and give me a minute.

9 Can you explain for me the process that you went
10 through in order to evaluate the determination that is
11 indicated in the report that retailers are not agents, as
12 opposed to the finding made by the jury in the Krakauer case?
13 Tell me the process you went through.

14 THE WITNESS: Okay. So we -- in various interviews
15 with DISH legal employees, including general counsel, in that
16 process we were exposed to information that DISH legal and
17 DISH executives had received from outside legal advisors and
18 we knew that there had been -- about the question of our
19 retailers/agents, and we knew there were two cases that had
20 supported the view that retailers were not agents. And we
21 knew that the negotiation -- I want to make sure I'm not on
22 the wrong ground here -- the negotiation between DISH and the
23 FTC on the subject of were there -- were they agents had not
24 arrived at any end point.

25 So we were of the opinion that there were several

1 pieces of evidence that retailers were not agents in the form.
2 And then I would say in addition when we looked at the retail
3 things like the retail sales agreement, the kind of training
4 DISH provided for retailers, a variety of communications
5 between DISH management and retailers over and over and over
6 again, and including in the retailer agreement itself it said
7 that the retailers were not agents. So we on the SLC had a
8 variety of sources of information to support that position.

9 THE COURT: Okay. So the process was that you
10 gathered some information, talked to the legal department,
11 looked at the retailer education and training materials and
12 the retailer agreement and as a result you determined that
13 retailers were not agents, even though the jury had found they
14 were, and that was affirmed by the Fourth Circuit?

15 THE WITNESS: May I add to that?

16 THE COURT: Yeah, absolutely, because I'm trying to
17 understand the process you went through.

18 THE WITNESS: Right. I would say the other thing
19 that in your summary you did not include is we had -- we were
20 aware of advice from outside legal counsel to that effect as
21 well.

22 THE COURT: Okay. Thank you. That was what I was
23 trying to get at with my earlier question.

24 THE WITNESS: Yeah. Thank you.

25 THE COURT: Sorry, Mr. Baron, for the interruption.

1 Please resume whatever track you were on, but try and stay on
2 process as opposed to substance. It's a hard path to tread.

3 MR. BARON: Well, it is.

4 BY MR. BARON:

5 Q And just so we're clear, I'm not trying to challenge
6 what your conclusions were, I'm trying to challenge how you
7 got there. So that is what I consider to be process and
8 whether or not you actually considered all of the information
9 that was available for you to consider. And so in your
10 determination that retailers were not agents, in contravention
11 of what the jury found, did you look at everything that the
12 jury was presented when it determined that the retailers were
13 agents?

14 A I wouldn't say we saw everything the jury saw in the
15 Krakauer case.

16 Q Is there any reason to believe that the information
17 that was presented to the jury to determine that they were --
18 retailers were agents, that they were not given the
19 opportunity to review all of the same information that you
20 received?

21 A I don't know.

22 Q Let me step back a moment about your sort of
23 understanding about your job as an SLC member here. You were
24 also the SLC member in DISH 1; correct?

25 A Yes.

1 Q And in that situation you were brought in later and
2 given special voting rights because Mr. Brokaw, who was also
3 an SLC member and the other SLC member were found to be --
4 have personal ties to Mr. Ergen; correct?

5 A I don't know how to describe it. There was some
6 difference in my role, yes.

7 Q Okay. You were brought in later. You weren't
8 originally a member of the SLC; correct?

9 A I believe I was an original member.

10 Q And you were given special voting power because of
11 Mr. -- because of the other team members' relationship with
12 Mr. Ergen; correct?

13 A I believe I was given special voting powers, but I
14 don't think I can tell you exactly what they were or why.

15 Q And there the analysis or the approach you took,
16 that was in connection with Mr. Ergen's acquisition of
17 LightSquared's debt. Do you recall that?

18 A Yes.

19 Q Okay. And in that situation you were not facing
20 the same information you had here. There were no judicial
21 findings of bad conduct by DISH, by Mr. Ergen, by anybody
22 else; correct?

23 THE COURT: Well, there was a bankruptcy court
24 issue.

25 MR. BARON: That's true.

1 BY MR. BARON:

2 Q But there were no findings -- there were no findings
3 -- that was where he bought the issues from, but there were no
4 judicial findings that somebody had actually acted illicitly,
5 there were no findings of bad conduct by Mr. Ergen or by
6 anybody else; correct? As far as you understood.

7 A I believe that's true. My memory may be wrong, but
8 I believe it's true.

9 Q So the way you investigated that case is you wanted
10 to investigate what the wrongdoing purportedly was and then in
11 doing that investigation make the determination that from your
12 investigation, your process, you made the determination as to
13 whether there was a breach of fiduciary duty that flowed from
14 the facts as you investigated them; correct?

15 A I believe that's true.

16 Q Here, however, you weren't investigating whether or
17 not there was bad conduct in particular. You accepted that
18 there was bad conduct that resulted in damages to the company;
19 correct?

20 A Well, I was aware that there were two cases that had
21 been finalized, if you will, other than appeal, that said
22 DISH violated DNC laws. Yes.

23 Q And there was the Krakauer opinion that also said
24 that it was willful and that they had neglected their
25 obligations in connection with the AVC; correct?

1 A Yes, I think that's true.

2 Q All right. So let's look at a couple of the facts
3 that were found in the Krakauer decision and see how you
4 procedurally handled those factual findings. First let's look
5 at Exhibit 1, Krakauer, star 20 through 21. And if you look,
6 that would be on page 7 of 12, the lower left-hand paragraph
7 under Mr. Campbell, do you see where it says, "Despite the
8 promises DISH made"? Do you see that?

9 A I don't yet, but I will. I see it, yes.

10 Q And here it says, "Despite the promises DISH made to
11 the Attorneys General in the compliance agreement, DISH did
12 not further investigate or monitor SSN's telemarketing or
13 scrubbing process. In fact, DISH did nothing beyond telling
14 SSN to use caution and to remove the individual complainants
15 from its call lists." Do you see that?

16 A I do.

17 Q All right. Did you accept that fact as being true?

18 A I accepted that as the decision by the judge and the
19 jury.

20 Q Okay. We're going to go back and forth. Yes, it
21 was a decision of the judge. Did you accept that as being a
22 true fact as part of your --

23 THE COURT: As part of the process of your
24 evaluation, did you accept that fact as true, or did you do
25 additional investigation?

1 THE WITNESS: We did additional investigation.

2 THE COURT: Okay.

3 BY MR. BARON:

4 Q And in doing that additional investigation, did you
5 come to the conclusion that it was in fact true that DISH did
6 nothing further to investigate or monitor SSN's telemarketing
7 or scrubbing practice, or did you disagree with that finding?

8 A We did not reach that conclusion.

9 Q Did you in your process for determining whether
10 there was potential liability ever undertake an analysis that
11 if indeed that fact were true that DISH did nothing beyond
12 telling SSN to use caution and remove the individual
13 complainants from the call list, that that would be a breach
14 of fiduciary duty were it accomplished by a fiduciary? For a
15 fiduciary to have done nothing and ignored the promises of the
16 AVC, did you ever undertake an analysis as to whether that
17 conduct would be a breach of fiduciary duty?

18 A I'm sorry, you asked about three questions. Can you
19 do it again so I can --

20 Q Certainly. I will.

21 THE COURT: The objection of compound is sustained.
22 Could you break it down?

23 MR. FLINN: Objection.

24 THE COURT: The witness has it handled.

25 THE WITNESS: Well, then just ask it again.

1 MR. BARON: I am.

2 THE COURT: Break it down.

3 MR. BARON: I'm just waiting for --

4 THE COURT: The chuckles to stop.

5 MR. BARON: There you go.

6 BY MR. BARON:

7 Q Did you ever in the process for undertaking your
8 analysis determine that if in fact it were true that DISH, in
9 violation of its promises to the AGs, took no action in
10 further compliance of its obligations, that that would be a
11 breach of fiduciary duty if in fact a fiduciary was obligated
12 to do so?

13 A Well, if I answer it I'm going to answer two
14 questions and you're not going to like it.

15 Q I like anything you have to say. I just want to
16 hear the truth.

17 A So I would say we looked at carefully did DISH
18 comply with the AVC; were they complying with the AVC. And
19 so I would say we reached a different conclusion than as
20 articulated in Judge Eagles' conclusions.

21 Q Okay. Let me ask my question again. As part of the
22 process, did you ever undertake an analysis to determine that
23 if the fact found by the judge in Krakauer was true that in
24 violation of the promises they did nothing, that that would in
25 fact be a breach of fiduciary duty if it was a fiduciary who

1 had the obligation to act?

2 A We didn't do any analysis of whether the facts that
3 the judge relied on were accurate or not.

4 Q Let me ask it again because I'm not trying to
5 confuse you.

6 THE COURT: Well, hold on a second. Sir, he's
7 trying to get you to the point of from your process you were
8 investigating whether there were breaches of fiduciary duty
9 by the defendants in this case; that those were alleged and
10 should be pursued by the company. You understand that; right?

11 THE WITNESS: Yes.

12 THE COURT: Okay. So he's trying to get to the
13 point of assume what the judge found was true. If the judge
14 found that and made that determination, did your process
15 include an analysis that that would include a breach of
16 fiduciary duty if one of the defendants was one who did what
17 the judge said?

18 THE WITNESS: If the -- thank you.

19 THE COURT: That's what he's trying to ask you.

20 THE WITNESS: That's clarifying.

21 MR. BARON: Thank you. Better than I did.

22 THE WITNESS: I'm sorry.

23 MR. BARON: No.

24 THE COURT: You can go. No, please answer if you
25 can.

1 THE WITNESS: I would say if the behavior that Judge
2 Eagles highlighted were true, based on our analysis we would
3 have concluded that was a violation of the AVC.

4 BY MR. BARON:

5 Q And would have that have been the determinant as
6 part of your process, that that violation of the AVC would
7 have been a breach of fiduciary duty, if accomplished by a
8 fiduciary?

9 A I think the question is -- I would say no, the
10 question is did the -- in our examination is -- did any of
11 director defendants knowingly cause the company to violate the
12 DNC laws. And that's a different question than were you in
13 compliance with AVC. I might add that we thought the company
14 was in full compliance of AVC.

15 Q So when you said no, no, that was not the analysis
16 that you undertook, is that what you meant by no? I'll ask it
17 again but I wanted to make sure that it is clear.

18 A Okay.

19 Q Is it an accurate statement that you did not
20 undertake an analysis as part of your SLC work, that if the
21 facts as found by Judge Eagles were correct, an undertaking by
22 a fiduciary, that that would constitute a breach of fiduciary
23 duty?

24 A I think we examined that and concluded that they
25 weren't in noncompliance with the AVC.

1 Q All right. I'm going to try it again. The question
2 is yes that was part of your analysis or not. Did you
3 undertake an analysis that said assuming Judge Eagles's
4 findings were true, the actual facts that if undertaken by a
5 fiduciary, that would or would not constitute a breach of
6 fiduciary duty as a violation of the AVC.

7 A We examined that question.

8 Q Was that part of your analysis?

9 A Yes.

10 Q Can you show me in your report where in that
11 analysis you did so?

12 A I don't know that I can show you in the report. But
13 we certainly considered every aspect of compliance with the
14 AVC.

15 Q If you did that analysis, would you expect that to
16 be in your report?

17 A All I can tell you is we looked at it carefully.

18 Q And if it's in your report, your attorney would be
19 able to show it to you like we show it to you on redirect;
20 correct?

21 A If it's in the report.

22 Q Let me show you another fact from the Eagles
23 decision. Can we pull up again on Exhibit 1 *23 and *24. And
24 that is on Page 8 of 12. Now, if you take a look on the left-
25 hand column, the last full paragraph, the bottom sentence

1 starts with "Nor."

2 A Yes, I see it.

3 MR. BARON: Highlight that for me please. Thank
4 you.

5 BY MR. BARON:

6 Q Do you see that where it says "Nor did DISH take any
7 other steps to comply with the provisions of the compliance
8 agreement that it would monitor, directly or through a third-
9 party monitoring service, its covered marketers to determine
10 whether the covered marketer was complying with all applicable
11 federal, state, and local do not call laws." Do you see that
12 fact?

13 A I see that, yes.

14 Q Again, did you accept that fact as being true, or
15 did you just accept that as a fact that the judge ruled and
16 that you were doing further investigation?

17 A The latter.

18 Q Okay. Did you ultimately conclude that you agreed
19 with the fact that DISH did not take any other steps to comply
20 with the provisions of the Compliance Agreement that it would
21 monitor directly or through a third-party monitoring service
22 its covered marketers to determine whether the covered
23 marketer is complying with all applicable federal, state and
24 local do not call laws? Is that true or false?

25 A We did not agree with that.

1 Q Did you ever undertake an analysis as part of it,
2 assuming that that fact were true and provable, that that
3 conduct, if undertaken by a fiduciary, would constitute a
4 breach of fiduciary duty?

5 A I think it's a hypothetical, because we didn't find
6 it.

7 Q Okay. So you didn't undertake that analysis?

8 A No.

9 Q You do agree that it was an obligation under the
10 AVC, as set forth by Judge Eagles' opinion, that Mr. Ergen and
11 Mr. DeFranco specifically had a duty to either directly
12 monitor the third parties or to hire a third-party auditor to
13 do so. You do agree that that was what the AVC required;
14 correct?

15 MR. FLINN: Objection, Your Honor. Relevance.

16 THE COURT: Sustained. Can you rephrase your
17 question and go to process.

18 MR. BARON: Sure.

19 BY MR. BARON:

20 Q As part of your process in determining what was
21 wrong, did you have an understanding as your basis that Mr.
22 Ergen and Mr. DeFranco had a direct obligation to monitor the
23 third parties, or, in the alternative, hire a third party to
24 do the audit?

25 MR. FLINN: Objection, Your Honor. Relevance.

1 THE COURT: Overruled.

2 THE WITNESS: I just wouldn't limit it to DeFranco
3 and Ergen.

4 BY MR. BARON:

5 Q But DeFranco and Ergen among others?

6 A Yes.

7 Q And, again, as part of your effort to understand
8 what was going on, did you find out that DISH did not hire a
9 third party to monitor, they did not hire the auditor?

10 A DISH -- depends on the definition of third-party
11 monitor. DISH did --

12 Q Third-party auditor.

13 A -- an audit. DISH did arrange audits of some
14 retailers to see if they were in compliance. And they did
15 hire a third-party consultant to help the retailers be in
16 compliance. PossibleNOW, I think, is the name that I used to
17 think was a law firm, though.

18 Q But possible -- again, just was it your
19 understanding of the fact that PossibleNOW was actually hired
20 to monitor SSN, or not?

21 A I don't know on SSN. I don't recall.

22 Q Now, let's pull up another fact. Can we pull up
23 Exhibit 1 *29. And that is on page 10 of 12, the first part
24 paragraph above "B. DISH's Arguments."

25 A And may I ask where this is from? This is which --

1 Q This is also the Krakauer opinion, so treble damages
2 opinion.

3 A Okay.

4 Q In this opinion if you -- do you see where it says,
5 the last full paragraph, "DISH knew"?

6 A Yes.

7 Q See where it says "DISH knew or should have known
8 that its agent, SSN, was violating the TCPA, and DISH's
9 conduct thus willfully and knowingly violated the TCPA." Do
10 you see that?

11 A Yes, I do.

12 Q Again, is that a fact that you accepted as true, or
13 just accepted as being the finding of the court?

14 A I'd say it's partially true. DISH did not think SSN
15 was its agent, but they knew that SSN violated the TCPA.

16 Q Did you agree that -- did you accept the fact here
17 that DISH knew or should have known that SSN was violating the
18 TCPA?

19 A DISH knew or should have known that SSN was
20 violating the TCPA? Yes.

21 Q You found that to be a true fact?

22 A Yes.

23 Q And because -- and the court then made the finding
24 that because DISH knew or should have known that SSN was
25 violating the TCPA, that DISH's conduct was thus wilful and

1 knowing. Did you accept that as a fact?

2 A I didn't.

3 Q You rejected that?

4 A I rejected that, yes.

5 Q Okay. Did you ever undertake an analysis to

6 determine that if the facts were true as found by Judge

7 Eagles, whether there would have been needed to be a fiduciary

8 who similarly acted knowingly and willfully for there to be

9 liability against DISH for acting knowingly and willfully.

10 Was that an analysis that you undertook?

11 A No.

12 Q All right. Let's go to another one. Let's go to

13 *33 of Exhibit 1. And that is on page 11 of 12. And that is

14 upper-left corner where it says "Given the tens". Do you see

15 that sentence, starts with "Given the tens"?

16 A Which number?

17 Q Do you see on that where it says "Given the tens",

18 the last sentence in that paragraph?

19 A Yes, I do.

20 Q All right. Again, Judge Eagles found "Given the

21 tens of thousands of violative calls SSN made in a span of

22 just over a year, even a cursory investigation or monitoring

23 effort by DISH would have uncovered the violations." Do you

24 see that sentence?

25 A Yes, I do.

1 Q Okay. Again, did you accept that as being a fact or
2 did you reject that as being an actual fact?

3 A I accepted the fact that DISH knew SSN was violating
4 the DNC.

5 Q And that even a cursory investigation or monitoring
6 would have uncovered the violations?

7 A However DISH did it, they knew it.

8 Q And do you see here where it says, "Under these
9 circumstances what DISH calls mistaken is actually wilful
10 ignorance." Did you accept that as a factual fact, that under
11 these circumstances what DISH calls a mistaken belief is
12 actually wilful ignorance?

13 A I don't.

14 Q And did you understand -- or did you undertake a
15 process of trying to disprove that what DISH calls mistakes
16 were actual willful ignorance. Was that the process you
17 undertook?

18 A We undertook a process to try to understand
19 precisely what the communications and relationships were
20 between DISH and SSN. So I would say we looked at this
21 question carefully.

22 Q Now in this, did you have an understanding what
23 Judge Eagles meant by "mistaken belief"?

24 A I don't.

25 Q Did you ever understand that what DISH was arguing

1 in the Krakauer case was, well, we didn't know that we had an
2 obligation to monitor and make sure that SSN was not
3 violating, so therefor it's a mistake that had happened. Did
4 you understand that to be the argument that DISH was making in
5 the Krakauer case?

6 A I don't believe so.

7 Q Did you ever undertake the analysis that if this
8 fact were true that what DISH did was willful ignorance on its
9 part, that that would be a breach of fiduciary duty if
10 undertaken by a fiduciary?

11 A We looked at DISH's relationship, communications,
12 discipline, penalties, coaching, the relationship between DISH
13 and SSN. But we didn't do it as a mistaken belief. We looked
14 at the facts.

15 Q My question is did you ever undertake an analysis
16 that if what Judge Eagles found to be actual willful
17 ignorance, that if that was undertaken by a fiduciary, that
18 that would be a breach of fiduciary duty by that fiduciary?

19 A We did not do that but we would have seen willful
20 ignorance.

21 Q Did you understand that it is a traditional claim
22 under breach of fiduciary duty to willfully ignore something,
23 or to willfully choose not to act?

24 A Yes.

25 Q And did you understand that if DISH chose not to

1 act, that you could procedurally infer that it would have been
2 the people in charge who chose not to act?

3 A Ask the question once more.

4 Q Sure. Procedurally did you undertake an analysis
5 that understood that if DISH did not act, that that would have
6 had to have been undertaken by the people in charge. That you
7 can infer that the people in charge did not act, if DISH did
8 not. Was that part of the analysis?

9 A We did not do that. We didn't analyze it that way.

10 Q Go to another fact. Will you go to *34 which is the
11 next column over. Do you see here where it says "DISH knew
12 SSN was using unscrubbed lists as a result of the Krakauer and
13 Campbell complaints and it knew SSN had a long history of both
14 the TCPA and DISH's business rules related to the TCPA
15 compliance." Did you accept that as being true?

16 A I believed that was true.

17 Q Okay. The next sentence says "DISH easily could
18 have discovered the full extent of the violations with minimal
19 monitoring effort." Is that also true? Or is it true that
20 you actually believed DISH that it was happening?

21 A Let me just read this to make sure I answer that
22 question first, if I may. I believe -- I agree that the
23 sentence "DISH easily could have discovered et cetera" -- I
24 don't agree with the conduct DISH -- the last part, DISH's
25 conduct was willful.

1 Q You just disagree with that factual finding?
2 A I'm sorry?
3 Q You would disagree with that factual finding?
4 A I'd say yes.
5 THE COURT: If somebody needs a break, you let me
6 know. We've been going an hour and fifteen minutes. I know
7 some people need breaks earlier than I do. So if you need a
8 break, let me know. And we will be breaking for the day at
9 4.45.
10 MR. PEEK: What time, Your Honor?
11 THE COURT: 4.45.
12 MR. PEEK: Thank you.
13 THE COURT: So Dulce can get everything put away
14 before 5:00 o'clock.
15 MR. BARON: Why don't we take a quick break now, if
16 we could.
17 THE COURT: Yes. You may take your break for
18 personal convenience at this time, Mr. Baron.
19 MR. BARON: Thank you.
20 (Court recessed at 2:35 p.m., until 2:46 p.m.)
21 THE COURT: Okay. Mr. Peek's back. We can keep
22 going.
23 MR. PEEK: Sorry, you're waiting for me, Your Honor.
24 THE COURT: It's all right. I'm not supposed to put
25 you in jail, my son says.

1 MR. PEEK: Who says that?

2 THE COURT: My son. He remembers from the Kerry
3 Rogers hearing.

4 MR. PEEK: Oh. My gosh. Yeah.

5 THE COURT: Yeah. We're all old.

6 MR. PEEK: Poor Kerry.

7 MR. BARON: Have you ever jailed a civil attorney?

8 THE COURT: I have not.

9 MR. BARON: Nice to know.

10 THE COURT: I have a form I fill out first, and
11 usually by then all of us have cooled down.

12 MR. BARON: Can we go to, again, back to Exhibit 1,
13 at *35, and that would be on page -- just to make sure I get
14 that right for you, 35 and 36. So that's on page 12 of 12,
15 left-hand column, first full paragraph, last sentence. No,
16 not the full paragraph, so that's part paragraph. The next
17 one. Yeah, that one. Last sentence of this.

18 BY MR. BARON:

19 Q Do you see where it says, "This case does not
20 involve an inadvertent or occasional violation?" Do you see
21 that?

22 A Yes, I do.

23 Q And it involves a sustained and ingrained practice
24 of violating of the law?

25 A And this is from the Krakauer --

1 Q This is also from Krakauer.

2 A Yes, I do see it.

3 Q Did you accept that finding of fact from Judge

4 Eagles that the violation of the no-call lists was -- did not

5 involve an inadvertent or occasional violation, it involves a

6 sustained and ingrained practice of violating the law?

7 A Was this referring to SSN?

8 Q That was referring to the violations that led to the

9 treble damages award.

10 A What is this comment about SSN?

11 Q That comment is about DISH and SSN because it were

12 found that DISH was an agent or SSN was an agent of DISH, so

13 it was both.

14 A So I don't agree that SSN was an agent of DISH. I

15 agree this is true of SSN, but not DISH.

16 Q Okay. So as far as -- if SSN -- and you said it a

17 couple of times, I just want to make sure. If SSN was

18 involved in a sustained and ingrained practice of violating

19 the law, did you decide -- did you determine that Mr. Ergen

20 and Mr. DeFranco didn't know anything about it?

21 A No. We did not determine that.

22 Q Okay. They knew about it. They just didn't have an

23 obligation because they weren't agents; correct?

24 A We did not determine that, either.

25 Q Okay. Did you determine that they knew about the

1 sustained and ingrained violation of the pricing law as a part
2 of your process?

3 A Well, certainly Mr. DeFranco did.

4 Q If Mr. DeFranco knew about the sustained and
5 ingrained practice of violating the law, did you ever
6 undertake the analysis that if he knew that there was a
7 sustained and ingrained practice of violating the law by SSN
8 that that would be sufficient to establish a breach of
9 fiduciary duty claim against him?

10 A We did not.

11 Q You did not undertake that analysis?

12 A We undertook the analysis to understand whether it
13 really was a sustained and ingrained violation of the law. We
14 didn't link that to, then did Mr. DeFranco somehow violate the
15 law.

16 Q Okay. Or breach of fiduciary duty?

17 A Or breach his fiduciary. Yeah.

18 Q Because you do understand that was what you were
19 looking at, is whether or not he breached his fiduciary duties
20 one way or the other; correct?

21 A We were really looking at did he violate -- did he
22 somehow condone knowingly violation of the DNC laws.

23 Q Did you ever specifically look at it from the lens
24 of did Mr. DeFranco, by knowing that SSN was involved in a
25 sustained and ingrained practice of violating the law, breach

1 his fiduciary duty to the company in violation of the AVC?
2 Was that ever part of your analysis?

3 A Yes.

4 Q And how did you analyze that if Mr. DeFranco was
5 aware that SSN was involved in a sustained and ingrained
6 practice of violating the law that that would not be a breach
7 of fiduciary duty for failure to comply with the AVC?

8 A We looked in detail at the extent to which all of
9 the director defendants supported and believed they were in
10 compliance with AVC and what information they had that said
11 that they and the company was in compliance with the AVC,
12 before the AVC, during the AVC, and after the AVC. But we
13 didn't link it to the question you're asking of the --

14 Q The breach of fiduciary duty.

15 A -- the breach of fiduciary duty.

16 MR. BARON: Okay. Let's move for a moment to the
17 U.S. versus DISH case. Can you pull up TX105 and go to page
18 435 of 475. And if you see -- take a look -- if you'll
19 highlight the second sentence on this page that says, "DISH
20 initially hired --" all the way through "any way they could."
21 BY MR. BARON:

22 Q Now, when you reviewed this opinion did you review
23 as far as page 435 and the finding -- this finding of fact
24 that says, "DISH initially hired order entry retailers based
25 on one factor, the ability to generate activations?" Did you

1 read this opinion this far?

2 A Did I read --

3 Q You said early on direct examination that you saw
4 the opinion and it was really long, you're not sure if you
5 read it all. Is this --

6 A Yes. But I'm certainly aware --

7 Q Did you read this?

8 A I'm certainly aware of how the order entry retailers
9 program started. So I wouldn't say I disagree with the first
10 sentence.

11 Q Okay. Did you agree that DISH initially hired them
12 based on one factor, the ability to generate activations?

13 A I would say that was a very important consideration,
14 yes.

15 Q Okay. So you accept that as a fact?

16 A I would say I accept that, yeah.

17 Q And then it says, "DISH cared about very little
18 else." Do you accept that as a fact?

19 A I don't, actually.

20 Q By the way, did you consider in this belief of the
21 Judge in U.S. versus DISH that DISH cared about very little
22 else, that by DISH that would by necessity be Mr. Ergen and
23 Mr. DeFranco or at a minimum, Mr. DeFranco?

24 A Because of the charge to the SLC I would -- when I
25 read or heard DISH I thought it -- I thought it included the

1 director defendants, yes.

2 Q Okay.

3 A All of them.

4 Q For the findings of fact in U.S. versus DISH when
5 U.S. versus DISH talked about DISH doing something you
6 interpreted that to be the director defendants including Mr.
7 Ergen and Mr. DeFranco?

8 A I think that's a little bit different question,
9 because at the time of U.S. versus DISH I don't think the DNC
10 issue had really gotten to the board level other than
11 complaints that were handled. So several of the director
12 defendants were involved.

13 Q At least Mr. Ergen and Mr. DeFranco?

14 A Yes, they both were.

15 Q Okay. Because they're the co-founders and the
16 managing officers of the company?

17 A Well it was more in Mr. DeFranco's case because of
18 his job, his position. And in Mr. Ergen's because he was very
19 concerned about DNC violations.

20 Q Next finding of fact on the same sentence was, "As a
21 result, DISH created a situation in which unscrupulous sales
22 peoples used illegal practices to sell DISH Network
23 programming any way they could." Do you see that?

24 A I do see that.

25 Q Did you accept that as a true fact?

1 A If you exclude as a result I would agree.

2 Q So you agree as a true fact that DISH created a
3 situation in which unscrupulous sales persons used illegal
4 practices to sell DISH Network programming any way they could.
5 You accept that as fact?

6 A I would say -- I misspoke. I don't think DISH
7 created that situation. That situation existed in the
8 industry.

9 Q Okay. So you disagree with the factual finding that
10 that was a situation with its retailers that was created by
11 DISH?

12 A I don't think DISH created that situation.

13 Q So you disagree with that --

14 A Yes.

15 Q Did you ever undertake, again, an analysis to
16 determine that if, in fact, that fact were true and provable
17 it was a fact that could be used and Mr. Ergen or Mr. DeFranco
18 would be collaterally stopped from arguing against it that --
19 well, actually, you know, let me break that down. Did you
20 discuss the effect of collateral estoppel on a lawsuit against
21 Mr. Ergen or DeFranco?

22 A I don't think I understand the question yet. Please
23 try again.

24 Q No. That is a perfectly legit answer.

25 THE COURT: Sir, do you understand what the term

1 collateral estoppel means?

2 THE WITNESS: I do not.

3 THE COURT: Okay. So --

4 BY MR. BARON:

5 Q Did you ever have an understanding that if there is
6 a judicial finding against DISH that that finding may be able
7 to be used without being rebutted in a subsequent trial
8 against Mr. Ergen and Mr. DeFranco?

9 A I did not know. I didn't know that -- or I don't
10 know it.

11 MR. FLINN: Objection, Your Honor.

12 THE COURT: Overruled.

13 BY MR. BARON:

14 Q So that was --

15 MR. FLINN: What --

16 THE COURT: I said, overruled.

17 MR. FLINN: My apology.

18 THE COURT: It's okay. I've got a mask on, and it's
19 hard -- and I just put a cough drop in. So, you know --

20 BY MR. BARON:

21 Q So that was never part of your analysis, because you
22 didn't even understand that concept; correct?

23 A I'd say that's true.

24 Q Now, again, staying with this sentence as a result
25 DISH created a situation. Would you agree with me that if, in

1 fact, DISH did create the situation the persons at DISH who
2 created that situation would be Mr. Ergen or Mr. DeFranco?

3 A I think it's so hypothetical I can't -- it didn't
4 exist, so I can't answer.

5 Q You understood that Mr. DeFranco, at least, was
6 aware of the practices; correct?

7 A Well he may -- he was --

8 Q The practices by SSN?

9 MR. FLINN: Your Honor, can he answer.

10 THE COURT: You've got to let him finish. One at a
11 time, please.

12 THE WITNESS: If the question is was he aware that
13 some retailers engaged in unscrupulous behavior, yes.

14 BY MR. BARON:

15 Q Okay. And he was the person that was in charge of
16 the program that hired and used retailers; correct?

17 A He was in charge of retail services and
18 distributions, yes.

19 Q So if DISH created it, that is synonymous of saying
20 that Mr. Ergen created it. You don't have to agree that he
21 did, but if DISH did, Mr. Ergen did?

22 A Once again, it's hypothetical. DISH didn't create
23 it.

24 Q I understand. But if DISH were to have be found, by
25 a jury somewhere, that it was created that would be synonymous

1 with Mr. Ergen creating it -- I mean, Mr. DeFranco?

2 A As I said, it's hypothetical. So what can I say,
3 DISH didn't create the situation.

4 Q And that was never part of your procedural analysis
5 in this anyway, correct, making the determination that if DISH
6 did it the person at DISH who would be responsible for it
7 would have been Mr. DeFranco or Mr. Ergen. That was not part
8 of your procedural analysis; correct?

9 A Well, once again, your question's very unclear,
10 because you asked if DISH did it, did what, would we hold DISH
11 responsible? Depends on what it is.

12 Q If DISH created a situation in which unscrupulous
13 sales persons used illegal practices to sell DISH Network's
14 programming in any way they could, you did not undertake an
15 analysis that if DISH did that that would mean that Mr. Ergen
16 and Mr. DeFranco did that. That was never part of your
17 analysis?

18 A That's true. That is true.

19 Q I think I just have one more quote from DISH. Not
20 one more question, but one more quote.

21 MR. BARON: At TX105 at 462. The whole full
22 paragraph.

23 BY MR. BARON:

24 Q Let me break this down. Do you see this paragraph,
25 that starts with "The court is also seriously concerned --"?

1 A Yes, I do.

2 Q All right. And that goes all the way through

3 "absent government pressure." Let's break that down. First

4 it says that "The court is also seriously concerned with the

5 most recent evidence showed that DISH continued to show little

6 or no regard for consumer complaints about the order entry

7 retailers' practices." Do you see that finding of fact?

8 A Yes.

9 Q Okay. Did you determine that that finding of fact

10 was true, that DISH continued to show little or no regard for

11 consumer complaints about order entry retailer practices? Was

12 that a true -- did you consider that to be a true fact, or

13 did you dispute that?

14 A We found a different -- we didn't find that to be

15 true.

16 Q Okay. So you disputed that. You thought that -- as

17 part of your analysis you did not accept that as a true fact?

18 A Well, I just hate to say it this way. We accepted

19 the judge's ruling, but this is not what we found in our

20 investigation.

21 Q Now, the next sentence says, "The Satellite System

22 calling records showed that Satellite Systems made 381,811

23 registry calls in 2010 and 2011." Do you see that? So that's

24 almost --

25 A Yes, I --

1 Q -- 400,000 calls to people on a do not call list;
2 correct?
3 A I don't know that registry calls is the same thing
4 as do not call list.
5 Q Okay. You didn't know that?
6 A Well, I don't, no. Are they the same thing?
7 Q Did you understand that the list was called a do not
8 call registry? Did anybody ever tell you that?
9 A I guess I didn't remember the register term. I
10 certainly know what a do not call list is. So you're saying
11 these are the same thing?
12 Q They are the same thing.
13 A Okay.
14 Q But let's assume -- did you accept that Satellite
15 System Network called 381,811 people that were on the do not
16 call list between 2010 and 2011? Did you accept that as a
17 fact?
18 A I accept that as a fact.
19 Q Did you accept as a fact that DISH received so many
20 complaints that the legal department prepared a standard built
21 after Satellite Systems' letter?
22 A Yes.
23 Q And you found that to be true?
24 A Yes.
25 Q And that the letter itself was DISH's response to

1 these consumers was essentially, go away, it's not our
2 problem, go after Satellite Systems. Did you find that to be
3 true, that that's what the letter said, that the form letter
4 prepared by DISH said?

5 A That is not my understanding.

6 Q Okay. So you disagree with that fact?

7 A I disagree.

8 Q All right. Did you ever as part of your analysis
9 ever determine whether or not a letter from DISH's Legal
10 Department that says fundamentally, go away, it's not our
11 problem, would be directly contrary to the promises made in
12 the AVC?

13 A We didn't -- to the best of my memory we did not
14 consider that directly in our investigation.

15 Q Okay. You would agree with me, however, that to the
16 extent that they formed -- that the Legal Department had a
17 policy that says, go away, it's not our problem, that would be
18 directly contrary to the obligations that Mr. Ergen, Mr.
19 DeFranco, and others specifically took on in connection with
20 the AVC?

21 A And if that letter went to the consumers, the
22 customers, is your question; right?

23 Q And you determined that it did not?

24 A I did not say that. I'm asking is that what you
25 mean, though, by the customers?

1 Q Yes.

2 A I would say that would be inconsistent with the
3 spirit of 2009 AVC.

4 Q Okay. And if that policy changed to say, we're not
5 responsible, go sue Satellite Systems, came about, did you
6 determine that that came about without the knowledge of Mr.
7 Ergen and Mr. DeFranco?

8 A I don't know.

9 Q Do you have any reason to believe that Mr. Ergen and
10 Mr. DeFranco would not know that there would be a policy
11 change that we're not responsible for these calls, that
12 usually goes to Satellite Systems Networks?

13 A Well, I guess I'd have to see the letter. I
14 wouldn't say that it argues that they're not responsible. I
15 think it depends on how the letter is written. But they did
16 not think that DISH was responsible for these illegal
17 behaviors by SSN or any other retailer.

18 Q Did you see the letter?

19 A I don't think I saw the letter.

20 Q That wasn't part of the analysis or the process, the
21 undertaking?

22 A I didn't -- well, I don't remember seeing it anyway.

23 Q The last sentence in -- all right. "DISH's denial
24 of responsibility and lack of regard for consumers are deeply
25 disturbing and support the inference that it is reasonably

1 likely that DISH will allow the future illegal calls absent
2 government pressure." Did you find that fact to be true?

3 A I don't think that's true.

4 MR. BARON: I don't have any further questions for
5 this witness at this time.

6 THE COURT: So, sir, I have a couple of questions,
7 but it's mostly about one area. So let's see if we can figure
8 it out. And I need you to put your mask back on.

9 THE WITNESS: Oh. I'm sorry. Yes.

10 THE COURT: I'm sorry. I didn't realize you had it
11 off. Part of your analysis and process that you went through
12 involves certain investigations that relate to factual
13 findings made [unintelligible] case or Krakauer case that you
14 disagreed with after your investigation. So set that aside.

15 THE WITNESS: Okay.

16 THE COURT: Assuming the findings that were made in
17 that decision by that judge were true, was there another basis
18 that the process of investigation included for the SLC related
19 to advice of outside counsel related to that issue?

20 THE WITNESS: Yes. I would say the answer is --
21 related to the issue of agency.

22 THE COURT: Yes.

23 THE WITNESS: Yes, I would say that's true.

24 THE COURT: So tell me about the process that you
25 went through as a member of this Special Litigation Committee

1 to evaluate the advice of counsel that was received from
2 outside counsel related to the agency issue. What did you do?

3 THE WITNESS: Okay. So several things. We reviewed
4 -- there were two recent cases that were heard that
5 established in the cases not --

6 THE COURT: Those aren't advice of counsel. Those
7 are judges making decisions. So what I'm trying to get you to
8 tell me about is as part of the process of your investigation
9 did you make inquiry related to advice of counsel provided to
10 the company as business practices related to this agency issue
11 that caused people to act one way or another as part of their
12 daily activities?

13 THE WITNESS: I would say we did. We interviewed --

14 THE COURT: Tell me about it.

15 THE WITNESS: We interviewed Kelly Drye who was a
16 outside counsel advisor to the company. And we interviewed
17 the people at Kelly Drye who are experts in the question of
18 agency in retailers and they negotiate with the FTC on that
19 question. So we interviewed them. We saw information they
20 communicated to the company.

21 THE COURT: And at what point in time -- I'm sorry
22 to interrupt. But what point in time was that communication
23 to the company?

24 THE WITNESS: It was actually started before the AVC
25 negotiation and continued through the AVC negotiation and was

1 after the AVC.

2 THE COURT: Thank you. Could you continue your
3 answer, please.

4 THE WITNESS: Yeah. So we saw that kind of
5 information. We heard from the general counsel and other
6 lawyers in the company the view they had and the work they had
7 done that led them to the question of agency and whether or
8 not retailers, in our case, were considered agents. So then I
9 thought that was valuable information. We looked at -- to me
10 a big issue was the retailer agreement that every retailer
11 signed, because it very clearly said, you are not an agent of
12 the company, you're an independent retailer. So that was
13 impactful to me and part of the process.

14 Those are the kinds of things we did. I'm sure I'm
15 forgetting some of them.

16 THE COURT: Okay. So I need to go back and break it
17 down a couple more.

18 THE WITNESS: Uh-huh.

19 THE COURT: So you said that as part of that process
20 you went through an analysis of the information that was
21 provided by the Kelly Drye law firm before the agreement with
22 the various attorneys general was signed and even after. Tell
23 me the additional processes other than the interview that you
24 went through related to that.

25 THE WITNESS: One of the other things that I

1 thought, made sense to me, was these two cases where they --

2 THE COURT: Judges don't count.

3 THE WITNESS: I understand.

4 THE COURT: That's not part of advice of counsel.

5 THE WITNESS: I know. I know it's not. But it was
6 information to me that was relevant to our analysis. So --

7 THE COURT: I understand that. But I'm only
8 focusing on --

9 THE WITNESS: Okay.

10 THE COURT: -- advice of counsel, because it's a
11 particular defense --

12 THE WITNESS: Yes.

13 THE COURT: -- that is protected from the disclosure
14 about the content of the information but yet the activities
15 related to it are discoverable, which is why I've been
16 grilling you in a narrow fashion.

17 THE WITNESS: Okay. So I guess the other things
18 that -- processings that I thought made the difference to me
19 was when we interviewed people in the DISH legal organization,
20 including the general counsel and formal general counsel. And
21 we heard from them all the work they had done to test the case
22 of are retailers agents or not, because we debated that and
23 considered it in great length. And they had considered that
24 as certainly in their negotiations with the FDC. So they had
25 serious discussions about this. They had feedback from the

1 FTC at least in one case, if I can say this, the FTC said that
2 they are not agents. So they had pretty good guidance, and
3 then that decision was -- or that commitment was overruled.
4 So those are the things we did. I came away -- oh, and I
5 guess I would say in the AVC negotiation there was no
6 agreement that -- or there was no stipulation that retailers
7 were agents. And then none of the 46 attorneys general
8 claimed AVC violation as a point of agency. So it was a
9 variety of sources.

10 THE COURT: Okay. So let me see if I can break it
11 down further. As part of the process that you went through in
12 evaluating what I'll call the advice of counsel issue, were
13 you provided with any written opinion letters that were
14 written by the outside law firms to the company?

15 THE WITNESS: Yes.

16 THE COURT: And did you review those?

17 THE WITNESS: Yes.

18 THE COURT: And were you provided, then, with any
19 additional analysis internally once the opinion letters were
20 received from outside counsel related to this issue?

21 THE WITNESS: Yes.

22 THE COURT: All right. Thank you.

23 MR. BARON: Can I follow up on your presentation.

24 THE COURT: No. He gets to go next, and then you
25 get to go.

1 MR. BARON: Oh. Is that the order? Okay.

2 THE COURT: It is. You're supposed to be sat down
3 by now.

4 REDIRECT EXAMINATION

5 MR. FLINN: Brian, would you bring up Exhibit 102,
6 please.

7 BY MR. FLINN:

8 Q Hello again, Mr. Lillis. I only have a few
9 questions. So this won't be long. And so this 102 is the
10 SLC's report.

11 MR. FLINN: Could you show the first page, please.
12 Okay. And then would you please jump to page 24, internally
13 numbered.

14 BY MR. FLINN:

15 Q Mr. Lillis, before we look more closely at this, you
16 mentioned earlier, I think, that the SLC addressed a different
17 issue from the Krakauer and U.S. versus DISH decisions; right?
18 Is that -- that's per your testimony?

19 A Yes.

20 MR. FLINN: Could you please highlight the middle of
21 that -- or expand the middle of that page, please. Scroll up,
22 please. Okay. And would you highlight the first full
23 paragraph on the page, please. Not highlight. I'm sorry.
24 Expand it. Well, you can highlight it, too.

25 //

1 BY MR. FLINN:

2 Q And that reads, "Whatever --

3 THE COURT: 102. It's the Special Litigation
4 Committee report. Okay. Keep going.

5 MR. FLINN: Thank you, Your Honor.

6 If you could expand it just a little bit.

7 THE COURT: That's not expanding.

8 MR. FLINN: That's not expanding.

9 MR. PEEK: We know Brian knows how to do this, Your
10 Honor.

11 THE COURT: I've seen him do it many years.

12 MR. PEEK: Yeah.

13 MR. FLINN: I think that will do.

14 BY MR. FLINN:

15 Q Can you read that, or can you see that Mr. Lillis?

16 A Yes, I can. Uh-huh.

17 Q Now, what it says is "Whatever the Krakauer court
18 may have determined with respect to DISH's actual compliance
19 with 2009 AVC, the evidence reviewed by the SLC during its
20 thorough investigation shows that DISH, including the board,
21 management, and specifically DeFranco, believed that DISH was
22 complying with the 2009 AVC"; right? And then it says, "No
23 evidence suggested that they believed that DISH was complying
24 with the 2009 AVC." Do you see that? Was that correct? Was
25 that the SLC's finding?

1 A Yes.

2 MR. FLINN: Thank you.

3 Would you please turn now to page 67, footnote 167.

4 And let's expand that.

5 THE COURT: Hold on a second.

6 MR. PEEK: What footnote do you want?

7 MR. FLINN: Footnote 167, please. So it must be the
8 prior page. I think it's that one right there. Okay.
9 Actually, Brian, would you take the last half of that and blow
10 it up.

11 THE WITNESS: Yes, I see it. Uh-huh.

12 BY MR. FLINN:

13 Q Okay. So there it says, "Nonetheless, the SLC has
14 proceeded as though the rulings made and the underlying DNC
15 actions will stand and were well reasoned based upon the
16 evidence presented and the legal standards applied. The SLC's
17 determinations do not depend upon the outcome of the DISH's
18 appeals and the underlying DNC actions." And is that correct?

19 A Yes.

20 Q And I know that you said you had some disagreements
21 with certain of the factual findings by the Krakauer report.
22 You also said that the SLC addressed a different issue from
23 the Krakauer report. For purposes of making its
24 determinations, did the SLC proceed as the rulings and the DNC
25 actions will stand and were well reasoned based upon the

1 evidence presented and the legal standards applied?

2 A Yes, we assumed they would stand.

3 MR. FLINN: Thank you very much, Mr. Lillis.

4 THE COURT: Now, Mr. Baron, you can follow up on my
5 questions and any additional requests.

6 RECROSS-EXAMINATION

7 BY MR. BARON:

8 Q In Krakauer all of the -- by the time the Krakauer
9 court went to jury and then ultimately the evidence that was
10 presented to Judge Eagles that was after those advice of
11 counsel memos were prepared; correct?

12 A I'm sorry.

13 Q Timing wise.

14 A Ask it once more.

15 Q Just so we're clear. The memos that Judge Gonzalez
16 asked you about that were advice of counsel memos about
17 whether or not there was an agency relationship, those existed
18 prior to the factual findings in Krakauer; correct?

19 A Yes.

20 Q Those were available to be used in trial; correct?

21 A I assume they would have been.

22 Q And if, then, given that opportunity to use them,
23 those could have -- those would have rebutted the findings of
24 the trial court or the jury were they to believe them;
25 correct?

1 MR. FLINN: Objection. Relevance, Your Honor.

2 THE COURT: Overruled.

3 THE WITNESS: I don't know whether they would have
4 of not.

5 BY MR. BARON:

6 Q In your investigation did you ever determine whether
7 or not those findings of fact in Krakauer had the same
8 opportunity to consider the advice of counsel that you
9 considered in your analysis?

10 A We really didn't probe that aspect of Krakauer.

11 Q And finally, was there a specific discussion -- I've
12 got to kind of ask that way.

13 THE COURT: Process, not substance. Try it.

14 BY MR. BARON:

15 Q In connection with the process for determining that
16 you disagreed with the agency did you undertake a specific
17 analysis as to whether the agreement -- the obligations and
18 responsibilities agreed to in the AVC are tantamount to an
19 agency relationship?

20 A I would say we did, because the AVC agreement did
21 not -- the two part -- the part of the 46 states attorneys
22 general and DISH did not agree that there was an agency
23 situation. In fact, DISH I think expressly said there was not
24 in the AVC.

25 Q In the AVC. Are you saying that they actually in

1 their agreement or they took the position before that prior to
2 the AVC there was no agency?

3 A I actually think in the agreement.

4 Q Can you show me where?

5 A I don't know that I can, but that's my memory.

6 Q Well your lawyer can if it exists. And what process
7 did you undertake to determine that the responsibilities and
8 obligations agreed to with those 46 attorney generals was not
9 tantamount to an agency relationship other than just your view
10 of the AVC itself?

11 A Well we read and studied the AVC. We talked with
12 legal counsel, company legal counsel who were involved in
13 negotiating the AVC to get their view of where the agreement
14 ended up in terms of agency or not agency. I think those are
15 the principle things we did.

16 Q And, again, with regard to the issue of whether or
17 not the agency provided obligations that could justify a
18 finding of liability and treble damages was the same
19 information that you had available to you to make the
20 determination that they were not -- or that they were not
21 substantively the same available to the jury in Krakauer and
22 the judge in Krakauer?

23 A Well certainly the information existed. I don't
24 know whether -- I don't know why it was or was not available.

25 Q It existed and lawyers could choose to use it or not

1 depending on their determination as to whether or not they
2 thought it was viable evidence; correct?

3 A I would say yes.

4 MR. BARON: I don't have anything further.

5 MR. FLINN: Your Honor, may I ask a follow up.

6 THE COURT: You may.

7 MR. FLINN: Thank you.

8 FURTHER REDIRECT EXAMINATION

9 BY MR. FLINN:

10 Q Mr. Lillis, would you please turn to Exhibit 102.

11 THE COURT: No, they're going to show it to you.

12 You don't get to turn to them anymore.

13 MR. FLINN: Yeah. I'm sorry.

14 THE COURT: We're a non-paper --

15 MR. FLINN: Brian, please bring up the report in
16 Exhibit 102.

17 BY MR. FLINN:

18 Q Okay. So you can see we've got the report, Mr.
19 Lillis?

20 A Yes, I do.

21 MR. FLINN: Would you please turn to page 267.

22 BY MR. FLINN:

23 Q And we're going to be looking first at page 267 and
24 then page 268.

25 A Okay.

1 MR. FLINN: Would you blow that up a little bit,
2 please.

3 BY MR. FLINN:

4 Q Mr. Lillis, you remember just a moment ago Mr. Baron
5 asked you some questions about why DISH did not submit
6 evidence, a certain evidence --

7 A Yes.

8 Q -- in the Krakauer trial concerning compliance with
9 the 2009 AVC. Do you remember that?

10 A Yes.

11 Q Okay. Would you please -- so let's read that, this
12 paragraph. It says, "Prior to trial the parties disputed the
13 extent to which Krakauer could use the 2009 AVC at trial.
14 Krakauer sought to reference the 2009 AVC in its opening
15 statement to establish that DISH did not fulfill its
16 obligations under the 2009 AVC and DNC laws." And two, "DISH
17 had the right to control Order Entry Retail such as SSN. DISH
18 moved to exclude the 2009 AVC on the grounds that it was
19 prejudicial to allow Krakauer to use a settlement document
20 from an enforcement action by state AGs. DISH explained that
21 Krakauer's use of the 2009 AVC, which contained allegations by
22 the AGs and provided for a \$5.9 million payment by DISH, which
23 suggests DISH did things incorrectly even though the 2009 AVC
24 was not in any way admission of anything. Furthermore, DISH
25 argued that Krakauer would attempt to use the 2009 AVC to say

1 in essence that the contract was breached even though there's
2 no claim by any attorney general that this contract was
3 breached."

4 MR. FLINN: Would you please turn to the next page.

5 BY MR. FLINN:

6 Q "On January 6th, 2017, the North Carolina Court
7 granted --"

8 THE COURT: Hold on a second. Now we have technical
9 difficulties.

10 BY MR. FLINN:

11 Q " -- the North Carolina court granted DISH's motion
12 to exclude in part and denied the motion in part. The court
13 ruled that Krakauer could reference in his opening statement
14 those parts of the 2009 AVC relevant to control, but that he
15 could not go beyond that and say, you know, all these
16 attorneys generals said that DISH did something wrong and in
17 response DISH compromised. This ruling thus precluded
18 Krakauer from using the 2009 AVC to establish that DISH
19 violated DNC laws. The ruling also made clear that DISH's
20 compliance with the 2009 AVC was not an issue in the Krakauer
21 litigation, and DISH therefore did not present evidence to
22 establish its compliance with the 2009 AVC."

23 Mr. Lillis, in your report did you explain the
24 reason why DISH did not submit evidence to establish its
25 compliance with the 2009 AVC?

1 A Yes, I believe we did, but I just didn't remember
2 it.

3 Q Okay. Thank you. How long ago did you complete
4 your investigation?

5 A Late in 2018.

6 Q So it's been, what, a year and eight months,
7 something like that?

8 A Too long.

9 MR. FLINN: That's all I have, Your Honor.

10 THE COURT: Anything else?

11 MR. BARON: Sure.

12 THE COURT: You can say no.

13 MR. BARON: No, I can't.

14 FURTHER RECROSS-EXAMINATION

15 BY MR. BARON:

16 Q Just so we're clear, though, the Krakauer court did,
17 and especially Judge Eagles, specifically reference the fact
18 that there were violations of the AVC as findings for
19 wilfulness on the treble damages part; correct?

20 A That's my memory, yes.

21 MR. BARON: And I have nothing further.

22 THE COURT: Thank you.

23 Right? Nothing? Thank you, Mr. Flinn.

24 MR. FLINN: We have -- yes, nothing.

25 THE COURT: All right. Mr. Lillis, thank you. You

1 can return to your chair.

2 THE WITNESS: Thank you.

3 THE COURT: Pick one with a blue sticker.

4 Next witness.

5 MR. FLINN: Your Honor, we're calling Mr. Federico.

6 And Ms. Burton will examine him.

7 THE COURT: Thank you.

8 ANTHONY FEDERICO, SLC'S WITNESS, SWORN

9 THE CLERK: Thank you. Please be seated. Please
10 state and spell your name for the record.

11 THE WITNESS: Anthony Federico, A-N-T-H-O-N-Y
12 F-E-D-E-R-I-C-O.

13 THE COURT: Thank you, sir.

14 You may proceed.

15 MS. BURTON: Thank you, Your Honor.

16 DIRECT EXAMINATION

17 BY MS. BURTON:

18 Q Good afternoon, Mr. Federico. I want to start off
19 by just describing your -- discussing your background a bit.
20 Can you please describe your formal education for the Court.

21 A I have my Bachelor of Science degree from the
22 University of Rochester. I did advanced studies in
23 engineering at Rochester Institute of Technology. I did a
24 variety of courses in executive learning at Xerox, most
25 notably at Indiana University, where I got a -- some people

1 call it an MBA in a box without the degree. Competition and
2 strategy at Harvard. It goes on and on.

3 Q I heard you mention Xerox. Was that your first
4 professional job?

5 A It was my first professional job.

6 Q Did you spend your entire career with Xerox?

7 A I did. Kind of boring, but I did.

8 Q Could you describe your progression through Xerox.

9 A Yes. Well, I started out as a technician, and I got
10 the Bachelor of Science degree and was promoted I think
11 slightly before that. And then I had a series of promotions
12 with some side experiences in running some businesses for
13 Xerox, running IT departments until I ultimately was a
14 corporate officer and chief engineer for the entire company.
15 And I ran all the product development.

16 Q What position did you hold when you retired?

17 A I'm sorry. What position --

18 Q -- did you hold when you retired?

19 A I was a corporate officer. I was chief engineer for
20 the company, and I was the executive liaison for the graphic
21 arts community.

22 Q Do you serve on any corporate boards today?

23 A I serve on the EchoStar corporate board.

24 Q When did you join EchoStar board?

25 A It's about eight years ago, ten years ago, something

1 like that.

2 Q Why did you join the board of EchoStar?

3 A I thought it'd be interesting. I thought I could
4 make a contribution with my operational skills, my technical
5 background. So it sounded interesting, something like I want
6 to do.

7 Q Has it been interesting?

8 A It was. I learned a lot. Had to learn a lot.
9 Still learning a lot.

10 Q What compensation do you receive for your service on
11 the board of EchoStar?

12 A I don't know. It's embarrassing, but I have no
13 idea. I really don't.

14 Q So it's not material to you?

15 A It would not change my lifestyle if it disappears
16 tomorrow.

17 MS. BURTON: Brian, could you please pull up
18 Plaintiffs' Exhibit 50. Shake things up a little bit.

19 THE COURT: Any objection?

20 MR. BARON: No, Your Honor.

21 THE COURT: Be admitted.

22 (Plaintiffs' Exhibit 50 admitted)

23 MS. BURTON: Thank you.

24 THE WITNESS: Excuse me. Is there a way I can get
25 this enlarged? There we go. Thank you.

1 THE COURT: Is that better?

2 THE WITNESS: Much better. Thank you for that.

3 THE COURT: You can ask anything to be made bigger.

4 Hopefully we can manage it.

5 MS. BURTON: Could you please scroll through this,

6 Brian.

7 THE WITNESS: Can I see that first page again.

8 Yeah. Okay. I got it.

9 BY MS. BURTON:

10 Q You got it. Do you recognize this document, Mr.

11 Federico?

12 A I do recognize it.

13 Q What is it?

14 A That's my resume done quite a few years back.

15 Q Does it accurately reflect your background and

16 professional accomplishments?

17 A Yes, it does.

18 Q And it's been admitted into evidence.

19 So I'd like to turn now to focus specifically on

20 your work as part of the SLC in this case.

21 A Okay.

22 Q Are you a director of DISH Network Corporation?

23 A I am a director on the board of directors for DISH.

24 Or I'm sorry. I'm sorry. No, I'm not on DISH.

25 Q Not on DISH?

1 A Not on DISH. Never was on DISH. Sorry.

2 Q There was a time when DISH and EchoStar were one
3 corporation.

4 A Yes. That's before I got there.

5 Q So you've never been a director of DISH?

6 A I have never been a director or employee of DISH.

7 Q How did you come to be a member of an SLC on the
8 board of DISH?

9 A Well, Charlie Ergen called me up and asked me if I
10 would joint SLC.

11 Q Could you describe your conversation with Mr. Ergen.

12 A Let's see. He did not tell me what the compensation
13 would be. I didn't know it till, I don't know, a month later.
14 He told me I wouldn't get rich doing it. He was right. He
15 explained to me what the independence was about and the other
16 people that he was putting on and how they were independent
17 even though they were on the board of what the legal standards
18 were. He explained to me that the directors for DISH were
19 being sued for breach of fiduciary duties in allowing DISH to
20 violate the DNC and the lawsuits. I don't think there was
21 anything more than that. But may have gone on for a while on
22 those things, but that was about it.

23 Q Did you come away with the conversation with an
24 understanding of what Mr. Ergen expected from you in your work
25 on the SLC?

1 A You know, he didn't come right out and tell me that.
2 I just know Charlie well enough from his -- he's also the
3 chairman of the board for EchoStar, and I was comfortable I
4 knew what he meant, yeah.

5 Q What did he mean?

6 A Charlie takes a long-term view of everything he does
7 in his companies. He's consistent with being a founder of a
8 company who's still being involved. He doesn't care about
9 what happens to his share, he cares about what's going to
10 happen over the long run. And so Charlie wanted to get this
11 right for the long run. If there was a mistake made, I felt
12 he wanted to know it, he wanted us to respond to this and
13 let's get it done, let's get it done right, and we'll fix it
14 for the future.

15 Q Do you know why Mr. Ergen asked you to serve on this
16 SLC, rather than another direct of EchoStar?

17 A I know he was -- the CEO of EchoStar, Michael Dugan,
18 I know he recommended me for this.

19 Q Prior to joining the SLC did you have any experience
20 with investigations?

21 A Legal -- investigations, yes, extensively. But not
22 legal investigations, no.

23 Q What kind of investigations did you have experience
24 with?

25 A I took over a variety of organizations that had

1 failed, and had responsibility to get them turned around
2 quickly and get the product out the door. Doing that often
3 requires investigations. I took over IT projects, I took over
4 businesses, and always it was to investigate. What I did was
5 investigate what was the root cause that caused it, how do we
6 fix it, are there people responsible that should be removed,
7 et cetera.

8 Q Why did you agree to serve on the SLC for the board
9 of DISH?

10 A You know, I've never done anything like this. I've
11 never testified in court, I've never done -- I've never been
12 part of a Standard sic] Litigation Committee. I was very
13 interested, thought I'd learn a lot.

14 Q Do you feel like you learned a lot?

15 A Oh, absolutely. I learned a ton.

16 Q What compensation do you receive for serving on the
17 SLC?

18 A \$5,000 a month.

19 Q Is that material to you?

20 A It will not change -- hopefully it's over this week
21 and I won't get that anymore and it's not going to change my
22 lifestyle.

23 Q Let's talk a little bit about your independence.

24 A Okay.

25 Q Did you at the start of the SLC or today, for that

1 matter, have any relationship with any of the defendants?

2 A Professional relationship, Charlie Ergen, like I
3 said earlier, who's the chairman of the board. So I have a
4 professional relationship with him on that. Ortolf, who's a
5 director defendant, was on the board for EchoStar until
6 several months ago, I don't remember how long ago, and he
7 left, he isn't there anymore. So I had a professional
8 relationship with him, also.

9 Q So other than your contemporaneous board service
10 with Mr. Ergen and Mr. Ortolf, do you have any other social or
11 business relationships with them?

12 A I have no other social or business relationships
13 with either one of them.

14 Q Now, Mr. Ergen's the controlling stockholder of
15 EchoStar; correct?

16 A Yes, he is.

17 Q Do you believe that he could remove you from the
18 board of EchoStar?

19 A Sure. Sure.

20 Q Did that possibility play any role in how you
21 carried out your work as a member of the SLC?

22 A No, it didn't. I'll tell you, on the board I often
23 argue with Charlie, and every single one of those arguments,
24 if he really got made enough, he could remove me. But if I
25 can't argue with him and do what I think is best, I can't do

1 that job. I'd resign, frankly.

2 Q Now, with respect to the other defendants and not
3 Mr. Ergen or Mr. Ortolf do you have any social or business
4 connections with any of them?

5 A Absolutely none.

6 Q Do you have any other conflict of interest or
7 conflict of loyalties that impaired your ability to act
8 independently on the SLC?

9 A No, I do not.

10 Q Did the SLC evaluate its own independence at the
11 beginning of its investigation?

12 A We evaluated each other independently. The --
13 individually and collectively we evaluated each other, as well
14 as our legal counsel, you guys.

15 Q So what did you do to evaluate everyone's
16 independence?

17 A Did I personally do?

18 Q Yes.

19 A You know, this is -- I did what I'm good at. I
20 talked to them, I listened to what they said, I read the
21 writeups that were provided to me about their backgrounds and
22 why they thought they were independent, what they had said
23 about themselves, and then my real evaluation takes place when
24 I talk to them and I get a feel for who is this person, is he
25 somebody that's going to stand up for what's right, is he

1 somebody that's going to kowtow to something somebody else
2 told them to do, does he have an agenda here. They all seemed
3 pretty clean to me, so --

4 Q Did you know that George had a social relationship
5 with the Ergens going into the investigation?

6 A I did. I did know that.

7 Q Did the SLC as a whole approach and conduct its
8 investigation in an independent manner?

9 A Well, when you say independent, we each did it
10 independently ourselves, then we did it collectively as a part
11 of a committee.

12 Q I'll clarify. I meant in a manner independent from
13 any relationship with the director defendants in this
14 inaudible]?

15 A Yeah. Absolutely. Absolutely. I saw no evidence
16 of anything going on with them.

17 Q All right. Let's shift gears a little bit to turn
18 to the role of the SLC. I believe Exhibit TX107 is already in
19 evidence.

20 MS. BURTON: Brian, could you turn to that, please.

21 BY MS. BURTON:

22 Q If you need it bigger, just say so.

23 Do you recognize this document?

24 A Yes, I do.

25 Q And what is it?

1 A That's the board of directors of DISH kicking off
2 the SLC and what they wanted us to do.

3 Q Did it set forth the responsibilities and the powers
4 of the SLC? Turn to page 2, please.

5 A Responsibility and hours did you say?

6 Q Responsibilities and powers.

7 A Oh. Powers.

8 Q I'll talk up. If it sounds like I'm yelling, I'm
9 sorry.

10 A I think these masks are a problem, so -- and my
11 hearing isn't as good as yours.

12 Yes, it attempted to tell us what our powers would
13 be, and it -- I didn't and I don't think the other SLC
14 defendants saw this as any limitation to our powers.

15 Q Was there ever anything that you or one of the other
16 SLC members wanted the SLC to do that you lacked authority to
17 do?

18 A Absolutely not.

19 Q What was the SLC's objective?

20 A The SLC objective was we were -- we had to respond
21 to plaintiffs' complaint specifically, but we were broadly
22 looking at how could we be of service to DISH and if it was
23 taking money from director defendants for their breach of
24 fiduciary duty, we were happy to do that. I mean, not happy,
25 but we were ready to do that anyway.

1 Q Were you ever directed or asked to do anything in
2 connection with the investigation for the purpose of shielding
3 the defendants from personal liability?

4 A Absolutely not.

5 Q At the start of the SLC's investigation did you know
6 whether it would be in DISH's best interests to litigate the
7 claims you were investigating?

8 A No, I absolutely did not know at the beginning.

9 Q Did you believe during the investigation that the
10 SLC could litigate the claims if you decided it would be in
11 DISH's best interest to do so?

12 A You know, I'd tell you I personally didn't focus on
13 that. I personally was focused on the director defendants,
14 were they doing their job, were they doing it realistically,
15 whether it was a breach that would be subject to some
16 retribution, if they would have to pay the corporation. You
17 know, that came later, not really initially. I just wanted to
18 see what were they doing wrong, they must have done something
19 wrong.

20 Q Do you have a conclusion as to whether it would be
21 in DISH's best interest to pursue the claims in this action
22 today?

23 A Yes. I individually do, and, yes, and we
24 collectively came to the same conclusion.

25 Q How did you come to those conclusions?

1 A You know, at the end of our investigation, when we
2 had exhausted every possible thing we could think of, every
3 avenue, every email we could possibly look at, every person we
4 could possibly talk to we couldn't come up with anything that
5 we could see that was a breach of fiduciary duty by turning a
6 blind eye or some action that they took of the director
7 defendants. And so at the end of all that we individually
8 came to our own conclusions. We met, we talked it over, and
9 we explained to you guys what we wanted. We expected you to
10 write one memo that we would read and sign off on. Well, that
11 wasn't -- we had to do several of them before we got the one
12 that we thought the wording was exactly right on moving
13 forward.

14 Q Let's talk now about the process that the SLC used
15 to conduct its investigation.

16 A Okay.

17 Q How long did the SLC spend investigating?

18 A You know, I just looked that up. We kicked off in
19 May, and we were done by November 2018.

20 Q How many hours did you personally spend on the
21 investigation?

22 A Absolutely hundreds and hundreds of hours. I can't
23 say a thousand, but it was hundreds for sure.

24 Q At the outset of the investigation were there any
25 particular questions that you thought it was important for

1 the SLC to evaluate?

2 A That we hadn't evaluated you mean?

3 Q At the beginning of the investigation.

4 A Oh. Yeah, sure. There was some going into this. I
5 had questions before we even had our first meeting.

6 Q Yeah. What were those questions going in?

7 A You know, I'd come at it if I had the job what would
8 I have done and did they know about it, how'd they not know
9 about it, what was -- what were their actions. There's a lot
10 of trails on this thing, and I don't know how they could
11 possibly hide them from me. I want to go at them, let's start
12 asking some questions, talk to these guys and see what they
13 have to say, give them a chance to describe things, and we'll
14 go from there.

15 Q Did you think that DISH's disclosures surrounding
16 DNC issues to its auditors were particularly important?

17 A Yes, I personally did. I personally thought a lot
18 of the board actions -- you know, I actually lose track. So
19 to Chuck and George, if I take credit for something you did, I
20 honestly just don't remember who did them. The process would
21 go along and somebody would be talking and all that and I'd
22 write down some questions, and often one of those guys would
23 ask the question before me. So I lose track of who actually
24 asked it. I believe I'm the one who wanted to go after was a
25 reserve taken specifically. I think I'm the one who wanted to

1 go talk directly to the auditors, the outside auditor who was
2 there then, not even there now, and ask him some questions. I
3 wanted to see, you know, what was he saying about all this.
4 Weren't you paying attention? I would think some of this
5 would have got -- if they failed to take a reserve where they
6 should have, the outside auditor was clearly in breach, as
7 well. So I wanted to know all that.

8 Q Thinking more generally, what steps did the SLC
9 follow to conduct its investigation?

10 A Well, we talked about initially we assessed
11 independence. That was before we really dug into anything.
12 Then there was a variety of memos. Obviously the plaintiffs'
13 complaint was something we looked at right away, we had to get
14 at Krakauer. We met, we kind of -- and we kicked off
15 discovery of a lot of stuff and figured we had it all. We
16 weren't even close, but we thought we did. And we directed
17 the attorneys, who -- we had by then decided who we were
18 hiring. That's you guys. And we directed you guys to go
19 collect it all and let's get together and let's start setting
20 up the -- who we have to interview, the director defendants
21 individually, and let's get them all set up and scheduled so
22 we can get through it.

23 MS. BURTON: Brian, could you pull up Demonstrative
24 TX110, please.

25 //

1 BY MS. BURTON:

2 Q Does this look to you to be consistent with your
3 recollection of the SLC's investigation?

4 A Yes. These are the major things. There's obviously
5 a lot of minor ones, but, yes, this definitely is.

6 Q So let's start with the SLC meetings.

7 A Okay.

8 Q The demonstrative shows that you guys met 10 times.
9 Does that seem roughly accurate to you?

10 A I'm sorry. The demonstrative shows that I --

11 Q You met 10 times.

12 A Oh. What you call meeting 10 times, that's meetings
13 to have a -- define that for me, would you.

14 Q Ten meetings not including the interviews.

15 A Okay. So, yes, yes. It's going to show that. It
16 doesn't include phone calls, the many phone calls we had, but.
17 yes, it does.

18 Q Before each of these meetings did you look at
19 agendas for the meetings?

20 A Absolutely. We created -- every meeting had an
21 agenda. You guys generated them from what we told you and
22 added good additional things, as well. And we looked them all
23 over, made changes that we saw fit, and then we followed the
24 agenda and had the meeting.

25 Q To the best of your recollection what happened at

1 the SLC meetings?

2 A Can you be more specific on that?

3 Q Did the SLC members, for example, discuss the
4 questions that you were --

5 A Oh. Absolutely. Absolutely. We talked -- at the
6 meetings we talked about what we had learned from various
7 people we'd talked to, what we'd learned from the readings
8 that we did which we compared notes on with you guys, who
9 really dove extensively into those readings, and we -- it
10 always resulted in us saying, you know what else we gotta do,
11 we gotta get this; you know, there must have been an email
12 written about that, let's find the emails, I want the whole
13 trail of emails, somebody must have -- somebody had to say
14 something wrong. Or, you know, it was other documents that
15 were around. And for a long time every time we did something
16 we created more work. It didn't look -- it wasn't going down,
17 it was going up. We ultimately got to the point where we ran
18 out of stuff.

19 MS. BURTON: Can you please pull up Exhibit 108.
20 And then you're going to have to blow it up and scroll through
21 it a little bit.

22 BY MS. BURTON:

23 Q But do you recognize these documents, Tony?

24 A Let me start at the top. The fact that we're
25 showing an attorney-client privilege makes me a little

1 nervous, but I'll read -- give me a second.

2 THE COURT: They're allowed to waive it if they want
3 to.

4 THE WITNESS: I know. I know that, Your Honor.

5 MS. BURTON: We have not asserted attorney-client
6 privilege --

7 THE WITNESS: Those still make me nervous.

8 MS. BURTON: -- over the nonredacted portions of
9 these.

10 THE WITNESS: Okay. This is concerning one of our
11 meetings.

12 BY MS. BURTON:

13 Q Yeah. Do you recognize what those documents are?

14 A Not yet. We were discussing the draft for one of
15 our official meetings coming up. Looks pretty cookie cutter
16 to me so far.

17 Q Are these the minutes of the SLC's meetings?

18 MR. BARON: I guess I'll object to leading.

19 THE COURT: Overruled.

20 THE WITNESS: You know, I'd have to sit still a
21 little bit longer and have to read a little bit more. It does
22 look like it's minutes for sure, so --

23 BY MS. BURTON:

24 Q We'll talk it about sort of more generally. After
25 the meetings did the SLC have counsel document your meetings

1 in any way?

2 A Absolutely. We elected not to just throw more data
3 on the thing. We already had volumes of data, so we elected
4 that you guys would write up what were the real findings, what
5 was the substance that we had from those meetings and what
6 were we going to want to do next. So you guys wrote up some
7 concise views on that stuff that we thought got right to the
8 heart of it.

9 Q During the course of your investigation did you
10 receive advice of counsel, advice from your attorneys?

11 A From you guys we're talking about?

12 Q From us.

13 A Yeah. Absolutely got advice.

14 Q Without getting into the substance of the advice
15 that we gave you, what topics did the SLC seek legal advice
16 on?

17 A Well, the Nevada laws, which I clearly didn't
18 understand, and got into a lot more depth on what an SLC was
19 about. Initially Nevada laws about independence you guys
20 brief us on. You -- when we reviewed Krakauer you kind of --
21 we understood that the case had been settled and there was no
22 reason -- yes, there's an appeal, but just accept we don't --
23 it does not apply to what you guys have to do. And which we
24 agree. We accept Krakauer, what Judge Eagle said, we accept
25 every single word of it, and we went off and looked at what

1 are the director defendants doing in this period, what was
2 going on.

3 Q Did you get advice of counsel on the kinds of claims
4 that DISH might seek to assert?

5 A We knew what the claims were at that point, and we
6 knew there was treble damages. And, yes, we read through what
7 was the background on why the damages were trebled. That's
8 "treble," not "trouble." I know I'm not clear speaking with
9 this mask on.

10 THE COURT: No. The mask is hard for the
11 transcribers, believe me.

12 THE WITNESS: I bet it is.

13 MS. BURTON: Sorry you guys have got to work through
14 that during this time.

15 BY MS. BURTON:

16 Q Let's talk about some about documents. Did the SLC
17 request and review documents as part of your investigation?

18 A Yes. Tons of documents.

19 Q Let's turn to one of them. Can you please pull up
20 TX106.

21 A Yes.

22 Q Okay. Do you recognize this document?

23 A Yes. This is the plaintiffs' original complaint
24 that got the DISH board to create an SLC.

25 Q Have you read the plaintiffs' complaint?

1 A I read it extensively several times, yes.

2 Q When did you first read it?

3 A Almost two years ago -- it was two years ago.

4 Q How would you describe the claims in the plaintiffs'
5 complaint?

6 A Understandable. They want to know was the director
7 defendants guilty of breach of fiduciary responsibilities
8 either by knowingly doing what they did or directed or not
9 doing something, turning a blind eye to it. Understandable,
10 reasonable complaint.

11 Q Did the plaintiffs' complaint also have an aspect
12 related to insider trading?

13 A Yes, it did. It did talk about that, as a matter of
14 fact, yes.

15 Q And did the SLC investigate each of the claims that
16 the plaintiffs made in their complaint?

17 A Every single one.

18 Q Was your investigation broader than the plaintiffs'
19 complaint?

20 A It was just a start. I mean, we started on that,
21 and then you quickly realize, okay, so they said the right
22 thing or they didn't say the right thing, what's really going
23 on here. And we would dig in. So we'd listen. We'd listen
24 to them tell us the directions they'd given out, and we
25 checked did their people see that. And we in fact found memos

1 of this -- that direction going out. So we wanted to prove
2 each of those either right or wrong, but go into some depth,
3 not just accept what we heard on the first conversation with
4 somebody.

5 Q Why did the SLC investigate claims that weren't even
6 asserted in plaintiffs' complaint?

7 A Well, again, we were working for DISH. Yes, this is
8 -- handling this complaint is part of that, but we were
9 working for DISH. We want to know if there's something that
10 these guys have done they owe DISH some money on. So we
11 wanted to go deep on that stuff.

12 MS. BURTON: Could you please, Brian, take us to
13 page 3 and then blow up paragraph 3 so we can see it.

14 BY MS. BURTON:

15 Q So this paragraph references a case, Krakauer versus
16 DISH Network LLC at the bottom of paragraph 3. Do you know
17 what that case is?

18 A Do I know what what is?

19 Q What the Krakauer is.

20 A Absolutely.

21 Q Did you read the complaint -- did you read the
22 opinion that was issued in Krakauer?

23 A Several times, yes.

24 Q When did you first read the opinions?

25 A Again, two years ago. This was one of the early

1 documents for sure.

2 Q And could you turn now to page I think it's at the
3 bottom of 20 and top of 21, the last sentence of paragraph 49

4 A I'm looking at the bottom of page 19.

5 Q Yep. So here it references -- the plaintiff's
6 complaint references a case U.S. v. DISH Network LLC. Do you
7 see that?

8 A Yes.

9 Q Did you read that -- the opinion that they're citing
10 in their complaint?

11 A So starting at Bullet 49?

12 Q Yeah. Did you read the United States versus DISH
13 opinion?

14 A I did. Oh. You wanted me to read what was
15 highlighted.

16 Q No. I'm telling you the complaint cites the
17 opinion. Have you read that opinion that they're citing?

18 A Yes, I have.

19 Q Okay. When did you first read U.S. versus DISH and
20 Krakauer?

21 A It was less than two years ago, but it was out in
22 that time frame.

23 Q What did you do to try to understand those
24 opinions?

25 A Well, same thing we did on just about everything.

1 We -- I read it individually, I thought about it, I had some
2 questions or often wrote down my questions. We held our
3 meeting, we discussed it individually and then collectively
4 amongst ourselves and you guys as a party to the discussion.

5 Q Did the SLC accept the findings made in U.S. versus
6 DISH and Krakauer as true for purposes of your investigation?

7 A We accepted the findings of Judge Eagle's verbatim
8 of what she said, and we took that as fact. And somebody in
9 DISH did something wrong. That was clear from her opinion.
10 We wanted to know if it was director defendants. And that's
11 where we started and went down a few levels beneath them. We
12 didn't find the person who did it, but that wasn't our focus.
13 Our focus was the director defendants, so we wanted to get a
14 few levels below them to see if they would rat out the boss
15 hoping to get the boss's job or something.

16 Q Did the SLC consider whether the findings that were
17 made in those two cases were sufficient for DISH to obtain
18 money damages from the defendants?

19 A I'm sorry. Would you repeat that. Did they find --
20 say it again.

21 Q Did the SLC consider whether the findings that were
22 made in those two cases were enough for DISH to recover money
23 damages from the defendants?

24 A No. There was nothing -- there was nothing we could
25 find in the Krakauer case that referenced the director

1 defendants and whether they were guilty, innocent, or
2 anything. They were talking about DISH, and they absolutely
3 went and put findings together for DISH as being guilty for
4 these things. So, no, the question that we were created to
5 answer was what was the director defendants' role, what were
6 they doing while this was going on, was there something they
7 should have been doing. You know, did they turn a blind eye
8 was the bigger one, but, you know, their actions -- they drove
9 this stuff, they directed it, what were they doing.

10 Q Did the SLC look at information related to the
11 opinions?

12 A Related to?

13 Q Related to these cases, to U.S. v. DISH and to
14 Krakauer.

15 A Yes. Of course. I'm not sure what you meant by
16 that, though. I mean, we had -- I said we reviewed them, so I
17 think that encompasses that was the latest ones throughout the
18 whole thing.

19 Q So if we look, the complaint also referenced an
20 assurance of voluntary compliance.

21 A Right.

22 Q Did you review that assurance of voluntary
23 compliance?

24 A I did. And we did.

25 MS. BURTON: Could you pull up TX102 at page 2022.

1 BY MS. BURTON:

2 Q Is this the assurance of voluntary compliance that
3 you reviewed?

4 A Yes, it was. Yes, it is.

5 Q Yeah. If I call it an AVC, will you know that I'm
6 referring to those?

7 A That's what I call it, so, yeah.

8 Q Did the SLC try to understand what the AVC required?

9 A Sure. Sure. Absolutely. Individually and
10 collectively.

11 Q What did the SLC do to try to understand the AVC?

12 A We followed our general process. We read through
13 the documents, we got together. This -- we read it before we
14 got legal advice, but we wanted to know, okay, this is -- this
15 is a legal matter, what do we -- what's the legal implications
16 here going in. I honestly don't remember there being any, but
17 we did go through that. And we talked about it to each other.
18 We built on each other's stuff, and I'm sure each of us grew
19 to a new understanding, but, you know, again, I think back, I
20 don't remember what I went in with. I just, you know, was --
21 I agreed with what we came out with in total concept. I
22 didn't throw anything away.

23 MS. BURTON: Can you please turn now to Exhibit
24 TX102 at pages 14124 and then blow that up so they can see the
25 top of the document.

1 THE WITNESS: Okay. Yep.

2 BY MS. BURTON:

3 Q Okay. Do you recognize the document that we're

4 looking at from just the first page?

5 A Yes, I do.

6 Q What is this?

7 A This is the kickoff of our first kickoff of what

8 documents we wanted. And this is the result of one of our

9 discussions.

10 Q Can you --

11 A This is just a little bit of what we needed. We

12 thought we had it all here, but yeah.

13 MS. BURTON: Can you scroll down on this first page,

14 please, Brian.

15 BY MS. BURTON:

16 Q So you see here at line 10 it says, "Prior action,"

17 meaning U.S. versus DISH and Krakauer. I'm pointing it out to

18 you because it's going to be helpful to know this --

19 A Yes.

20 Q -- when we talk about the next page.

21 A Yep. Yep. Okay.

22 Q And I don't want you to be confused. All right.

23 Can you turn to the next page of the document, please. All

24 right. So let's talk about these document requests that you

25 sent.

1 A Sure.

2 Q So the first category is board materials. Do you
3 see that? Why did the SLC ask for board materials?

4 A So, you know, you can get confused here between the
5 responsibilities of somebody as their line duties as a direct
6 line manager and what happened at the board. But what
7 happened at the board was very critical in that did we -- we
8 want to know do all the defendants -- are they materially
9 liable. If there are one or two, we needed to dive down more.
10 And, you know, DISH is a big company, a lot of people, a lot
11 going on. And it's hard to believe, but this wasn't the
12 biggest thing the company had going on at the time by quite a
13 bit. And so we wanted to do that, and we did want to focus on
14 Charlie Ergen, David Moskowitz, and DeFranco, because they
15 played the biggest role in all this stuff and what were they
16 directing down below.

17 Q Did you get the emails of Mr. Ergen, Moskowitz, and
18 DeFranco from Mr. --

19 A We had a lot of their emails, yes, we did.

20 Q Did you review a bunch of those emails?

21 A Every single one.

22 Q Through counsel?

23 A Well, you brought them in. You got them for us,
24 yes.

25 Q Okay. And turn to the -- so the next category here

1 is legal materials.

2 A Uh-huh.

3 Q So the first category is the post-trial decisions
4 and orders issued in the prior actions. And that's the
5 Krakauer and U.S. versus DISH. Did you get those, receive
6 those?

7 A Did I get them? Yes, I did.

8 Q Yeah. Did you receive other materials from those
9 cases?

10 A Absolutely. We had a lot of materials on each of
11 them.

12 Q What are the other materials that the SLC requested
13 from those cases?

14 A Well, we wanted to know a lot about Kelley Drye and
15 what their input to this was. They were experts on the
16 process associated what we had to do with the -- forgetting do
17 not -- following the do not call stuff, and so we wanted to
18 read about that and ultimately get ready for when we would
19 talk to them. Let's see. What other materials?

20 Q Let's talk about Kelley Drye for a minute. Why did
21 you want to see the legal advice that Kelley Drye was given?

22 A You know, I know -- I heard Chuck. I know everybody
23 viewed them as legal advice. I didn't view it that way. I
24 viewed them as experts on the do not call stuff, and they had
25 a lot of suggestions. strong views on what process you should

1 put in place to ensure you're not violating that stuff. But
2 DISH had a much bigger view of this. I mean, DISH Rule 1 is
3 do not break the law. But Rule 2 is let's run a business
4 here. It is bad business to tick off your customers. And
5 this is ticking off the customers. That's why the government
6 made rule. A lot of people were getting very upset. I was
7 getting upset from other companies with calls I was getting.
8 So Kelley Drye had some views on that stuff, and I know DISH
9 adopted them, and that's why -- one of the reasons DISH
10 believed and Kelley Drye believed that DISH was the benchmark
11 on what they were doing for themselves on this.

12 Q What you're talking about is business practices.

13 A Business practices. Exactly.

14 Q Can you scroll to the next page, please. So this is
15 -- scroll to the top, please.

16 A This is what now?

17 Q Scroll to the top of the page, please. All right.
18 So Number 11 is the continuation of the legal materials.

19 A Yep. Yep.

20 Q Did the SLC collect emails from a number of DISH's
21 attorneys?

22 A Absolutely.

23 Q And why was that? Why did you want those emails?

24 A Again -- let's see. So the direction was given
25 don't violate any laws. Is anything the legal department's

1 doing that's trying to cover up for something, or are they
2 trying to drive compliance out? I mean, that's what we wanted
3 to know, are they driving compliance, are they trying to do
4 something else. And so we thought it was very important to
5 find out if -- was DISH knowingly violating the law at the top
6 end. Now, I'm not talking about down at the lower levels
7 where Judge Eagles determined that they were violating the
8 law, but at the top end what was -- what was the direction the
9 company was given in this. So it was a big deal for us.

10 Q So you drew a distinction between was DISH violating
11 the law and was the director defendants causing it.

12 A Absolutely. We accepted DISH violated the law.
13 There was no question about that, so that's already been
14 determined. So now you want to know how high -- was this from
15 the top of the company? You know, a Boeing Aircraft, Boeing
16 clearly looked like it came from the top, that they were not
17 following what they should have been doing. Was that what
18 DISH was doing? And that's what we wanted to know.

19 Q Why did the SLC request business materials as part
20 of its investigation?

21 A Frankly, it really looked like it was a bad business
22 deal. DISH exists -- they put stuff into somebody's home that
23 cost them a lot of money. Customer doesn't pay for all that
24 up front. They get that in relatively free. And then if the
25 customer is happy, they buy more programming, they keep the

1 contract. The longer it stays, then DISH starts to make real
2 money. Which obviously they did pretty good at. So it was a
3 bad business practice. Why are they allowing this to happen?
4 And, I don't know, independent of the law, why would you allow
5 that to happen? And DISH was driving things to try to make
6 that stop happening. In fact, their compliance was three
7 sigmas. I remember -- I think Judge Eagle found that was
8 three sigma on DISH's own actions and stuff they did, not the
9 agents or retailers.

10 Q Are you thinking now perhaps about U.S. versus DISH,
11 as opposed to the Krakauer case by Judge Eagles?

12 A It was only two years ago. I certainly could make
13 that mistake.

14 Q Did the SLC request any documents that it did not
15 receive?

16 A No. There was no documents we asked for -- there
17 was nothing we asked for we didn't receive.

18 Q So the SLC report says that the SLC's counsel
19 collected, reviewed, and categorized around 44,000 documents.
20 Does that sound accurate to you?

21 A It felt like a lot more than that, I'll tell you.
22 But I can believe that. I can believe it was 44,000.

23 Q About how many documents did you personally review?

24 A Well, I can tell you that's 10 feet on the wall of
25 my home study that my wife is not very pleased I've used up.

1 I mean, that's a lot of documents. That sounds like 44,000 to
2 me.

3 Q Let's talk now about the SLC's interviews.

4 A Sure.

5 Q Roughly how many interviews did the SLC conduct?

6 A Well, we could count them. They've got all listed
7 there. It's quite a few. I don't know, 15, 20. It was more
8 than 10. I know that. It was a lot. Well, first of all, we
9 started with all director defendants, and then you listed the
10 attorneys, and you didn't list some past employees that we
11 interviewed. There's a lot of them. I really don't remember.

12 MS. BURTON: Could we pull up TX111, the
13 demonstrative and just expand that.

14 THE WITNESS: Okay. So that's probably the whole
15 list. It feels like a lot more than that. Sorry.

16 BY MS. BURTON:

17 Q No worries. It often does.

18 A I'm not -- I don't see somebody's name that I find
19 missing, but I'm sure that's right.

20 Q This looks like an accurate list of the people the
21 SLC interviewed?

22 A It definitely looks like that.

23 Q Did you attend each of these interviews?

24 A I attended every interview except for the very first
25 one with Brandon, Brandon Earhart.

1 Q Was there anyone who you believed the SLC should
2 have interviewed that the SLC didn't interview?

3 A No. There was no one.

4 Q Did you have questions for the interviewers going
5 into these interviews?

6 A I don't think there was one of these I didn't have
7 questions. Like I said, I honestly can't remember where I
8 asked them or George or Charlie jumped in front of me and
9 asked them first. We -- far as I could see, we were on the
10 same path. I never was worried that I was upsetting them.
11 They seemed to be going in the same direction I wanted to go.
12 So --

13 Q You said Charlie. Did you mean Chuck Lillis?

14 A I meant Chuck, yes.

15 Q Great.

16 A Sorry.

17 Q No. Just trying to keep a clean record.

18 A Thank you.

19 Q You're welcome.

20 A Yeah. That one could be a bad mistake.

21 Q It could have been.

22 A Charlie was not in these meetings. Charlie Ergen
23 was not in the meetings.

24 Q What types of questions did you ask the interviewees
25 at the interviews?

1 A You know, again, you know, I come from my
2 background, so I'm asking them questions relative to the
3 operational aspects of this. So, you know, what did they do.
4 I tried -- I think we all tried to make them feel at ease so
5 they would feel free to tell us lots of things that maybe they
6 wouldn't have if they were a little more -- a little less
7 comfortable. And we generally had going into -- I know in
8 every one of these we had a set of questions we wanted
9 answered going into, and those were often asked by you guys up
10 front. And then they'd get the answers and then we would
11 chime in with additional ones that occurred to us at the
12 meeting. Always quite a few.

13 Q Was every question that you had going into the
14 interviews answered during the interviews?

15 A Actually, I would say I got an answer for every
16 question. I didn't accept every answer I got, and I'm sure
17 nobody else did, either. And that always drove us to have to
18 go down to other documents or things we wanted to look at.
19 So, yeah, I think at the end of all that -- I can't remember
20 anything that wasn't -- that I didn't have an answer to that I
21 was comfortable with.

22 Q What did you do to test the answers that you were
23 given?

24 A Well, I mean, it's a normal thing for how -- been in
25 business my whole life. I ask somebody a question, and I

1 think you do that here, and we, you know, listen to the
2 answer. A person answered a question either says something
3 that makes me feel a little nervous that they're holding back
4 on me, and you poke some more. Or it seems inconsistent with
5 something else I heard. That's a big one for me. And then
6 I've got to put the two together one way or another. So I
7 want to get the answers that I'm hearing, you know, if
8 operation's the same, Legal never told us that, and Legal
9 says, we told them that. Well, you know, there's going to be
10 some memos, so we're going to go dig up on those. I can't
11 remember that one every happening, but it probably did,
12 frankly.

13 Q Did you ask questions during the interviews about
14 emails that different people wrote?

15 A Did I ask questions in the interview --

16 Q Sorry. I'll restate it and louder.

17 A Okay. Great.

18 Q Did you ask questions during the interviews about
19 the documents that the SLC had collected?

20 A Absolutely. Absolutely. There was questions that
21 were triggered by those. Generally, as I remember, I think
22 you guys asked -- most of the questions I had for that part I
23 think you guys answered for us -- you asked for us, I mean,
24 and so the questions that -- you know, maybe there were some
25 that I had written or thought about beforehand I didn't tell

1 you and I'd asked from my readings and that. Others were
2 driven by what I heard in the interview and wanted to know a
3 little bit more than the answer they gave us, or, well, it
4 didn't make sense to me, et cetera.

5 Q Did Mr. Lillis and Mr. Brokaw ask questions during
6 the interviews, as well?

7 A Absolutely.

8 Q Do you believe that you and your counsel asked tough
9 questions to the individuals being interviewed?

10 A Absolutely. Absolutely.

11 Q What did you do to assess the truthfulness of the
12 people you interviewed?

13 A So you get a reading at the time they're answering,
14 and you may poke around it. And you reach a point in the
15 poking where you say, okay, that's all I'm going to get from
16 this person, let's go to the next level, let's find some more
17 documents or let's ask some more people. Documents were --
18 especially as we got down lower in the organization is really
19 what we were looking for in general. I mean, you could go
20 down and ask everybody in the entire company and we'd be here
21 for another years.

22 Q Did the SLC have a record made of the substance of
23 the interviews?

24 A You know, I should know the answer to that, but I
25 think we did. I think we had at least the major ones,

1 questions. I'm pretty sure of that. Did we have them all? I
2 doubt it. But I don't honestly remember. I have to go look
3 at the minutes and see them. Wouldn't take me long.

4 Q When you say the minutes, were those a written
5 record of --

6 A It's a written record after every meeting that we
7 had for what was the primary thing that we learned in that
8 meeting and where we wanted to go next.

9 Q And that included the interviews?

10 A Oh, yeah. Absolutely. Absolutely.

11 Q Why did you have what you're calling minutes
12 prepared of the interviews, rather than having them
13 transcribed?

14 A Well, I don't need more data. We want information.
15 So when you're dealing with volumes, 10 feet of paper, I don't
16 need more paper. What I need is tell me what is the key thing
17 that was said here, what is key, what have we got to follow up
18 on. So we wanted information. We want the information that
19 drives it and that would drive us, not restating everything
20 the person says often. You know, especially when you got to
21 the lower-level people it might take five, six questions
22 before you got an answer that was what you were really looking
23 for. That's what we wanted, the thing we were really looking
24 for.

25 Q Did you review the interview summaries that your

1 counsel prepared?

2 A Absolutely I did.

3 Q Did you comment on them?

4 A Absolutely. Absolutely. Generally -- a lot of them
5 I had questions on, you know, and I'd call one of you guys up
6 and you'd answer the questions for me. And sometimes that
7 would drive us to other things we would do or go get.

8 Q Were the final summaries substantially accurate and
9 substantially comprehensive?

10 A The final summary for the minutes?

11 Q From minutes, yes.

12 A Yes. Yes. They were very good. They were good.
13 They're more than good enough.

14 Q Did you take any notes of the interviews?

15 A During the interviews my notes were, I gotta ask
16 this question. So I wrote down what questions I wanted to
17 make sure I asked, because I couldn't -- I wouldn't always
18 remember them at the end there. Some of them went quite a
19 while. And my process ultimately became, you know, let's see
20 if somebody else asks those questions, too. Frankly, I'd have
21 the continuous -- continuously I'm evaluating everybody else's
22 independence, and if nobody's asking the questions but me, it
23 doesn't -- it should have got me nervous. And it would have.
24 And they had questions and they asked them, and I could check
25 them off and didn't have to ask the question myself. Then I'd

1 put some in myself at some point if there was more left.

2 Q At the end of the SLC's investigation what did the
3 SLC do to reach a determination on the merits of the claims?

4 A So when we finally got to the point where we really
5 had gotten down to absolute minutia in our mind that -- we'd
6 gotten all the big answers. What we want now is now we've got
7 to put all this together, and, you know, we'd have to answer
8 the plaintiffs' comments and we have to think ourselves, do we
9 have something that we should be going after director
10 defendants for on behalf of DISH. And we individually --
11 well, I can't speak for Chuck and George, but I absolutely
12 came to a conclusion, and once I got my conclusion -- and you
13 can probably convince me otherwise, but you're going to take
14 -- it's going to you some trouble, because we put a lot of
15 time into getting that conclusion. So I go into a meeting and
16 we start our conversations, and at the end of the
17 conversations -- we were a damn good team, we really were.
18 And a good team in discussions like that, at the end I can't
19 remember what was -- what was my original idea, or, was that
20 the one of the other guys or you guys, where did that -- I
21 don't know where that came from, I know that's what I believe
22 now, though. And I'd like to believe I believed that before.
23 But, you know, at the end of that meeting I couldn't tell you
24 who said what. I just knew what the final results were.

25 Q Did you talk about the evidence that the SLC had

1 gathered as part of that meeting?

2 A The evidence that the SLC had gathered as part of
3 the final? I'm not understanding you. When we were writing
4 the final report now you're talking?

5 Q At your final meeting where you're discussing your
6 determinations --

7 A Okay. Yes.

8 Q -- did you talk about the evidence the SLC had
9 gathered?

10 A In the final report you're talking about?

11 Q At your final meeting.

12 A Yeah. Of course we did. And we definitely talked
13 about all the stuff we'd gathered that would prove those
14 points. And given this is such a long time from when we put
15 that, you know, I had to think through what were the actual
16 biggest things that I saw at DISH that made me strongly
17 believe in this. And every time I looked at the list I can
18 add more to it. But that's still -- that is an important list
19 for me. I have things that really convince me. I'll give you
20 the biggest one. The biggest one is there was nobody in the
21 entire company that ever believed that they were responsible
22 to the level that Krakauer found them responsible for for the
23 retailers. They really felt retailers -- we want a retailer,
24 we don't want an agent. We want a retailer that can do the
25 work. We want to hire somebody that knows what they're doing,

1 they know their clientele. And so that's what they wanted.
2 They didn't know they were violating anything, because they
3 didn't believe it. I mean, that was a real big thing. But
4 there's a whole bunch of others, so --

5 Q I don't want to get into the substance of your
6 determinations --

7 A Okay.

8 Q -- for the purpose of this discussion.

9 A Sure.

10 Q Was there any evidence that the SLC ignored in
11 reaching its conclusions?

12 A Absolutely none intentionally. I mean, I don't
13 know, if there's one we missed, I'd be surprised. But I
14 suppose that's possible. It has to be possible. There's a
15 lot of stuff there. But there were no -- nothing
16 intentionally ignored for sure.

17 Q What questions were you trying to answer in your
18 deliberations?

19 A In our little?

20 Q In your deliberations.

21 A Oh. Our deliberations.

22 Q When you had this meeting what were you trying to
23 decide?

24 A Well, we wanted to answer questions that the
25 plaintiffs had asked for sure. So that was a big part. We

1 wanted to answer the questions of what were the director
2 defendants -- did they know this was going on and that we were
3 in trouble, did they know that and to what level did they know
4 it. Because when you get into the Moskowitz, DeFranco, and
5 Ergen, they of course knew some of it. At what level did they
6 know it? I mean, you know, we found, for example, that some
7 customers had written letters to Charlie directly complaining
8 about all these darn calls they were getting. And what was
9 Charlie's actions? Charlie's actions were swift. What was
10 happening to people that were violating -- when they found a
11 retailer that was violating, what'd they do? Well, they fired
12 them. They fired a lot of retailers. Was it an employee?
13 They fired a lot of employees who, you know, somebody's job
14 was to go sell and they were selling and figured they could
15 get away with it, so they tried some things, and when they got
16 caught they were terminated. You know, that's about as tough
17 as you can get. So --

18 Q When you were deliberating did you believe that you
19 had sufficient information to make a determination?

20 A Yes. Or we wouldn't have started the deliberations.
21 We absolutely felt that. I felt that for sure. I can't
22 answer for the other guys. I think they did, though.

23 Q How did the SLC document its conclusions?

24 A Well, we had a final report that we asked you guys
25 to write, and you wrote it and we edited and, you know,

1 probably drove you crazy. I mean, some of us were down to
2 real detail, that's not right, let's get the exact right words
3 on that. And George in particular was genius on that stuff,
4 so he did a lot of that work. I like to think Chuck and I
5 contributed a lot, as well, on the thought process and what
6 were the key things to say. And, you know, you could write
7 those up a hundred times and we could probably make that a
8 thousand-page report if -- but, again, we weren't looking for
9 more data, we were looking for information. That's what we
10 tried to put in it.

11 Q Did there come a point in time at which you were
12 comfortable that the SLC report reflected your determinations?

13 A Yeah. Absolutely. It was probably three iterations
14 before the end I was comfortable and nothing after that
15 changed my mind, so -- yeah, I'm not real fussy on words.

16 Q Did the SLC decide to provide a near-final draft of
17 its report to DISH's inside counsel?

18 A Yes, we did.

19 Q Why did you do that?

20 A Well, we didn't -- you know, we're here to help
21 DISH. We don't want to be disclosing some trade secrets.
22 And, you know, if -- and where our conclusion is actually
23 something DISH probably I suspect they were going -- the
24 people we were sending was their bosses, so they probably were
25 mostly happy, I would suspect. But I don't know. But we

1 didn't want to -- the bottom line is we did not want to give
2 the competition information on trade secrets that DISH was
3 doing. That defeated the purpose of us trying to help DISH.

4 Q Were you also trying to ensure that DISH's privilege
5 was preserved?

6 A Well, to me that's part of the trade secrets, but
7 yes. When I say trade secrets I'm not just talking about --
8 was not in this case talking about technical stuff at all,
9 business stuff, how they ran the business and all that. You
10 know, for all I know the stuff they had done from Kelley Drye
11 might have been trade secrets. I don't think it was, but
12 there's a lot of -- there's a lot of stuff like that.

13 Q Did DISH's inside counsel propose changes to the SLC
14 report?

15 A Did they what?

16 Q Did DISH's inside counsel propose any changes to the
17 SLC --

18 A Yes, they did.

19 Q Did any of those changes affect the SLC's
20 determinations?

21 A No, no. In fact, the changes -- this is client-
22 attorney privilege on the part of DISH, of course, but the --
23 so I'm not going to go too far on this. But the --

24 Q Do not go down that line.

25 A Okay.

1 THE COURT: You asked the question.

2 MS. BURTON: I asked -- I asked --

3 THE WITNESS: Your Honor, thank you.

4 MS. BURTON: I asked the question.

5 THE COURT: Why don't you rephrase your question.

6 BY MS. BURTON:

7 Q Did the changes, yes or no, affect the SLC's final
8 determination?

9 A Absolutely not in any way, shape, or form even to
10 the smallest level.

11 Q Thank you. Can you please pull up TX102. And
12 you're probably going to have to make that one bigger just
13 like everything else.

14 A This looks like our final -- you're going to ask me
15 what is this?

16 Q I am going to ask you what it is.

17 A Okay. Can I answer now?

18 Q You can answer now.

19 A This is our final report.

20 Q Have you reviewed the final SLC report?

21 A Absolutely.

22 Q Does it accurately describe your investigation?

23 A Absolutely does.

24 Q And does it accurately describe the issues that you
25 considered?

1 A It accurately describes the major ones. There was a
2 lot of other ones we considered that didn't merit getting to
3 this level.

4 Q Does it accurately reflect your conclusions?

5 A Yes, it does.

6 MS. BURTON: Thank you, Mr. Federico. I will now
7 turn you over to opposing counsel.

8 THE COURT: Mr. Baron, we have 15 minutes before
9 we're going to break. Use your time wisely.

10 MR. BARON: I don't know what that means.

11 CROSS-EXAMINATION

12 BY MR. BARON:

13 Q Good morning, sir. My name's Randall Baron. I
14 represent plaintiffs in this action.

15 You understood that the AVC specifically placed
16 responsibility on folks like Mr. Ergen and Mr. DeFranco to
17 supervise its marketers, determine if they were complying with
18 federal do not call laws, and discipline them or terminate
19 them if they failed to take steps to prevent violations of the
20 law? Did you understand that?

21 A I'd like to answer that with a sentence, I guess. I
22 can't answer yes or no now. I understand that they held DISH
23 and everybody in it accountable for that. It certainly
24 includes the names you mentioned.

25 Q Did you understand -- amongst those accountable did

1 you specifically understand that Mr. Ergen and Mr. DeFranco
2 were individually as officers or directors of DISH responsible
3 for supervising its marketers, determining if they were
4 complying with federal do not call laws, and discipline or
5 terminate them if they failed to take steps to prevent the
6 violations?

7 A Yeah. I'm not trying to play games with you, but I
8 don't remember that they specifically said them in particular,
9 though I think they did point out they wanted all the
10 directors specifically to be briefed on it, as I remember. So
11 -- but it certainly includes them.

12 Q Was part of your analysis in determining what to do
13 did you in any way consider whether Mr. Ergen and Mr. DeFranco
14 were directly responsible under the AVC?

15 A Absolutely we did that.

16 Q And you determined that they were; correct?

17 A And we determined that they were not.

18 Q That they were not responsible for complying with
19 the AVC?

20 A I'm sorry. I shouldn't have said that. They
21 absolutely were responsible for it.

22 Q Okay. And you are aware that Judge Eagles in the
23 Krakauer action specifically found that a fact that despite
24 the promises DISH made to the Attorneys Generals and the
25 compliance agreement DISH did not further investigate or

1 monitor SSN's telemarketing or scrubbing practices, in fact
2 DISH did nothing beyond telling SSN to use caution and to
3 remove the individual complainants from the call list? Are
4 you aware that Judge Eagles made that finding?

5 A Yes, I did.

6 Q Did you accept that as an actual fact, that that is
7 actually what happened?

8 A I accepted that as a fact and frankly an immaterial
9 fact as to what the senior people did. But, yes, that was a
10 fact.

11 Q That was a fact that DISH made no efforts whatsoever
12 to do anything beyond telling SSN to use caution and remove
13 the individuals complainants? You found that to be an actual
14 fact?

15 A So did I trip on information that would suggest that
16 DISH did do more than that? Yes, I did. Did I -- did that
17 play any role in my investigation of top guys? No, it did
18 not. So I accepted in terms of what we investigated that it
19 did not. I happen to know that there were fines paid. I
20 happen to know there was people that DISH tried to get
21 terminated, thought they got terminated. So, you know, I
22 could argue that -- but, you know, it didn't matter. It
23 didn't matter. We accepted that that stuff -- that if in fact
24 there was nothing that happened, that they did exactly the way
25 Judge Eagle said it, that it was that bad, well, that should

1 make it easy for us to find how the senior players had played
2 a role in that.

3 Q Listen to my question. Did you accept as a fact
4 that DISH, that means anybody at DISH, did nothing beyond
5 telling SSN to use caution and remove the individual
6 complainant from the call list?

7 A Yes.

8 Q That was a fact --

9 A Yes, I accepted that was a fact from the Krakauer
10 case.

11 Q So you --

12 A I was trying to answer more.

13 Q Okay. So in that -- was part your analysis then
14 that nobody at DISH did that, that included Mr. Ergen and Mr.
15 DeFranco also did nothing? That's what that conclusion --
16 what that means; right?

17 A No. They clearly did nothing. Absolutely I agree
18 with that wholeheartedly. They did nothing to go address SSN.

19 Q And you understood that under the AVC they
20 personally had a responsibility to do something; correct?

21 A Absolutely. The entire senior staff had a
22 responsibility.

23 Q So did you undertake an analysis that it would have
24 been a breach of fiduciary duty for somebody who had the
25 responsibility to do something but did nothing? Did you

1 undertake that analysis to determine if that was in and of
2 itself a breach of fiduciary duty?

3 A So that question was obvious in the plaintiffs'
4 writeup that that's what you were looking for. So, yes, we
5 absolutely went and looked at specifically that. Because,
6 frankly, I can understand how you would think or you'd come to
7 the conclusion that, geez, they must have done something,
8 didn't they do anything. And there's a lot of factors in a
9 big company of you're responsible for everything going on, a
10 lot of things that we haven't talked about that they did on a
11 day-to-day basis.

12 Q So you --

13 MR. PEEK: Let him finish.

14 THE COURT: Mr. Peek, he was done.

15 MR. PEEK: Okay.

16 BY MR. BARON:

17 Q So you specifically did determine that Mr. Ergen and
18 Mr. DeFranco -- or you did an analysis, I apologize, you did
19 specifically analyze that if Mr. DeFranco and Mr. Ergen did
20 nothing and were responsible for doing nothing, that that
21 nonetheless was not a breach of fiduciary duty?

22 A That's exactly right.

23 Q And that is somewhere in your report?

24 A Yeah. Because I remember, yes.

25 Q Okay. So your lawyers when they get up here on

1 redirect can show us where that is, because you can't tell me,
2 can you?

3 A Okay.

4 Q Okay. And just so that we're clear, the jury
5 verdict form in the Krakauer action specifically found that
6 SSN, System [unintelligible], was acting as DISH's agent when
7 it made telephone calls in violation of the TCPA? Do you
8 recall reading that?

9 A Yes, I do.

10 Q Okay. And you believed -- and you accepted that as
11 a fact; correct?

12 A I accept as a fact that they did find that.

13 Q No. That's not my question.

14 A Okay.

15 Q My question, as an absolute fact it is absolutely
16 true that SSN was acting as DISH's agent. That was the
17 finding of the jury. Did you accept that as an actual fact
18 that they were doing so?

19 A I accepted that's what they found.

20 Q That's not my question.

21 A I did not -- what I do not -- what I have -- what I
22 struggle with here is that I know DISH does not accept that --
23 to this day they struggle with that. They accept that they're
24 responsible for those people, but they don't feel they're
25 agents, they feel they're retailers. But they definitely feel

1 responsible. Frankly, it's in their best interest to be
2 responsible.

3 Q Okay. Were they agents? Was SSN an agent of --
4 from the perspective of your analysis did you determine
5 whether or not SSN was an agent of DISH during 2010 and 2011
6 when they made the phone calls?

7 A So what's the date of Krakauer? Once Krakauer came
8 out Krakauer said they were agents.

9 Q Yes.

10 A And I accept that Krakauer said they were agents.
11 They were agents.

12 Q So you agree that they're agents?

13 A I agree that's what the court says. I have no --
14 this one's an easy one for me. I'm not an attorney, so some
15 of this stuff gets rather [unintelligible] for me. But, yes,
16 I accepted an agent. It's the word to me.

17 Q It's really simple. In your analysis did you start
18 your analysis -- take your analysis from position they were
19 agents of DISH, SSN, or they weren't agents of DISH? Which
20 one was it?

21 A Well, we started with Krakauer, so we accepted them
22 as being agents.

23 Q And ultimately by the time you reached your
24 conclusion was the process done with you accepting (a) they
25 were -- SSN was an agent of DISH, or (b) SSN was not an agent

1 of DISH?

2 A I'm going to try to test my understanding here of
3 what you're looking for. So are you asking me did our
4 investigation look and say, given that SSN was an agent did
5 DeFranco and Moskowitz and Ergen, did they do everything they
6 were supposed to be doing in terms of holding up their
7 fiduciary responsibilities? Is that --

8 THE COURT: That's not what he asked you, sir.

9 THE WITNESS: Okay.

10 THE COURT: He asked you, since you said you assumed
11 that they were agents when you started the investigation, at
12 the end of the investigation, after your process went through
13 were they still agents, or did you reach a different
14 conclusion.

15 Right, Mr. Baron?

16 MR. BARON: Yes.

17 THE COURT: Okay.

18 BY MR. BARON:

19 Q As a basis for your ultimate conclusion.

20 A No, no. We definitely didn't reach a different
21 conclusion. We definitely did not reach a different
22 conclusion. We accept that they're agents from that
23 respective [unintelligible] in terms of our investigation for
24 sure.

25 Q Now, the judge in Krakauer also specifically held

1 that, consistent with the jury's verdict that these agents
2 violated the TCPA and SSN, was DISH's agent the -- was DISH's
3 agent the court found that SSN and DISH wilfully and knowingly
4 violated the TCPA. Did you understand that to be a fact that
5 Judge Eagles found in Krakauer?

6 A That DISH did that, yes.

7 Q Did you accept that as true --

8 A Absolutely.

9 Q -- that DISH wilfully and knowingly violated the
10 TCPA?

11 A Absolutely. DISH. You didn't say director
12 defendants, but DISH did do those violations, yes.

13 Q Okay. And at DISH did you analyze whether if DISH
14 could be held liable for wilfully and knowingly violating TCPA
15 that the people who could hold DISH responsible would only be
16 the senior management? Did you consider that?

17 A Sure, I considered that. I sure considered it. You
18 know, the senior management's responsible for everything
19 that's going on.

20 Q Did you --

21 A So, yes, they were responsible.

22 Q Okay. And that the inference and the strong
23 inference that could be drawn is that if DISH wilfully and
24 knowingly violated the TCPA, that you could infer from that as
25 a legal matter as part of your process that that would apply

1 to Mr. Ergen and Mr. --

2 MR. PEEK: [Inaudible].

3 THE COURT: It's not your witness, Mr. Peek. Now.

4 MS. BURTON: Objection. Substance.

5 THE COURT: Sustained. Also requires speculation.

6 Can you rephrase your question.

7 MR. BARON: Sure.

8 BY MR. BARON:

9 Q As part of the analysis that you took to determine
10 that, sure, DISH wilfully violated it but not Mr. Egan [sic]
11 and Mr. DeFranco --

12 THE COURT: Ergen.

13 MR. BARON: Ergen. Sorry.

14 THE COURT: I'm on my third DISH case. I know the
15 name.

16 MR. BARON: You know them better than I do at this
17 point.

18 THE COURT: Well, no, not really. But yeah.

19 MR. BARON: And I knew them earlier this morning.

20 THE COURT: You're getting tired, and we're breaking
21 in three minutes, so --

22 MR. BARON: Let me see if I can just get this line
23 out.

24 BY MR. BARON:

25 Q That Mr. Ergen and Mr. DeFranco, as the managerial

1 directors and officers in charge of the company and this
2 program -- let me withdraw that.

3 Did you in accepting that DISH wilfully and
4 knowingly violated the TCPA as part of your process try to
5 draw inferences that were appropriate from that finding?

6 A Yes. Now, you crossed this a few times, so I'm
7 going to just try a little bit extra to make sure I'm
8 communicating. I think the question you're asking me is,
9 given DISH in fact was knowingly and wilfully violating the do
10 not call laws as described in Krakauer, what -- and that
11 clearly means that Charlie Ergen and everybody below him are
12 included in that. Was there actions Charlie either should
13 have taken or turned a blind eye to that he didn't -- is that
14 the question?

15 Q No.

16 A Okay.

17 Q It was far more simple. Given that you know that
18 Charlie Ergen and in particular and Mr. DeFranco, who was
19 specifically in charge of that program that was in violation
20 of the TCPA wilfully, that therefore you should at least
21 consider inferring whether that means those two individuals
22 were wilfully liable?

23 A So that's -- that definitely is what we studied.
24 And that is -- that specifically is a difficult thing. So why
25 -- I mean, there's a bunch of whys. That's why we had so

1 extensive work on this, is --

2 Q Isn't it correct --

3 A -- did they do it? What were they supposed to have
4 done?

5 Q I'll ask this one question and then we can be done.
6 Isn't it correct that there is nowhere in your SLC report
7 where you even mention the word "inferences," reasonable,
8 strong, otherwise, with regard to whether or not the people in
9 charge of the program could be held liable for wilfully
10 violating the TCPA?

11 MS. BURTON: Objection. Substance.

12 THE COURT: Overruled. Can you answer, please. And
13 if you don't know, that's okay. This is not a memory test.

14 THE WITNESS: You know, I don't remember the exact
15 words. I do know we did it. I do know we thought we included
16 that. So -- and, you know, without pulling the report out I'm
17 afraid I couldn't tell you -- I could tell you why I don't
18 think they were. I could go on that for a long time and
19 without violating anything you said in fact about their
20 responsibilities. And -- but that's not the question, so --

21 THE COURT: See you at 9:45.

22 MR. BARON: Thank you, Your Honor.

23 THE COURT: Have a nice evening. If you have boxes,
24 you should take them with you, because we are in the age of
25 we're not supposed to touch anything. And I will have other

1 people here at 9:00 o'clock.

2 (Court recessed at 4:45 p.m., until the following day,
3 Tuesday, July 7, 2020, at 9:45 a.m.)

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INDEX

<u>NAME</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
<u>SLC'S WITNESSES</u>				
Charles Lillis	30/73	75	145/151	148/154
Anthony Federico	155	201		

* * *

EXHIBITS

<u>DESCRIPTION</u>	<u>ADMITTED</u>
<u>PLAINTIFFS' EXHIBIT NO.</u>	
1	85
2	82
6	91
23	92
50	157
102	49
104	50
105	50
106	38
107	40
108	47

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CERTIFICATION

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

AFFIRMATION

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

**FLORENCE HOYT
Las Vegas, Nevada 89146**

Florence M. Hoyt

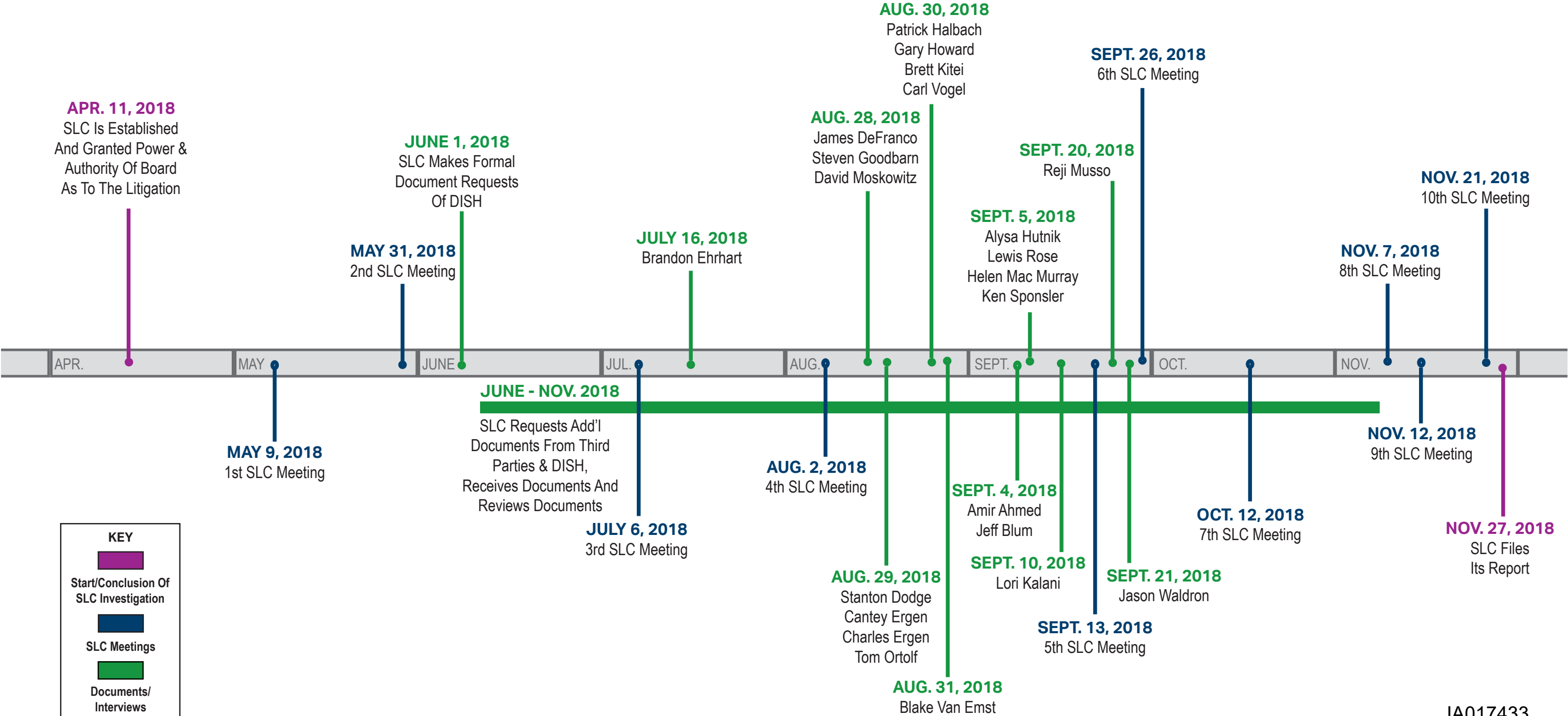
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7/7/20

DATE

SLC Demonstrative

CHRONOLOGY OF SLC INVESTIGATION



SOURCE: SLC Report at 24-25, 30-34.

JA017433

TX 110-000001

SLC Demonstrative

Interviews Conducted by the SLC

Interviewee	Relationship to DISH	Date
Brandon Ehrhart	Senior Vice President; Deputy General Counsel; Corporate Secretary	July 16, 2018
Steven Goodbarn	Former Director	Aug. 28, 2018
David Moskowitz	Director; Former General Counsel	Aug. 28, 2018
James DeFranco	Director; Various Executive Positions	Aug. 28, 2018
Stanton Dodge	Former General Counsel	Aug. 29, 2018
Tom Ortolf	Director	Aug. 29, 2018
Charles Ergen	Director; Various Executive Positions, Including President & CEO	Aug. 29, 2018
Cantey Ergen	Director	Aug. 29, 2018
Carl Vogel	Director	Aug. 30, 2018
Patrick Halbach	Vice President of Internal Audit	Aug. 30, 2018
Gary Howard	Former Director	Aug. 30, 2018
Brett Kitei	Inside Counsel	Aug. 30, 2018
Blake Van Emst	Vice President of Retail Services	Aug. 31, 2018
Amir Ahmed	Senior Vice President of Sales	Sept. 4, 2018
Jeffrey Blum	Inside Counsel	Sept. 4, 2018
Lewis Rose and Alysa Hutnik of Kelley Drye & Warren LLP	Outside Counsel	Sept. 5, 2018
Helen Mac Murray of Mac Murray & Shuster LLP	Outside Counsel	Sept. 5, 2018
Ken Sponsler of PossibleNOW, Inc.	Compliance Vendor	Sept. 5, 2018
Lori Kalani	Former Inside Counsel	Sept. 10, 2018
Reji Musso	Former Member of Retail Sales and Services	Sept. 20, 2018
Jason Waldron of KPMG	Outside Auditor for DISH	Sept. 21, 2018

JA017434

SOURCE: SLC Report at 32-47.

TX 111-000001