

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. 77 of 85

[JA017435-JA017678]

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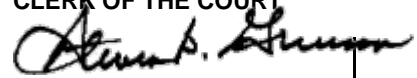
[Additional counsel appear on next page.]

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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 2

TUESDAY, JULY 7, 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.

JA017435

APPEARANCES:

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EMILY BURTON, ESQ.
BARR FLINN, ESQ.
CHRISTOPHER MILTENBERGER, ESQ.

1 LAS VEGAS, NEVADA, TUESDAY, JULY 7, 2020, 9:56 A.M.

2 (Court was called to order)

3 THE COURT: Sorry for the delay. We had some
4 questioned documents that were appearing to be lodged with the
5 court and it took longer than I anticipated for counsel to
6 lodge them with the court.

7 (Pause in the proceedings)

8 THE COURT: Come on back up. We've got to reswear
9 you. So, Dulce, if you could swear him in.

10 ANTHONY FEDERICO, SLC'S WITNESS, SWORN

11 THE CLERK: Thank you. Please be seated. Please
12 state and spell your name for the record.

13 THE WITNESS: Anthony Federico. F-E-D-E-R-I-C-O.

14 THE COURT: Thank you, sir.

15 Mr. Baron, you were in the middle of your
16 examination.

17 MR. BARON: I was.

18 THE COURT: Sir, if you need a break at any time,
19 you let us know, okay?

20 THE WITNESS: Okay. Thank you.

21 CROSS-EXAMINATION (Continued)

22 BY MR. BARON:

23 Q Good morning, Mr. Federico.

24 A Good morning.

25 Q Nice to see you again. In your analysis that you

1 undertook with the Special Committee, did you review or are
2 you familiar with the finding in Krakauer that said, "DISH did
3 not take any other steps to comply with the provisions of the
4 Compliance Agreement that it would monitor directly or through
5 a third party monitoring service its covered marketers to
6 determine whether the covered marketer is complying with all
7 applicable federal, state and local Do Not Call logs"?

8 A That does sound familiar. Yes.

9 Q And did you accept those facts as being true?

10 A We did. We did and I did.

11 Q And did you accept as part of that factual finding
12 as your analysis the concept that if DISH did not take any
13 other steps to comply with the provisions of the Compliance
14 Agreement, then by necessity neither did Mr. DeFranco or Mr.
15 Ergen? I said it right today. It's early, so I'm sure it will
16 change.

17 A You know, I'd have to answer -- it wasn't that
18 simple. Can I expand my answer on that? I can't give you a
19 yes or no on that.

20 THE COURT: Sure. Tell me your explanation.

21 THE WITNESS: Well, we certainly went and
22 investigated what actions that all the director defendants
23 did, including DeFranco, individually and collectively. So
24 we went looking for that stuff. That was key to our
25 investigations. And we didn't find any.

1 BY MR. BARON:

2 Q But my question was -- so, yes, did you as part of
3 your analysis -- and all I'm wondering of your analysis, did
4 you specifically say, well, if DISH didn't do it, then at
5 least I should consider whether or not Ergen and DeFranco
6 didn't do it as well, because of course they are the senior
7 officers at DISH? Was that part of your consideration?
8 Again, I'm not asking whether your consideration was
9 reasonable or not --

10 A Yeah, I understand.

11 Q -- just was that part of it?

12 A Well, we actually found things that they did do.
13 You know, there were strong actions taken by the company at
14 the highest levels before and after Krakauer. I realize there
15 wasn't an effect -- that Krakauer clearly found that the
16 company did not do it, so it didn't make its way to the
17 customer, obviously --

18 Q Okay.

19 A -- or the complainant.

20 Q But, so in that context was it indeed your analysis
21 that while the court in Krakauer found that DISH did not do
22 it, implying that nobody, including the senior officers at
23 DISH did actions in compliance, you just disagreed with that
24 because you found facts --

25 MS. BURTON: Objection --

1 MR. BARON: That you found facts?

2 THE COURT: Overruled.

3 THE WITNESS: No. I -- we didn't read -- when she
4 said that DISH did it, we accepted there was somebody in DISH
5 that did it. And we looked to see what was going on and,
6 frankly, we saw strong direction coming from several senior --
7 the director defendants, all three of the ones that were also
8 managing directors, we saw strong actions. So, you know, we
9 went looking for that but it was a little surprising not to
10 find that they had done something.

11 BY MR. BARON:

12 Q When you say not finding, you were looking for
13 smoking guns, you were looking for emails, something to that
14 effect; correct?

15 A We looked at emails. We talked to them about it
16 individually. We talked to them collectively. And we
17 interviewed the people that reported to them. We drove down
18 those lines pretty strongly.

19 Q And in connection with determining -- again, did you
20 in the analysis say, look, if DISH did not do that, then --
21 or DISH did not act, clearly that finding would be wrong if
22 you found that Mr. Ergen and Mr. DeFranco did comply; correct?

23 A That's not how we viewed it -- how I viewed it. As
24 senior manager, I gave a lot of directions and a lot of them
25 didn't cause the company to do anything different. So you can

1 have both. You can have the company going left and you told
2 them to go right, and apparently that happened here.

3 Q By the way, did you ever find -- overnight I don't
4 know if you looked back at your report, but did you ever find
5 any indication in your report where there -- or in the Special
6 Committee report that was issued where there was indeed an
7 analysis of whether or not specifically Ergen and DeFranco
8 breached their fiduciary duties in connection with the AVC?

9 A You know, I was -- I don't know if I can do this,
10 but I didn't -- you know, I went and I thought about your
11 question yesterday on that and I went and I looked at the
12 report and I saw things that were there that I thought it
13 would have said, yes, that says it.

14 Q Can you point it to me if I show you the report?

15 A Sure. If I looked at the summary. If I looked at
16 the summary specifically.

17 Q Could we?

18 THE COURT: You may.

19 MR. BARON: Could we pull up Exhibit --

20 MS. BURTON: 102.

21 UNIDENTIFIED SPEAKER: No, 6.

22 MR. BARON: No, we can pull up 102. That's fine.

23 If you could pull up 102. Thank you. Okay.

24 THE COURT: So, Ramsey, can you go clear the mark?
25 I'm not allowed to touch them anymore.

1 THE WITNESS: I can only guess why that is.

2 THE COURT: Yeah, because I can screw anything up
3 and blow up a thing just by touching it.

4 THE WITNESS: Yeah, me, too. There you go. It's
5 going. Can we look at the index? I think I can point out the
6 things in the index specifically on this. Frankly, that's
7 what I did last night was I took a look at the index. Or
8 actually this morning. If you could just go to the next
9 couple of pages, I think.

10 MR. BARON: If we could pull up through to the next
11 pages. All right. Just say flip if you would like it to go
12 to the next page.

13 THE WITNESS: Yeah, keep going. Go further, please.
14 So if I looked at iv, so number four, you'd see at page 139,
15 "DISH made DNC compliance a priority," so it was an action
16 they took.

17 BY MR. BARON:

18 Q So let's go to page 139. Can you show me on page
19 139 where it specifically says that DISH undertook an analysis
20 to evaluate whether or not Ergen and DeFranco were in breach
21 of their fiduciary duties in connection with complying with
22 the AVC?

23 A I'm sorry. I'm answering the wrong question. I was
24 answering the question what actions did Ergen and DeFranco
25 take.

1 Q No. My question, let me ask it again. You went
2 back and looked at the report yesterday. You said you
3 believed you undertook an analysis, a specific analysis to
4 determine whether Mr. Ergen and DeFranco breached their
5 fiduciary duties in connection with their obligations under
6 the AVC?

7 A Right. So what I see here is these were the actions
8 that they did take, that we verified that they did take by
9 talking to other people, checking memos and all that. So to
10 me that was them taking action that wasn't breaching their
11 fiduciary duty. That's not what you were looking for, though.

12 Q That's not. I'm looking for a specific analysis
13 over a particular claim that was in the complaint. Is there
14 an analysis that says Mr. DeFranco and Mr. Ergen did not
15 breach their fiduciary duties in complying with the AVC?

16 A You know, if I put the AVC, the AVC clearly is
17 talking about the lack of DISH following the Do Not Call laws
18 and managing their -- what DISH feels is their retailers and
19 others feel is the agents. And this kind of sets against that
20 in my mind. This specifically -- I mean, it was a huge thing.
21 We don't violate law. We don't break the law here. That's a
22 big deal. And this is -- violating DNC is breaking the law.
23 So I would have thought that was what you would be looking
24 for. That's what we were looking for, for sure.

25 Q Mr. Federico, it was a specific question of whether

1 or not when you sat down and did an analysis you said these
2 are the elements that would constitute a breach of fiduciary
3 duty of the AVC and these elements are either met, i.e., Mr.
4 DeFranco and Mr. Ergen were responsible? There is a fact that
5 I have accepted already that says that there was -- that no
6 one at DISH complied with the AVC, and therefore these people
7 in charge were then in breach of fiduciary duties. Did you
8 undertake that analysis?

9 A You know, I would have thought this was it, so I
10 would have said yes to that. But you don't see this as taking
11 that analysis. You have a different view of what you would
12 have liked to have seen done, I guess.

13 MR. BARON: Let's pull up another quote, if I could.
14 If you would, please, Brian, Plaintiff's Exhibit 1, which is
15 the Krakauer written opinion, at least he version that we're
16 using. Could you go to page 8 of 12? In the right-hand
17 column there is a paragraph that starts, "The Evidence" under
18 Agency.

19 THE WITNESS: Can this be enlarged?

20 MR. BARON: It will be.

21 THE WITNESS: Thank you.

22 MR. BARON: There you go.

23 BY MR. BARON:

24 Q Now, again, you read this opinion and reading this
25 paragraph it says, "The evidence at trial persuasively

1 demonstrated that SSN was acting as DISH's agent and was
2 acting in the scope and course of that agency when it made the
3 calls at issue, and the jury so found." And then it goes on
4 to say, "DISH had substantial contractual rights to control
5 SSN's telemarketing activities and DISH represented to 46
6 state Attorneys General that it had control." Did you accept
7 that as being true?

8 A We did.

9 Q And, "DISH was aware of SSN's long history of TCPA
10 violations." Did you accept that as being true?

11 A Accepted that being true. Yes.

12 Q And, "Within a year of the beginning of the class
13 period and again at the beginning of the class period, DISH
14 knew SSN was calling numbers on the registry and that SSN was
15 using lists of numbers that it had not scrubbed." Was that
16 true?

17 A Yes, it was. We accepted that as true.

18 Q And then, "It took no action to monitor DISH's
19 compliance with telemarketing laws and effectively acquiesced
20 in SSN's use of unscrubbed lists." You accepted that fact as
21 true as well?

22 A Absolutely.

23 Q All right. Did you acknowledge in that factual
24 finding that DISH had the opportunity, including Mr. Ergen and
25 Mr. DeFranco, to specifically say, yes, maybe all of that

1 happened, but we believed that there was no agency so we had
2 no responsibility? Did you in your analysis understand that
3 to be a fact?

4 A Your questions are a little long for me, so I'm
5 going to try to say it, if I could --

6 Q I'll try and break it down. I'm not trying to trick
7 you. So if you ask me to rephrase, I'm happy to.

8 A Well, no. I think you asked me did I accept that
9 DISH did not accept that these agents, as it says here, were
10 agents and they felt they were retailers, and the answer is
11 yeah, DISH clearly felt they were retailers and they were not
12 directly responsible for them.

13 Q Well, I think I'm asking you slightly more because,
14 again, my question isn't how you [unintelligible]. I want to
15 understand whether or not things were part of your analysis.

16 A Part of what?

17 Q Part of your analysis. So I want to make sure that
18 as part of your analysis you considered the fact that prior
19 to this finding of fact that you accept as true, that DISH's
20 defense at this trial was, hey, that may have happened but we
21 didn't think we were agents, so therefore we're not
22 responsible.

23 A I think I understand now what you're asking me. So
24 let me see if I got it. If I don't rephrase it a little bit,
25 I just -- I don't prove to myself that I understand your

1 question, so that's why I'm doing this. It's not anything
2 that you're doing wrong. So I think what you're wondering is
3 how could DISH's directors, the director defendants have --
4 what did they do that was driving this in a different
5 direction to be in compliance with the AVC laws.

6 Q No.

7 A No? Okay.

8 Q That's not it.

9 A I guess I still don't get it. Okay.

10 Q Again, my question isn't what you found. My
11 question is very simple, what you considered, right. And my
12 question was, In your analysis and accepting these facts as
13 being true --

14 A Yeah.

15 Q -- did you consider the fact that DISH's defense to
16 this agency claim was, well, we didn't believe we were agents
17 so therefore we are to not be liable for what these people
18 did? Did you understand that to be their defense?

19 A That was part of their defense.

20 Q Okay.

21 A There was more to it than that because they -- DISH
22 was giving directions. They were managing -- their view of we
23 should be able to manage a retailer to get them to stop doing
24 this stuff. This is not what we want them to do. It wasn't
25 good for DISH's business, either. They didn't want that to

1 happen. So --

2 Q Again, all I'm trying --

3 MR. PEEK: Can he --

4 THE COURT: It's not your witness, Mr. Peek.

5 But it would be really nice if you let the witness
6 finish his answers because I know he's not law trained, so
7 he's in a not familiar court setting, so let's give him the
8 benefit of the doubt when he pauses to finish his answer.

9 MR. BARON: Fair enough.

10 THE COURT: Okay.

11 MR. BARON: I apologize.

12 THE COURT: It's all right.

13 Did you have something else you were trying to add,
14 sir?

15 THE WITNESS: I think we got the end of it. Thank
16 you, Your Honor.

17 THE COURT: Okay. But I need not two people to talk
18 at a time, because it's really hard for Flo to do a transcript
19 for Mr. Peek, who's demanding it constantly --

20 MR. BARON: And it's really --

21 THE COURT: -- if I've got two people talking at a
22 time.

23 MR. BARON: And it's really rude of me and I didn't
24 mean to be so.

25 THE COURT: It's all right.

1 BY MR. BARON:

2 Q So given that it was their defense, again, did you
3 consider the fact that all of the information that you used to
4 ultimately come to the determination that you didn't believe
5 that Ergen and DeFranco and others did not believe that they
6 were in an agency relationship with SSN, that those very same
7 facts were available as part of that very trial in Krakauer?

8 A Absolutely. I think the fact that they didn't
9 believe they were agents doesn't mean they weren't driving
10 actions to try to get them to stop doing this stuff.

11 Q Again, I don't want to miscommunicate here.

12 A Okay.

13 Q I'm not asking what you tried to conclude and your
14 answers keep on saying what you determined and what you think
15 the facts are. That's not what we're here for. I'm just
16 trying to make sure that when you came to your conclusion that
17 you believed that Mr. Ergen and Mr. DeFranco did not really
18 believe that they were agents, did you consider in part of
19 that conclusion the fact that that same information, whether
20 it was based on advice of counsel, memos, whether it was based
21 on other court opinions, whether it was based on your talking
22 to them about their personal belief, all of that information
23 was available to be used at the trial in which the jury found
24 the opposite, that they were in fact agents?

25 MS. BURTON: Objection.

1 THE COURT: Sustained.

2 MS. BURTON: It's contrary to the record from
3 Krakauer, also.

4 THE COURT: We want to do procedure; process, not
5 substance.

6 MR. BARON: I am.

7 THE COURT: No, you're not. You're asking what it
8 was based on. That's substance. What you want to know is
9 what the process was that he got to that. What investigation?
10 What additional information did they try to do to determine
11 that the Krakauer was not accurate.

12 MR. BARON: Yeah. And to that I want to understand
13 whether or not they reviewed the information and had an
14 understanding --

15 THE COURT: And that's process.

16 MR. BARON: Huh?

17 THE COURT: You've got to phrase it as process. I
18 need you to focus on that, Mr. Baron. I'm really sorry, but
19 that's what the Nevada Supreme Court has outlined as the
20 primers I'm allowed to use.

21 MR. BARON: And I agree with you. And again, what
22 I am trying to -- what I think the process means is whether
23 you undertook not only reviewing the appropriate documents,
24 but you undertook the appropriate analysis into the
25 appropriate areas. What you concluded is not what I'm --

1 THE COURT: That's a blended. It's okay. So as
2 long as we can focus on the process, including the analysis
3 the Special -- the SLC made is part of the process; not the
4 actual analysis but the fact they did something as part of
5 their analysis.

6 MR. BARON: And that's all I'm asking. I'm asking
7 as part of your --

8 THE COURT: But your questions are not as straight.
9 I need them to be more focused.

10 BY MR. BARON:

11 Q As part of your analysis, did you look at the record
12 of what was argued and provided in connection with the
13 Krakauer case in order to determine whether or not they had
14 the opportunity to make all of the same arguments that you
15 looked at to determine that you thought that Mr. Ergen and
16 Mr. DeFranco did not believe that they were agents? Was that
17 better?

18 A I can't say that we looked at why things that the
19 director defendants were doing -- in fact, we did not do this.
20 I didn't do it, anyway. I did not look at the things that we
21 saw the director defendants were doing and asked the question
22 why wasn't that presented in the Krakauer case. I did not do
23 that.

24 Q Or whether it was or was not; correct?

25 A Or was or wasn't, because I don't really -- you

1 know, I know what the judge said they didn't do and I accepted
2 that. I didn't go chase down, well, why didn't -- why didn't
3 our defendant attorneys say this or that. You know, first of
4 all, it's not my background.

5 MR. BARON: Let's move to -- I think we're close to
6 being done. Let's move to -- pull up TX105 at page 435 of
7 475, please.

8 BY MR. BARON:

9 Q And if you would take a look at --

10 MR. BARON: Would you highlight where it says --
11 the second full sentence starting, "DISH initially hired" all
12 the way through "could." Thank you. Would you blow that up
13 for me, please.

14 BY MR. BARON:

15 Q In the U.S. v. DISH case, you read and accepted as
16 an actual fact that was found by the court that "DISH
17 initially hired order entry retailers based on one factor, the
18 ability to generate activations. DISH cared about very little
19 else. As a result, DISH created a situation in which
20 unscrupulous sales persons used illegal practices to sell
21 DISH programming any way they could." Do you see that?

22 A I do see that.

23 Q And again, that was a factual finding by the judge
24 in Illinois.

25 A Yes.

1 Q And you accepted that as a fact?

2 A I accepted as a fact that that's what was visible
3 outside of DISH and that there's people that must have done
4 that stuff. But I don't know if I'm off based again, but.

5 Q Did you accept as a fact -- again, as part of -- in
6 order to [unintelligible], did you accept as a fact that DISH
7 created a situation in which an unscrupulous salesperson used
8 illegal practices to sell DISH programming any way they could;
9 that DISH actually created the situation?

10 A You know, my only hesitation in saying yes is that
11 we went after this and we dug down pretty deeply beyond the
12 director defendants because, frankly, that would be such a bad
13 business practice. It would kill us. I'm not the only one
14 who was upset with a business practice that would suggest they
15 did that. And so --

16 Q Again, you're entitled to accept it or --

17 A -- it wasn't what we saw --

18 THE COURT: Wait. You've got to let him finish.

19 THE WITNESS: It wasn't what we saw as coming down
20 from the director defendants or the director defendants
21 knowing at any time that that stuff was happening. We
22 couldn't find that.

23 BY MR. BARON:

24 Q No one here is saying that you have to accept it or
25 reject it. I just want to know which one it was as part of

1 your process. Did you accept as true DISH created a situation
2 in which unscrupulous salespersons used illegal practices, or
3 did you say, yeah, the court said that, I just think it's
4 false?

5 A No, it's not -- No, I accept it. I absolutely
6 accept it. You know, the results say that in some cases and
7 that was just very, very upsetting to us. It wasn't good
8 business practice independent of the law.

9 Q And did you investigate as part of your practice
10 what DISH did to actually create that situation of the fact
11 that you accepted as true?

12 A I can't say that we did that. I cannot say we did
13 that. We were accepting this. We weren't trying to come up
14 from the bottom to find out, you know, so who is it that told
15 them that? Why weren't you doing it? I mean, we asked those
16 questions but at a higher level than the person who was hiring
17 these people, obviously, and managing them and directing them.

18 Q Okay. So the answer is no, you did not specifically
19 as part of your investigation --

20 A We did not -- we did not go --

21 Q -- seek to determine in what manner DISH created
22 that situation?

23 A We did part of that, right? We looked at what the
24 directions were that were given. We did not look at where the
25 execution was on that. And it's between the directions and

1 the execution where a lot of the problems came up here, it
2 looks like -- looked like to me, anyway.

3 Q Did you in part of your analysis consider that if a
4 court did determine that DISH created a situation in which
5 unscrupulous salespersons could be used, that that issue could
6 be used as collateral estoppel in a case against Mr. Ergen and
7 DeFranco?

8 A So I know this came up yesterday, the collateral
9 word. I struggle understanding it, much like Chuck was, okay.
10 I need a --

11 Q And that's fine.

12 A When you say collateral, does that say it's a
13 financially material issue or not?

14 THE COURT: No, sir. It's a legal term that says
15 if something has been tried by the parties or their privities
16 before, the parties or privities are bound in a subsequent
17 action, even if they were actually right there. How's that?

18 THE WITNESS: So it's a question of the attorney's
19 actions?

20 THE COURT: No. It's a judicial finding that
21 somebody is bound to another ruling.

22 THE WITNESS: Okay. Okay, I got that.

23 BY MR. BARON:

24 Q And I was planning to break this down twice. One
25 is whether you have a specific recollection of undertaking the

1 analysis on collateral estoppel. And I take it using those
2 words, you don't recognize those words so you don't recall
3 doing that analysis. Is that a fair statement?

4 A Yeah. You'd have to be more specific on what action
5 because I certainly am not familiar with the other cases
6 you're probably referencing.

7 Q And I will break it down --

8 A Great.

9 Q -- because I don't want to -- Not recognizing the
10 phrase collateral estoppel, so it's fair that you don't recall
11 there being a specific analysis that the Special Committee
12 undertook regarding the effect of collateral estoppel on a
13 subsequent action. Is that fair? Using that word.

14 A I can't use the word collateral estoppel. If you
15 added another word after collateral. What does that mean? I
16 don't know what that means.

17 Q That's fine. And then -- so now using I think the
18 description that the judge used or something near that, did
19 you have a specific -- did you undertake a specific analysis
20 of the effect that a prior legal finding by a judge or a jury
21 on the facts would have in a subsequent case against Mr. Ergen
22 and DeFranco or any other officers?

23 A No. When it came to prior court cases and that, we
24 really depended -- I depended on our legal people telling us
25 that -- what the law was, and the law of course is often

1 generated by what happened in previous cases. So if I missed
2 something there, then, yeah, I missed it because it's not --
3 I just didn't get into all these other cases. We had good
4 advice on a lot of them like that.

5 Q One last item that I'd like to talk to you about as
6 far as involved with this.

7 MR. BARON: Can you pull up TX105 at 462, please.
8 And would you please blow up in the middle paragraph, "The
9 evidence."

10 THE WITNESS: What document is this out of?

11 MR. BARON: This is also the U.S. v. DISH.

12 THE WITNESS: U.S. v. DISH. Okay.

13 MR. BARON: Could you pull up, "The court is also."
14 This is the paragraph and highlight, "The court is also
15 seriously concerned with." The entire paragraph.

16 BY MR. BARON:

17 Q And this is a finding of fact from U.S. v. DISH and
18 it starts off with, "The court is also seriously concerned
19 with the most recent evidence that showed that DISH continued
20 to show little or no regard for consumer complaints about the
21 order entry retailer practices." Did you, again, accept this
22 fact that it was true that DISH continued to show little or no
23 regard for consumer complaints about the order entry
24 retailers? Did you accept that as being a fact as part of
25 your analysis?

1 A Yes.

2 Q And similarly, did you accept as a fact that
3 Satellite Systems' calling records showed that Satellite
4 Systems made 381,811 registry calls in 2010 and 2011? Did you
5 accept that as a fact?

6 A Yes.

7 Q And did you understand when accepting this as a fact
8 that registry calls meant calls on the Do Not Call list?

9 A You know, I can't honestly say I remember looking at
10 it like that, but I did hear the discussion yesterday and I do
11 realize today that that is what meant, yes.

12 Q Okay. And that there was a letter, a form letter
13 drafted by the legal department that was a standard go after
14 Satellite Systems letter, described by the court as being
15 fundamentally a letter that said, Go away, it's not our
16 problem, go after Satellite Systems. Did you accept that as
17 a fact that indeed DISH's general counsel prepared a letter
18 that said, Go away, it's not our problem, go after Satellite
19 Systems?

20 A Very upsettingly, I did accept that and did know
21 that.

22 Q What do you mean by very upsettingly?

23 A Frankly, it was a stupid letter. I don't know how
24 else to interpret that. I'm sorry, I don't know if any of the
25 guys are here that wrote that, but that wasn't the way you'd

1 want to drive a change into the system.

2 Q And did you read --

3 A And I think DISH recognized it was a mistake and
4 tried to recover later.

5 Q Did you read that letter?

6 A You know, I never -- I don't remember seeing the
7 letter directly. I may have. I probably did, but I don't
8 remember it now.

9 Q Okay. And did you specifically investigate whether
10 that letter was undertaken by the legal department on their
11 own or whether the legal department undertook that process by
12 talking to either Mr. Ergen or Mr. DeFranco or anyone else?
13 Did you look at that?

14 A In a backhanded way, yes. We looked at the
15 directions that were coming from Mr. Moskowitz in these areas
16 and clearly this was not where he was driving for stuff. So
17 I'm telling you, the business side couldn't tolerate this.
18 So it looked to me like somebody down in the organization made
19 a mistake. I can't believe anybody senior in any capacity at
20 that company would have directed that to happen. I mean, it
21 was a very dumb thing to do.

22 Q So in 2000, Mr. Moskowitz was general counsel until
23 2007; correct?

24 A I don't remember the dates. So that would have been
25 not Moskowitz at that point.

1 Q Yes.

2 A Okay. So I still would repeat everything I said.
3 It just would have to be Stanton Dodge at that point, I
4 believe.

5 Q Did you specifically investigate to what extent a
6 fiduciary, any fiduciary, whether it was Mr. Ergen, Mr.
7 DeFranco or anyone, was aware of the fact that the legal
8 department prepared a go away letter?

9 A I think what I was looking at was a higher level
10 than that, a broader level. To me this was -- you know, we've
11 got a lot of attorneys who do a great job, and I knew that
12 there was directions, very strong direction. People were
13 terminated instantly for doing something that even suggested
14 a violation of the law at DISH. So that wasn't the culture.
15 I mean, and there was nobody -- we poked at that at a lot of
16 levels. Everybody knew that wasn't the culture. So -- and
17 when I -- something like this, it still irritates me. It's a
18 clear business mistake to do this, to run this way. It's
19 killing -- in my mind, the company loses doing stuff like
20 this, independent of the legal price.

21 So remember now, we're looking at DISH and the
22 director defendants and we're looking at them not just for
23 your complaint, we're looking at them what did they do. Did
24 they do something that stockholders can and should go after
25 the director defendants individually for what they did. So

1 it's broader than what you're saying. So that's -- on a
2 personal basis I thought I had some expertise to help with it.

3 Q And I think the answer is no, but I want to clarify
4 based on what you just said. Isn't it accurate to say based
5 on what you said that you did not in your analysis determine
6 whether or not this -- the preparation of this go -- or not
7 our problem, go away letter was indirect contravention of the
8 obligations that were set forth in the AVC?

9 A I think we did. I think we did do that.

10 Q You did do that?

11 A It clearly is in direct conflict, if that's what
12 you're asking. And I think we --

13 Q And you did an analysis of that?

14 A Again, the analysis we came at was what was coming
15 down. We're focused on the director defendants, so we're
16 looking at what directions were they giving and did it drive
17 any of these, many things that could have been done a whole
18 lot better. So I'd say, yes, we did the analysis. We did it
19 from the other side because we're focused at the director
20 defendants. And I didn't answer your question again. Sorry,
21 I didn't -- I'm not meaning to evade them, I'm just trying to
22 be truthful here.

23 Q Again, the answer (sic) was, Is there somewhere that
24 I can look at in the report where it says you undertook the
25 analysis, you acknowledged that this letter was or was not a

1 direct breach of the AVC and therefore -- but that does not
2 result in a potential claim for breach of fiduciary duty?

3 MS. BURTON: Assumes facts.

4 THE WITNESS: You know, I -- I'm sorry.

5 MS. BURTON: Objection.

6 THE COURT: Overruled.

7 MS. BURTON: Thank you.

8 THE COURT: Okay. Keep going.

9 THE WITNESS: I can't say that at that level that I
10 did it. It was a broader level that my focus was in.

11 BY MR. BARON:

12 Q Only one more line of questions and it doesn't have
13 to do with the investigation, it has to do with your
14 independence. And I just want you to explain to me, did you
15 think it was odd that the person who asked you to be on the
16 Special Committee was the person that was being investigated?
17 When Mr. Ergen came to you to be on a special committee, that
18 it was a special committee that was investigating him?

19 A Actually, I thought that would be the right way to
20 do it. You have a significant owner of the company and he
21 wants things fixed up and if there's a problem he wants it
22 fixed. He's the one losing the money on this more than
23 anybody, right? He's got both sides. He has more at stake
24 on the stockholder side than he did in the direction side.

25 Q He has more -- he has -- you know, he has the

1 greatest interest in getting somebody who will agree not to
2 sue him?

3 A See, I didn't see it that way. I really didn't. He
4 wants what's best for the shareholders more than any public --
5 any non founder-run public company.

6 Q Did you understand when he approached you that he
7 could personally be on the hook for as much as \$340 million?

8 A Yeah, sure.

9 Q You understood that?

10 A Yeah. It was huge amounts of money.

11 Q And Mr. Ergen would not be motivated in any way to
12 want to get out from under liability from that?

13 A Okay, sure.

14 Q You didn't consider that at all?

15 A Well, you're absolutely right. My actions could
16 have very much upset him. It could have cost me my stance --
17 my being on the board of EchoStar. I didn't care, frankly.
18 I can't do both. I have to focus on -- every time I open my
19 mouth during a board meeting I risk alienating him and others.
20 I can't live like that. I don't live like that.

21 Q Every time you open your mouth you don't risk him
22 paying \$340 million out of his pocket; right?

23 A Actually, some of the things I would have done
24 probably were of that -- were of a nature big enough to have
25 cost the company that kind. And I got overruled correctly, so.

1 Q But not Mr. Ergen personally?

2 A Sometimes by Charlie himself, yeah, he would

3 overrule me. And then I'd sit and I'd think about whether I

4 did the right thing or not.

5 Q And one more question on --

6 THE COURT: How many times are you going to have

7 more?

8 MR. BARON: Well, one more line. I keep doing that

9 line.

10 MR. PEEK: That's about the third time, Your Honor.

11 THE COURT: Yeah, this is like the fourth time you

12 said one more area, one more line, you know. Okay.

13 MR. BARON: Fine. I'll stop.

14 THE COURT: No, it's okay. You can keep going.

15 We're all going to give you a hard time because I'm going to

16 give Peek and his team a hard time, too, so it's got to be

17 even.

18 MR. BARON: All right. That's fair.

19 BY MR. BARON:

20 Q How long -- when did you learn that -- well, let me

21 ask you this. Did Mr. -- did you know that Mr. Brokaw was --

22 had been determined by the California Supreme -- or the Nevada

23 Supreme Court to be not sufficiently independent to

24 investigate Mr. Ergen and --

25 MS. BURTON: Objection.

1 THE COURT: Actually, that was me.

2 MS. BURTON: It misstates the prior findings.

3 THE COURT: Wait. No. Actually it was me who made
4 that determination.

5 MR. BARON: I'm still reading from the supreme court
6 opinion, though, that accepted that.

7 THE COURT: Yeah, well, I just got affirmed.

8 MS. BURTON: Objection. Misstates the supreme court
9 opinion.

10 THE COURT: Overruled. Okay.

11 BY MR. BARON:

12 Q Did you at some point come to understand that in the
13 prior DISH case Mr. Brokaw was found by both this Court and
14 agreed by the Nevada Supreme Court to be not sufficiently
15 independent to investigate Mr. Ergen?

16 A Yeah, I think the words I remember were that's the
17 type of relationship that you should be suspicious of. And I
18 thought that matched my views perfectly. His relationship,
19 he had a personal relationship with him and that made me
20 suspicious when I was interviewing him and talking to him
21 about whether I would trust him to do the right thing.

22 Q And you understood it wasn't just a, you know, every
23 now and then we have a drink. They had a very close personal
24 relationship; right? He was -- his daughter was the
25 goddaughter of --

1 A Charlie's wife, Cantey. I don't know how strong a
2 relationship between Charlie directly and George is. I know
3 that Cantey was the godmother and did things with them. But,
4 you know, I know there was a relationship. I know he stayed
5 at their house at least occasionally when he was in town.

6 Q Even after SLC meetings he would be dropped off
7 there; right?

8 A I actually dropped him off after one of the SLC
9 meetings. You're absolutely right.

10 Q And that didn't concern you that that may be a
11 conflict of interest?

12 A It concerned me through the whole thing constantly.
13 Every time -- every time there was a conversation. I don't
14 ever give up on these. Through this day every time you say
15 something and I'm sitting here and I know where I'm going,
16 I'm trying to always try to figure out are you trying to work
17 against me or what's going on? It's just the way I am. I
18 never give up on those. I never found George to have done a
19 single thing that wasn't what I thought was him coming at this
20 from exactly the perspective I would expect him with his
21 background to come, which was different than mine, so. It was
22 positive. I thought that was a good thing that we had that
23 expertise on our committee.

24 MR. BARON: All right. I don't have any further
25 questions, Your Honor.

1 THE COURT: Sir, I have a couple of questions and
2 it's going to go back to something I think I asked you about
3 yesterday. So you were -- as part of your process you looked
4 at the Kelley Drye white paper and the information that was
5 provided to DISH and its board members and employees back at
6 the time, which I understand was before the Krakauer
7 litigation occurred?

8 THE WITNESS: Yes, I did.

9 THE COURT: As part of the process that you
10 underwent in reviewing the Kelley Drye white paper and the
11 information it provided in evaluating the claims that were
12 made in the complaint in this case, what other things did you
13 do as a result?

14 THE WITNESS: We interviewed the person who led the
15 Kelley Drye activity and questioned him at quite a bit of
16 depth as to what -- was DISH doing these things and how does
17 this compare to other companies that were out there? We were
18 getting at the material issue of -- it was a bigger deal, I
19 don't know why it didn't come up, but it was a big deal for
20 us. Materially, was this a big dollar item? If it was, then
21 everything else would go down the tubes. The director
22 defendants should have been on it. He felt DISH was already
23 the benchmark. He was very proud of the work he did and that
24 he had added things for DISH to do and they did do it. And
25 so, yeah, he added some -- they were a good company for DISH

1 to have hired, it looked like to me.

2 THE COURT: Did you, as part of the process you went
3 through in your investigation, did you look at any other
4 information other than the Kelley Drye information related to
5 this agency issue for the TCPA and DNC issues?

6 THE WITNESS: You know, Your Honor, the agency thing
7 to me versus retailer and where that exact level is, that's
8 really beyond my expertise. I mean, I understand what an
9 agent is, I understand what a retailer is. And the line, the
10 legal line where you say that's being violated, I'm not an
11 expert at that. I know if it was -- I know if it was an agent
12 I'd be managing the people directly and it would have been a
13 total waste of time to farm that out to somebody else,
14 frankly. So I can see why they went with retailers. Retailers
15 brought some things to the table that DISH did not have, so
16 that made sense to me.

17 THE COURT: And then as part of your process you
18 also looked at PossibleNOW?

19 THE WITNESS: Yes.

20 THE COURT: Can you tell me as a result of the
21 information you learned about the compliance consultant
22 PossibleNOW what additional work that you and the SLC did to
23 address the compliance issues that were of concern?

24 THE WITNESS: We actually -- again, we talked to the
25 person. And again, we talked to the people on the DISH side

1 who were given the advice. And there's a point in there where
2 it gets to close to me becoming critical on a personal level,
3 again, from my background. With SSN specifically, DISH wanted
4 them to adopt PossibleNOW. And it gets into negotiations and
5 DISH wasn't going to pay for it, SSN should be paying for it.
6 And it never got paid for, so they never got the -- got it to
7 happen.

8 That's very unfortunate in terms of where we ended
9 up here, probably. I think a lot of this might have gotten
10 fixed. Or they would have faked it. Some of their stuff that
11 SSN was doing, it was clear they weren't being truthful with
12 DISH, and DISH bought in on some things at a low level that
13 they shouldn't have. They should have seen through it.

14 THE COURT: Okay. Thank you, sir.

15 THE WITNESS: Yes. Thank you, Your Honor.

16 THE COURT: Redirect. You don't get to leave.

17 THE WITNESS: Oh.

18 THE COURT: Your lawyer gets another chance.

19 THE WITNESS: But I already talked to her.

20 THE COURT: She gets -- everybody gets two. I get
21 four.

22 THE WITNESS: Oh, my God.

23 REDIRECT EXAMINATION

24 BY MS. BURTON:

25 Q Thank you for staying in the witness stand just a

1 little bit longer, Tony.

2 A No problem.

3 Q I'm going to ask you a few questions hopefully to
4 clarify and maybe simplify some of the testimony that you have
5 offered in response to Mr. Baron's examination, and hopefully
6 to help you find some points in the report that you were
7 trying to find with him.

8 A Okay.

9 Q So on a high level did the SLC investigate any
10 claims that might allow DISH to recover from the director
11 defendants for the judgements that were entered in U.S. v.
12 DISH or Krakauer?

13 A Absolutely. Numerous.

14 Q Now, you testified that the SLC investigated each
15 of the claims in the plaintiffs' complaint. Do you remember
16 that?

17 A Absolutely I remember that.

18 Q And the plaintiff -- and then Mr. Baron asked you a
19 number of questions about whether the SLC analyzed this theory
20 or that theory. Do you recall that?

21 A I do.

22 MS. BURTON: So can you take us to page 285 of the
23 SLC report, which is Exhibit 102, and it's internal page 285,
24 please. Can you zoom in on the first paragraph? Thank you.

25 //

1 BY MS. BURTON:

2 Q Does this discussion in the SLC report -- does this
3 show a discussion in the SLC report of the plaintiffs' claims?

4 A Of the what?

5 Q Of the plaintiffs' claims?

6 A Okay. Let me read it. Yes, it does.

7 Q And does this show that the SLC analyzed the claim
8 for breach of fiduciary duty in the plaintiffs' complaint?

9 A Absolutely does. Thank you for finding that
10 directly.

11 Q You are welcome.

12 THE COURT: That's her job.

13 THE WITNESS: Okay. Good job.

14 THE COURT: And she's doing a good job. But, you
15 know, that is her job. That's why she gets to come back after
16 Mr. Baron and ask you all the questions.

17 MS. BURTON: Thank you, Your Honor.

18 BY MS. BURTON:

19 Q Plaintiffs' counsel also asked you a number of
20 questions yesterday about whether the SLC investigated the
21 possibility of recovering from the director defendants by
22 inferring a breach of fiduciary duty. I think he used the
23 word inferring a lot. Do you remember that?

24 A I'm sorry. I'm trying to read what you're saying
25 here. Where are you?

1 Q We're going to go somewhere else in the SLC report.

2 A Okay. Would you remind repeating that again?

3 Q Certainly. Yesterday you were asked a number of
4 questions about whether the SLC investigated the possibility
5 of recovering from the director defendants by inferring
6 liability on them. Do you remember those questions?

7 A I remember that, yes.

8 Q Do you recall whether the SLC made a determination
9 as to what DISH would need to prove in order to recover
10 damages from the director defendants?

11 A Absolutely. In fact, that one I can tell you is in
12 probably the last couple of paragraphs in the report where we
13 summarized what we had done. That one was repeated there.

14 Q Well, how about we go to page 295 and see if it's at
15 page 295. It's probably also in the last couple of pages of
16 your report.

17 MS. BURTON: And can you please zoom in on the
18 paragraph right before that bullet point or the block point,
19 on the block quote. Do you see the block quote? The
20 paragraph before that on the block quote, please. Thank you.

21 THE WITNESS: Where are we now?

22 BY MS. BURTON:

23 Q We are in the SLC report. We are --

24 MS. BURTON: Can you just scroll up a little bit so
25 he can see the heading, please?

1 THE WITNESS: Right. Right. Yeah.

2 MS. BURTON: We're in the heading --

3 THE WITNESS: Yeah, I got it. I got it.

4 MS. BURTON: You got it?

5 THE WITNESS: I got it. And I remember this
6 paragraph, believe it or not, despite it being a couple years
7 ago.

8 BY MS. BURTON:

9 Q Does this reflect the fact that the SLC reached a
10 conclusion as to what DISH would need to prove to recover
11 money damages?

12 A Yes, it does.

13 Q And so does this show that the SLC considered
14 whether you could just infer liability on the director
15 defendants?

16 A That's the way I understood it, for sure.

17 Q So if I read the block quote, "A director or officer
18 is not individually liable to the corporation for any damages
19 as a result of any act or failure to act in his or her
20 capacity as a director or officer unless such breach involved
21 an intentional misconduct, fraud or knowing violation of law."

22 A Absolutely.

23 Q Was that legal standard part of the SLC's analysis?

24 A Absolutely. It's behind everything that was in
25 there. Without that legal standard, I would not have accepted

1 continuing being here because it would have been dumb. They
2 couldn't possibly do more than that if you're running the
3 company, a large company.

4 Q You testified yesterday that the SLC investigated
5 whether DISH had viable claims against the director
6 defendants, assuming all the findings in Krakauer stood. Do
7 you remember that?

8 A No, I don't. I'm sure I did, but -- I don't doubt
9 you. How's that?

10 Q It's fair. Let's go to page 318 of the SLC report
11 anyway. So if you look at that heading, "The Krakauer
12 trebling decision does not demonstrate that the director
13 defendants acted in bad faith with regard to compliance with
14 the DNC laws."

15 A That's right. I do remember. I remember that from
16 back then, too.

17 Q Is this one place in the SLC report that shows that
18 the SLC analyzed this issue?

19 A Absolutely it does.

20 Q And if we go down to the third paragraph, the one
21 that begins with "First." So there the SLC report states,
22 "First, the finding that DISH acted willfully and knowingly
23 and that DISH should pay treble damages does not mean that the
24 director defendants acted willfully and knowingly or otherwise
25 breached their fiduciary duties." Is this one place where the

1 SLC report reflects your analysis?

2 A It's definitely another place, that's for sure.

3 MS. BURTON: Let's look -- please scroll down, then,
4 to -- I think it's the next page, page 319.

5 BY MS. BURTON:

6 Q And there's a paragraph that begins, "Second, in the
7 trebling decision the North Carolina court does not purport to
8 address any knowledge or conduct of the board." Is this
9 another place where the report reflects the SLC's analysis of
10 whether those opinions were enough to define liability?

11 A Yes, it does.

12 Q And then if we look at -- shifting gears a little
13 bit. You also testified yesterday that the SLC investigated
14 what the director defendants knew about DISH's compliance with
15 the AVC. Do you recall that?

16 A Yes, I do.

17 Q Let's look at a few places in the report that show
18 that the SLC investigated that issue.

19 MS. BURTON: Can you take us to page 214, please.

20 MR. BARON: What number? I'm sorry.

21 MS. BURTON: 214. Internal page 214, Exhibit 102.

22 BY MS. BURTON:

23 Q Now, here the SLC report states, "In its position
24 in the 2009 AVC, DISH denied the assertions by the AGs." And
25 then at the bottom of the page, "The 2009 AVC made no attempt

1 to reconcile the AGs' position with DISH's position on any of
2 these issues." Is this one example of the SLC considering
3 DISH's subjective understanding of the AVC?

4 A Yes, it is.

5 MS. BURTON: And now if we turn to page 322 of the
6 SLC report, and I'm looking for the bottom paragraph on the
7 page.

8 BY MS. BURTON:

9 Q It states, "Based upon its thorough investigation,
10 the SLC has determined that the board and management,
11 including DeFranco, believed in good faith that DISH was
12 complying with the 2009 AVC. The evidence uniformly shows
13 that, after consultation with counsel, DISH, including
14 DeFranco, believed that the 2009 AVC required DISH to continue
15 conducting the investigation of consumer complaints that DISH
16 was already voluntarily conducting for business purposes."
17 Does this show that the SLC analyzed this issue?

18 A Yes, it does.

19 MS. BURTON: Can you now please pull up TX108 and
20 turn to DISH's SLC Production 20.

21 BY MS. BURTON:

22 Q Let's start at the top of the page here. Do you
23 recognize this document, Mr. Federico?

24 A Yes, I do.

25 Q What is this?

1 A This is the minutes from one of our meetings that we
2 approved, it looks like in October.

3 Q Would these minutes accurately reflect what the SLC
4 discussed at that meeting?

5 A Since I reviewed them at the time and agreed to
6 them, I know they reflect that or we wouldn't have stopped
7 reviewing them.

8 Q Let's go to the bottom of this page and the top of
9 the next page. Stop there. So the minutes state, "Counsel
10 and the SLC continued their discussion of certain aspects of
11 the evidentiary record from the Krakauer trial, including Mr.
12 DeFranco's testimony. Counsel and the SLC also discussed with
13 the SLC certain provisions of the AVC, DNC compliance and AVC
14 compliance efforts by DISH, the board's role with respect to
15 and views of DISH's DNC compliance and AVC compliance and the
16 North Carolina court's ruling in Krakauer." Is this further
17 evidence that the SLC discussed these opinions and how they
18 fit into your analysis?

19 A Yes. Yes, it is.

20 Q And is this consistent with your recollection that
21 the SLC looked at whether the conduct in connection with the
22 AVC or the DNC supported a claim?

23 A Yes.

24 MS. BURTON: And then could you scroll -- Yes, stop
25 here.

1 BY MS. BURTON:

2 Q And then the minutes note that, "Counsel then
3 discussed with the SLC members a number of key events and
4 documents relevant" -- sorry. Okay. The sentence above that
5 reads, "The SLC also discussed with counsel the legal analysis
6 that had been provided to DISH by DISH's outside counsel."
7 Does this show that part of the SLC's process included
8 analyzing the legal advice that informed the director
9 defendants' actions?

10 A Yes, it does.

11 MS. BURTON: Can we please turn back to TX102, and
12 I'd like to look at page 323 when you get there. And I think
13 it's the top of page 323.

14 BY MS. BURTON:

15 Q So here the SLC report states, "The Krakauer court
16 did not have before it evidence concerning DISH's compliance
17 with the 2009 AVC." Does this demonstrate that the SLC had a
18 different record than the judge in Krakauer?

19 A Yes, it definitely does.

20 Q And the report goes on to explain that there were
21 some evidentiary rulings in that case that kept out some of
22 the evidence surrounding the AVC. Now, do you remember
23 whether the SLC looked at that evidence that was kept out of
24 the Krakauer case?

25 A You know, I know we did. If you're going to ask me

1 what was it, I won't be able to recall it, but I know we did
2 look at that.

3 Q And then can we -- So you mentioned in some places
4 in your testimony that you saw some evidence in your
5 investigation that was contrary to what the courts found in
6 U.S. v. DISH and Krakauer. Do you remember that?

7 A Yeah, I hope I worded it different than that, but
8 there were things that we accepted from the -- and I mean that
9 wholeheartedly and totally -- from the Krakauer case that
10 without trying to look -- trying to investigate it, it seemed
11 very inconsistent with what we found. And inconsistencies
12 drive us -- drive me in particular to go look at more stuff.
13 Why is it inconsistent? Is something going on I don't know
14 about? So perhaps there was something going on real low level
15 in the organization. It must be since the judge found it to
16 be happening. But the evidence that we looked at seemed very
17 much in conflict with it.

18 Q Where you found inconsistencies between the evidence
19 you were looking at and the conclusions made in Krakauer
20 versus U.S. v. DISH, did the SLC base its conclusions on
21 assuming that the opinions were correct?

22 A Absolutely we did.

23 Q So there was also a question on cross-examination
24 about whether the SLC considered collateral estoppel. You
25 didn't remember whether we did or we didn't.

1 MS. BURTON: Can you please take us to page 349 of
2 TX102. Could you scroll up, please. This is not it. Is it
3 the bottom of that page?

4 I.T. TECH: 348, right?

5 MR. FLINN: 349.

6 MS. BURTON: Yeah, it's 349, big heading C and down.
7 BY MS. BURTON:

8 Q So it states, "DISH's litigation of the claims would
9 be complicated by the factual determinations reached in the
10 underlying DNC actions. As a litigant in the underlying DNC
11 actions, DISH may be precluded from asserting contrary facts
12 in any litigation that it undertook to prosecute the claims."
13 Does that refresh your recollection?

14 A Yes. Yes, it does.

15 Q So do you recall the SLC considering the role that
16 collateral estoppel would play?

17 A Yes. Yes. And actually if I didn't say it, I
18 should have said it. I was very confident when I was making
19 my comments in this area that -- this was just me, personally,
20 this isn't the places I focused, but I was confident that our
21 attorneys, you guys, were looking at stuff like this all the
22 time. So if I didn't say that, then I misspoke before, but I
23 think I did say something to that effect.

24 Q You did. You said that you thought we did. But
25 let's scroll down because you specifically analyzed whether

1 collateral estoppel could be used to bind the director
2 defendants. The SLC report states, "Conversely, the director
3 defendants were not themselves litigants in the underlying
4 DNC actions. The director defendants would be able to take
5 different positions on issues than those found in the
6 underlying DNC actions." So does that show that the SLC did --

7 A This I do remember right here.

8 Q You remember that?

9 A Absolutely. Yes.

10 Q Well, that is collateral estoppel right there. That
11 is what it means in layman's terms.

12 A I'm going to try to forget that word at this trial.
13 I want you to know that. You didn't hear that, did you, Your
14 Honor?

15 THE COURT: I did.

16 THE WITNESS: Oh, I'm sorry.

17 THE COURT: I have lots of people who want to forget
18 that word.

19 THE WITNESS: I'm sorry.

20 BY MS. BURTON:

21 Q So I want to close with just one point. There were
22 a lot of places today in the SLC report that we looked at kind
23 of out of context. Did you -- well, it be more than a year
24 ago when you reviewed and approved the final SLC report --
25 understand what was in it?

1 A Understand what was in it?

2 Q What was in it, yes.

3 A Absolutely. I felt I understood every single line
4 of what was in it.

5 Q And do you stand behind what was stated in the SLC
6 report today?

7 A I confidently stand behind what was in the SLC
8 report. There's a lot of time we put in that individually and
9 collectively. Yeah, I stand behind everything that's in
10 there.

11 MS. BURTON: Thank you, Mr. Federico.

12 THE COURT: Mr. Baron, anything else?

13 RE CROSS EXAMINATION

14 BY MR. BARON:

15 Q Could you turn to -- I guess it was 102 that you
16 were just looking at, which is the report. And I'm going to
17 go back to the pages that counsel pointed out to you. Could
18 you go to page 285. And this is what your counsel showed you
19 to say, yes, you analyzed all of the claims and theories of
20 our complaint. Is that what you say this section discusses?

21 A I'm sorry, I'm going to need time to read --

22 Q Sure.

23 A -- what we're specifically talking right now.

24 Q I understand. She pointed it to you, she asked you
25 a question, This includes everything? And you said yes.

1 A Yeah. If --

2 Q So now I'd like you to actually read this and tell
3 me whether or not --

4 A That's what I thought you wanted me to do.

5 Q -- in your view this --

6 THE COURT: Hold on. One at a time. Remember --

7 MS. BURTON: This is not page 285.

8 THE WITNESS: It's 284.

9 I.T. TECH: Hold on. There's two numbers. 285 --

10 MR. BARON: Oh, I'm sorry. 285 of the report.

11 I.T. TECH: Okay.

12 MR. BARON: Sorry. There you go. I couldn't see it
13 yet, either, because I wore my glasses and they fog up.

14 THE WITNESS: Would you -- now that we're on this
15 page, would you just restate your question for me, please.

16 MR. BARON: Sure.

17 BY MR. BARON:

18 Q Your counsel asked you, Doesn't this section here,
19 showing you this page, show you that you've analyzed all of
20 our claims and theories? And you said yes.

21 A Yes. I think it does, still.

22 Q So now what do you understand this section to be?

23 A So now the question is on the overall section and
24 it's going to be hard for me to read the whole section over
25 again.

1 Q But you didn't read it when she asked.

2 A So when you say this section, are you talking about
3 Claims Asserted in the Complaint? Is that what you're talking
4 about?

5 Q Yeah.

6 A This is the section we're talking about? Okay.

7 Q What is it meant to be?

8 A My memory says yes. I can read it and come back
9 and answer more specifically if you'd like. Oh, yeah, right.
10 I mean, the first paragraph talks to what I remember as being
11 the big five in the original complaint.

12 Q It's -- oh, I'm sorry. Are you done?

13 A No, no, I'm done. Yeah.

14 Q It's a description of the complaint as drafted by
15 your counsel; right?

16 A Yes.

17 Q All right. Is there anywhere in here where it
18 specifically discusses an analysis of the ability to prevail,
19 the elements, how one would do so, etcetera, on a claim for
20 breach of fiduciary duty in connection with the AVC? Is there
21 somewhere in here you can actually point to that it actually
22 undertakes that analysis?

23 A So, I'm sorry, it was a little long for me to
24 follow. Are you asking is there something specific in here on
25 what the AVC drives into the overall -- I'm sorry, I really

1 got confused here.

2 Q I'm assuming your counsel wasn't just testifying.
3 I'm assuming your counsel was actually asking you a question
4 that this refreshed your recollection that clearly there was
5 an analysis of the AVC theory of breach of fiduciary duty in
6 here --

7 A Oh.

8 Q -- and I want you to show me where.

9 A Actually I think there's another section in the
10 report that we talk to that specifically. Again, you're going
11 off an old memory, an old man's memory here.

12 Q Is it fair to say that, you know, you can't point
13 one out to me, at least immediately?

14 A Not unless you want to sit around for awhile. I
15 would like to believe I could do that if I had the time to
16 read through this again.

17 Q Let's go to page 294. That was the second page that
18 your counsel pointed you to. And on page 294 under where it
19 says, Fiduciary Duty Claim, do you understand what this
20 portion of the report is meant to convey?

21 A You've got to give me a second. So I'll tell you
22 up front this got -- when it gets to legal-like language, I'm
23 looking for something more brief for myself. But I don't
24 remember Caremark. I know we had --

25 MS. BURTON: I mean, I'll object again. This is --

1 THE COURT: Overruled.

2 MS. BURTON: -- not a page that I pointed him to.

3 THE COURT: Overruled.

4 MR. BARON: 294? Yes, it was.

5 THE COURT: Guys, don't argue with each other,
6 please. Was there another question, Mr. Baron, since he
7 finished the answer?

8 MR. BARON: Sure.

9 BY MR. BARON:

10 Q This section simply discusses your lawyer drafting
11 what they believed a legal theory was under Caremark; correct?

12 A Yes. Yes, it does.

13 Q And was there an analysis anywhere in this section
14 that says the AVC breach of fiduciary duty theory is based
15 upon a fiduciary's failure to comply with an agreement with
16 the 46 AGs, not whether or not it was a general failure of
17 oversight, whether they were violating or in breach of an
18 agreement that was specifically entered between the company
19 and the AGs' on the officers' behalf? Was that analysis
20 undertaken anywhere in this section or anywhere in the report?

21 A Actually, we accepted that DISH was found to be in
22 fiduciary liability, not the director defendants, though.
23 There was nothing on the director defendants that suggested
24 that. We were focused on the director defendants.

25 Q Again, my question was -- this was pointed out to

1 you. Is there somewhere in here that I haven't seen that
2 you've seen where it specifically says a claim for breach of
3 fiduciary duty for the directors and officers, Mr. Ergen and
4 DeFranco, for specifically failing to comply with an agreement
5 that was entered into on their behalf?

6 A Actually it was to the contrary. It talked about --
7 in fact, she had it up earlier today. It talked about not
8 being able to claim that the director defendants -- they
9 couldn't assess that. In fact, that's why we're here.

10 Q Okay. Now let's go to another page that was
11 identified by your counsel on page 318 of this document.

12 MR. PEEK: Your Honor, there's a mislabeling of the
13 pages here between the --

14 THE COURT: So do you want us to refer to the page
15 number or the Bates number?

16 MR. BARON: The page number.

17 THE COURT: The actual page number on the document?

18 MR. BARON: Yeah.

19 THE COURT: Okay.

20 MR. BARON: And that's what I believe.

21 BY MR. BARON:

22 Q So this is 318 and you remember she pointed to this
23 section, Section 4, and specifically pointed to the sentence
24 that says, "First" and the sentence that says, "Second;"
25 correct?

1 A Yes.

2 Q All right. And those sections were as to whether --
3 those sections were as to whether or not you believed that any
4 of the senior officers, the directors, knew that the DNC laws
5 were being violated; correct?

6 MS. BURTON: Objection. Misstates the testimony.

7 THE COURT: Overruled.

8 THE WITNESS: I'm sorry, would you say that again?

9 MR. BARON: Sure.

10 BY MR. BARON:

11 Q Those two sections specifically deal with whether or
12 not there is evidence of whether or not the directors, the
13 defendants, Mr. Ergen, Mr. DeFranco and others, knew that they
14 were violating DNC laws?

15 A This does not have that, nor did we find that.

16 Q No. It was an analysis saying that you did not find
17 that they knowingly violated DNC laws; correct? That's what
18 this section is about.

19 A Okay. Okay.

20 Q Is that correct?

21 A I accept what you just said.

22 Q It is not about whether or not Mr. Ergen or Mr.
23 DeFranco could be held responsible for violating the AVC;
24 correct? There is no analysis of that in here?

25 A In this specific section. This isn't the whole

1 thing. What this is saying is that the AVC wasn't claiming
2 that they did. In DISH versus -- the U.S. v. DISH case wasn't
3 saying that there was them, either. I mean, that's what this
4 is talking about. That's only a piece of it, though. There's
5 several other sections that she talked to. I think there
6 might even be a few more she didn't even talk to yet.

7 MR. BARON: I have no further questions.

8 THE COURT: Anything else?

9 MS. BURTON: I'm just going to talk about two
10 points.

11 THE COURT: If you say no, Mr. Baron doesn't get to
12 get up again. Okay. All right.

13 MR. BARON: I mean, I'll object unless they are
14 rebuttal to what I asked.

15 THE COURT: Mr. Baron, we'll see. I'm listening.

16 FURTHER REDIRECT EXAMINATION

17 BY MS. BURTON:

18 Q Did you understand or did the SLC analyze whether
19 it would be in DISH's best interest to litigate against the
20 director defendants for claims where DISH couldn't recover any
21 money based on the litigation?

22 MR. BARON: Objection. Beyond the scope.

23 THE COURT: Overruled.

24 THE WITNESS: Absolutely. To a great extent we
25 evaluated that.

1 BY MS. BURTON:

2 Q And the SLC analyzed what -- did you analyze what it
3 would take, what DISH would have to prove in order to recover
4 money damages from the defendants?

5 A Yes, we absolutely did.

6 Q And so with respect to -- let's turn to page 318 of
7 this SLC report, where we have been. Sorry, not 318; 322 of
8 the SLC. This is a page we looked at earlier.

9 MR. BARON: I will object again, beyond the scope.
10 I didn't ask him about this page.

11 THE COURT: Overruled.

12 MS. BURTON: You asked him about --

13 THE COURT: Don't argue with counsel.

14 MS. BURTON: My apologies.

15 THE COURT: Okay. Keep going.

16 BY MS. BURTON:

17 Q The SLC report, is this where the SLC analyzed
18 whether DISH could recover money from the director defendants
19 related to the AVC?

20 A Why we could recover money?

21 Q Why you couldn't.

22 A Why we couldn't. We -- this was part of that
23 overall analysis. This was a very key part because it was
24 certainly easy to misunderstand Mr. DeFranco's comments in
25 Krakauer. So it drove us to go to very great extents with

1 him, his people and emails -- on that specific line right
2 there.

3 Q The SLC report is 355 pages; right?

4 A Yes.

5 Q So there's probably, beyond the points that we've
6 talked about today, additional points in here that reflect
7 your analysis?

8 A I'm sure there are. I'm sure there's many.

9 MS. BURTON: Thank you, Mr. Federico.

10 THE COURT: Now, Mr Baron, anything else you'd like
11 to ask?

12 MR. BARON: No, Your Honor.

13 THE COURT: Thank you so much.

14 Sir, you may step down.

15 THE WITNESS: Thank you, Your Honor.

16 THE COURT: Next witness.

17 MR. PEEK: Your Honor, may we have a short break?

18 THE COURT: You may. How long is short, Mr. Peek?

19 MR. PEEK: It's a comfort station break, Your Honor.

20 THE COURT: Seven minutes for a convenience break,
21 which means fifteen in your mind. I'll be back after I find
22 more coffee.

23 (Court recessed from 11:19 a.m. until 11:29 a.m.)

24 THE COURT: Ready? Raise your right hand.

25 //

1 GEORGE BROKAW, SLC'S WITNESS, SWORN

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

4 THE WITNESS: My name is George Brokaw. George,
5 G-E-O-R-G-E, Brokaw, B-R-O-K-A-W.

6 THE COURT: Thank you, sir. And if you need a
7 break, you let us know.

8 Mr. Peek.

9 MR. PEEK: Thank you, Your Honor.

10 DIRECT EXAMINATION

11 BY MR. PEEK:

12 Q Mr. Brokaw, would you give us a brief description of
13 your educational background beyond high school. And, please,
14 when you're doing so, could you insert the dates as to, you
15 know, when you attended and what you attended.

16 A I graduated undergraduate from Yale University in
17 1990. I graduated from law school, so I got a JD -- I got a
18 BA at Yale. I got a JD at the University of Virginia in 1994.
19 I also got a Master's in Business Administration, an MBA, also
20 in '94. I did what was called a joint program at the time,
21 also at the University of Virginia.

22 Q Also in 1994?

23 A Yes.

24 Q After you graduated from law school did you ever
25 practice law?

1 A I took the bar in New York, but I never practiced
2 law.

3 Q And did you pass the bar?

4 A I did pass the bar the first time.

5 Q And now, if you would, please, give us a brief
6 description of your employment background after you graduated
7 from UVA in 1994. And again, if you can, please, give me the
8 dates of your various employment, and I'll come back to which
9 positions --

10 A Yeah. So I'll give you the dates to the best of my
11 recollection going back. I first joined a firm as an
12 investment banker called Dillon Read. I believe that was in
13 1994. I then, in 1996, joined Lazard, which is also an
14 investment bank, where I rose to the level of partner serving
15 as a financial advisor in mergers, acquisitions, and financing
16 transactions. After that I became a partner at a fourteen --

17 Q Let me back up one.

18 A Sorry.

19 Q The time you were at Lazard?

20 A From approximately 2000 -- sorry, excuse me. I got
21 a decade -- I was at Dillon Read from 1994 to 1996. From 1996
22 to 2005 I was at Lazard, where I held a number of senior
23 management roles. From approximately 2005 to 2011, I want to
24 say, I was a partner at a \$14 billion investment fund -- the
25 assets varied over time, but that was indicative of the size

1 -- called Perry Capital. I then became a partner at
2 Highbridge, which is a -- that is the alternative asset
3 management business owned by J.P. Morgan. At least at the
4 time it was, it's no longer. And then after that --

5 Q So it was that period, so 2005 you ended up --

6 A Roughly 2013. Between 2005 and '13 I was a partner
7 to hedge funds. And then after 2013 I went off to do my own
8 investment setup, family office, including some investment
9 partnerships with various partners I had, some of which
10 continue today.

11 Q And what was the name of that other entity that you
12 formed?

13 A The first entity that I've formed after leaving
14 Highbridge was Brokaw Trafelet or Trafelet Brokaw.

15 Q And how long did that Trafelet Brokaw entity exist?

16 A That partnership lasted until approximately say the
17 fall of -- November 2018.

18 Q Okay. In each of these entities where you were
19 employed or as a partner what was the nature of the business
20 that you were conducting?

21 A Early in my career my role was as a financial
22 advisor to large corporations, actually some small -- I guess
23 by today's standards now they would be considered medium-sized
24 corporations. And I provided -- helped them also obtain
25 financing, equity debt. I was what would be conventionally

1 called an investment banker. After that I converted over to
2 what's conventionally called as a principal investor where I
3 was making investment decisions on my behalf or on behalf of
4 third-party capital that we were managing as business.

5 Q Have you over the last say 10 or 15 years served on
6 any boards of directors of private companies? Let's start
7 with private companies.

8 A I've served and continue to serve on several boards
9 of private companies.

10 Q Do you hold positions of officership in any of these
11 private companies?

12 A Not the ones that I'm serving on the board of now.

13 Q In those private companies where you were a member
14 of the board of directors were you also a shareholder?

15 A In some cases, yes. Well, to be specific, in some
16 cases the -- especially earlier on -- funds for which I was a
17 investment professional held positions in those companies.
18 Today, generally speaking with one exception, I'm on the board
19 of a fund in Hong Kong, a distressed investment fund in Hong
20 Kong, and I am not an owner of that. But for other companies
21 where I'm involved we have cattle businesses and other things,
22 biomedical, science businesses, small private companies, I
23 generally have an economic interest.

24 Q Have you served on the boards of directors of any
25 public companies?

1 A I have.

2 Q And can you please give us a list of the public
3 companies where you have served as a director.

4 A To the best of my recollection, I would point to two
5 that I'm currently on the board of, other than DISH. One is
6 called Alico, Inc., and one is called CTO Realty Growth, both
7 of which are public companies. In the past I've served on
8 other public company boards, and including, for example, North
9 American Energy Partners. And Alico, I was at one point vice
10 chairman, as well.

11 Q And when were you vice chairman of Alico?

12 A I believe I was vice chairman for the better part of
13 the period between I want to say '15, '16, '17, '18. But I
14 don't know specifically when I adopted -- I can't remember off
15 the top of my head when I adopted that. And then, just
16 because of commitments and other things, I've -- I'm just a
17 director now. I've given up the vice chairman title. I
18 didn't want to have executive responsibility.

19 Q Now, the public companies on which you served as a
20 member of the board of directors, are they on public stock
21 exchanges, such as NASDAQ or the New York Stock Exchange?

22 A Yes. One of each, actually.

23 Q Do any of these companies in which you served on the
24 board of directors have subcommittees, such as audit,
25 compensation, and the like?

1 A Other than DISH?

2 Q Yes, other than DISH.

3 A Yes. They all have I'd say what I would call

4 customary committees, audit, governance and nominating, and

5 compensation. And some companies have subcommittees where

6 relevant for specific industries, but they all have a I would

7 say customary --

8 Q Audit, compensation and nominating.

9 A -- slate of committees.

10 Q And have you served on any of these, as you say,

11 typical committees, whether it be audit, nominating or

12 compensation for boards -- or for companies other than DISH?

13 A Yes, I've -- in various companies I've served on

14 audit and compensation and governance. Alico was slightly

15 different because as vice chairman I did not serve on the

16 audit committee.

17 Q So you've had experience on serving on these kinds

18 of subcommittees of either compensation, audit or nominating

19 in other boards?

20 A Yeah, going back to '07 -- 2007, sorry.

21 Q Now, we all know that you are on the board of

22 directors of DISH.

23 A I am.

24 Q And when did you -- when were you first elected to

25 the board of directors of DISH?

1 A A month before Chuck joined. So, I think around
2 October 2013, if I'm not mistaken.

3 Q And you're currently still a member of the board of
4 directors of DISH, are you not?

5 A I currently am a member of the board of directors of
6 DISH.

7 Q And do you serve on any of its subcommittees, such
8 as audit, compensation, and nominating?

9 A I do.

10 Q And on what committees do you serve?

11 A I currently serve as the chairman of the
12 compensation committee. I serve on the audit committee where
13 I'm actually the designated financial expert for the board of
14 DISH. It's a term of art, deferred NASDAQ, but every company
15 is required to have one. And I'm actually serving that
16 function for another public corporation, as well, one of the
17 ones we discussed before. And I served previously as chairman
18 of nominating and governance, but I gave that up when I -- I
19 served there, but I gave that up when I became chairman of the
20 compensation committee.

21 Q And you said you are a financial person for the
22 audit committee. What is that? And you said that was
23 particularly in NASDAQ.

24 A In layman's terms, you're evaluated for your prior
25 expertise and background to determine whether you have the

1 ability to evaluate, you know, financial reporting documents.
2 You don't have to be an auditor, but you have to understand
3 financials. And given my background, that's -- anyway,
4 that's --

5 Q Thank you. And do you know whether or not the DISH
6 board has made any assessments or determinations as to whether
7 or not you meet the independence requirements under NASDAQ?

8 A They have.

9 Q And when did they do that?

10 A When I joined the board. And I believe they
11 actually make that determination every year, because I have to
12 fill out a form.

13 Q That's what I was going to ask you. You have to
14 fill out a form every year, do you not?

15 A Yeah, I do.

16 Q And do you know what some of those factors are that
17 determine independence under NASDAQ?

18 A Generally I do.

19 Q And what are some of those, if you can recall?

20 A I'd like to characterize them as primarily a lack of
21 financial beholdenness, if that's a word, or an absence of
22 financial beholdenness to the company. There is a series of
23 requirements that are set forth, but that's the gist of it.
24 And the ability to act independently.

25 Q Another one is that you're not an employee, for

1 example, of the company.

2 A Obviously, yeah. Employees of the company don't
3 even fill out the form.

4 Q When were you asked to be a member of the board of
5 directors? I know you were elected October of 2013. So when
6 were you asked to be a member of the board?

7 A It was -- I think the topic was broached a couple of
8 months before that and I didn't -- it took a while for me to
9 decide whether I wanted to do it.

10 Q You say it was broached. With whom was the topic
11 broached?

12 A As I recall, Charlie Ergen called me.

13 Q And what did you and Mr. Ergen discuss about you
14 being a member of the board of directors of DISH in this
15 period of time in two months or so before you were elected?

16 A What I recall is that he observed that the company
17 would be going through -- which turned out to be prescient, I
18 guess -- going through a number of activities in his
19 expectation that would involve greater use of financial
20 markets, potentially M&A, than might have historically been
21 the case. And he felt like the board could use somebody with
22 a background -- an investment banking background, for lack of
23 a better term, to help inform those discussions.

24 Q Now, you're a defendant in this action, are you not,
25 in the action brought by the plaintiffs shareholders; correct?

1 A I am.

2 Q And at the time -- you understand they brought the
3 claim based upon verdicts and judgments in North Carolina and
4 in the District of Illinois in Federal Court.

5 A I do.

6 Q And you have an understanding of the periods of time
7 upon which these claims in Krakauer and U.S. versus DISH were
8 made?

9 A I do.

10 Q And what are those?

11 A My understanding is that the time period for which
12 liability was determined in Krakauer was approximately 2009
13 through 2011. My understanding is that the -- and maybe -- I
14 think, just '10, late '09, '11, but roughly in that period.
15 And then the U.S. versus DISH period actually extended
16 further. I think it went back in some instances to perhaps
17 almost as far back as 2003. But I think it ended also in
18 2011, I believe.

19 Q So you were not a member of the board of directors
20 of DISH in each of those time frames on which Krakauer and the
21 U.S. FTC sought liability against DISH?

22 A That is correct.

23 Q Getting back, then, to being named as a defendant in
24 this case. Did you have an understanding as to whether or not
25 you had any material risk that you individually, as claimed by

1 the plaintiff derivative shareholder, would be held liable for
2 any monetary damages in the plaintiffs' complaint?

3 A My understanding and belief was that because I was
4 not on the board for which potential liability might be
5 determined, that I did not face, you know, material risk or
6 risk of liability for the period that we were investigating.

7 Q So let's go back now. So you said Mr. Ergen
8 approached you about two months before you went on the board.
9 During this two-month period before you decided to serve on
10 the board did you have further conversations with Mr. Ergen
11 about serving on the board?

12 A Only that I would get back to him. I was reflecting
13 on deciding whether I wanted to go set up my own family office
14 and do things. And consideration as to whether I had the time
15 and, you know, the ability to do it were wrapped up in a more
16 -- it was -- on a personal level it was a more complicated
17 decision. So it took me some time to think it through. So I
18 -- the conversations were -- there were a couple of them. For
19 lack of a better term, they were, let me get back to you, you
20 know.

21 Q You now serve on the Special Litigation Committee of
22 DISH in this litigation with the Plumbers Union, do you not?

23 A I do.

24 Q And you served previously on another special
25 litigation committee which addressed claims brought by

1 Jacksonville Firefighters on behalf of shareholders?

2 A Yes, I did.

3 THE COURT: Randomly assigned to me both times.
4 Amazing.

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

6 THE COURT: Randomly assigned to me both times --
7 actually, three times now. Random. Right, Mr. Peek?

8 MR. PEEK: Yes, Your Honor.

9 THE COURT: Yeah.

10 BY MR. PEEK:

11 Q So do you have an understanding of why the Special
12 Litigation Committee was formed in this action?

13 A I believe so.

14 Q And what is that understanding?

15 A My understanding is that we were supposed to decide
16 whether or not it was in DISH's best interest to pursue the
17 claims asserted here by the plaintiffs or other claims that we
18 might ascertain or find in the process of our investigation.

19 Q And at the time the SLC was formed were you granted
20 a certain authority by the board of directors that created and
21 established the Special Litigation Committee?

22 A My general understanding of that authority was
23 twofold, that we had the authority to broadly investigate the
24 claims, or anything else, frankly, we wanted to investigate,
25 and to pursue those claims if we thought that it was in DISH's

1 best interest to do so.

2 Q So let me actually have you look at Exhibit 107.

3 A Okay.

4 MR. PEEK: Can you bring that up, please, Brian.

5 THE COURT: And, sir, if you need part of it blown
6 up, please let us know.

7 THE WITNESS: Thanks. I appreciate it.

8 BY MR. PEEK:

9 Q And you recognize this? And if you do, please tell
10 me what your understanding of it is.

11 A Yeah. I recognize what it is. It's a unanimous
12 written consent, I believe, of the board creating the special
13 committee and giving it the authorities I previously
14 discussed.

15 Q So first we see that there's a topic called
16 formation of the special committee. That's what you just
17 described. It was formed.

18 A Right.

19 MR. PEEK: Then if you go to page 2, I believe,
20 Brian, at the bottom of that page, there you go. Blow that up
21 please.

22 BY MR. PEEK:

23 Q Now, you said that you were given certain powers by
24 the board of directors as a Special Litigation Committee. And
25 do you see what those are here at the bottom of page 2 where

1 it begins, "Resolved: that hereby delegates to the Special
2 Litigation Committee the power and authority of the board of
3 directors to," and then it says --

4 A It's actually weirdly easier for me to read up here
5 than it is here, because my eyesight is better long.

6 MR. PEEK: Can we turn that a little bit towards
7 him.

8 THE COURT: Ramsey has stepped out.

9 MR. PEEK: Just a little bit.

10 THE COURT: Be really careful, because the plug --

11 THE WITNESS: You know, what I'll use my -- I can --

12 MR. PEEK: No. It's all right --

13 THE COURT: It's okay. It's being turned. Look at
14 that. All right. That's good.

15 THE WITNESS: That's perfect. Thank you so much.
16 Very kind.

17 BY MR. PEEK:

18 Q So there's -- you said there were the broad powers.
19 Do you see those broad powers identified there in five
20 separate enumerations?

21 A I'm familiar with these broadly. I'm just reading
22 them --

23 Q That's fine. Please.

24 A -- to refresh my recollection of the specifics.
25 Yes, I recognize that.

1 Q And you understood from that, from those five
2 separate items you had very broad powers to investigate the
3 claims that were brought by the Plumbers Union on behalf of
4 certain shareholders?

5 A I did understand that.

6 Q Let me -- I'm going to come back to the Special
7 Litigation Committee in a moment, but I want to at least
8 examine what your relationships are or are not with other
9 members of the board of directors.

10 A Okay.

11 Q And you know a number -- you know all of the members
12 of the board of directors?

13 A Yes.

14 Q And I'm going to separate the Ergens from other
15 members. Do you have any social or business relationships
16 with any of the other members of the board of directors?

17 A No.

18 Q Is your only interaction with the other members of
19 the board of directors as a -- at times when you have meetings
20 with the board of directors of DISH?

21 A I would say yes. In addition to that I would say
22 there are incidental discussions, largely, you know, around
23 DISH that are not at necessarily at board meetings. But I
24 would say that my interactions with all of the board members,
25 other than the two you excluded, is around DISH-related

1 activities.

2 Q So it would be as co-members of the audit committee,
3 for example?

4 A Correct.

5 Q Co-members of the nominating committee?

6 A Correct.

7 Q And co-members of the compensation committee?

8 A Correct.

9 Q So let's talk about Mr. Ergen. So when did you
10 first have any interaction with Charles -- Charlie Ergen?

11 A My first interaction with Charlie Ergen was as an
12 investment banker. And it was because we were representing a
13 company called Southwest --

14 Q Who is we?

15 A Sorry. When I was at Lazard, Lazard was a financial
16 advisor to a company that used to exist called Southwestern
17 Bell Corporation.

18 Q SBC.

19 A SBC. And SBC had a relationship, a financial
20 relationship with what was I think then called Echostar -- I
21 don't think it was called -- it may have been called DISH back
22 then, but with DISH related to the distribution of the DISH
23 product and bundling agreement. And that was being unwound.
24 And it was financial relationships associated with that that
25 needed to be unwound. And we were -- I negotiated against

1 Charlie -- or I was hired by I guess the person on the other
2 side of the fence to --

3 Q The SBC side?

4 A -- the SBC side to address that. There was myself
5 and a guy called Felix Roaten [phonetic], who was -- who's
6 sadly passed since, but he was another partner at Lazard.

7 Q Well, was your first interaction with Mr. Ergen face
8 to face --

9 A No. It was --

10 Q -- or via telephone?

11 A All of these negotiations were telephonic. Because
12 it had to do -- I mean, I can give you a high sense of what it
13 was. It had to do with some derivative, i.e., option type-
14 structures. And given -- and so it was more of a math -- it
15 was a very specific sort of math discussion.

16 Q So in this period of time of unwinding the
17 relationship between SBC and at that time DISH or whatever its
18 predecessor's name was your only interaction was via
19 telephone?

20 A Yes.

21 Q And over what period of time was this interaction?

22 A Well, after that interaction there were --

23 Q No. What period of time was the interaction with
24 regard to the SBC and --

25 A It was relatively short. I don't recall exactly.

1 But it was certainly measured in, you know, weeks or months,
2 not more than that.

3 Q So did there come a time where you had additional
4 contact or interaction with Mr. Ergen after the SBC-DISH
5 unwinding.

6 A I did. After that interaction to my knowledge
7 Lazard never represented DISH. I certainly didn't. But for
8 some reason he would call without warning and infrequently,
9 perhaps every other -- less than once year, to just ask my
10 opinion on something. That --

11 Q Once again, were these, face to face or telephonic?

12 A Telephonic.

13 Q Okay.

14 A And that -- there was one financial or series of
15 financial transactions that he was engaged with where that
16 frequency increased a bit. So it went from -- I mean, I hate
17 to describe it as frequency. He probably called me three -- I
18 mean, in the order of single-digit times between -- over that,
19 but during -- there was a situation where DISH was trying to
20 acquire Clearwire. And at the time that Sprint was trying to
21 -- Sprint's another telecom company. Clearwire owned a lot of
22 spectrum. Sprint was trying to buy those shares in Clearwire
23 it didn't already own, and DISH was trying to --

24 Q They were competing for the same --

25 A Yeah. It was -- it was effectively a hostile, I

1 mean unsolicited proposal by Charlie for Clearwire. And that
2 transaction or that -- the series of transactions related to
3 Clearwire and Sprint went on for four years or something, for
4 years. And so that was the other topic I remember him from
5 time to time asking for. And there was no rhyme or reason to
6 the timing of when he decided to call or ask a question, but
7 he would seek out my thoughts, I suppose, over that period of
8 time.

9 Q And you said, I think, that was two or three times a
10 year over this period of time of the Clearwire-Sprint
11 transaction.

12 A That's my recollection. It may have been more in
13 one year and less in another year, because I think that -- you
14 know, that -- those transactions like that I can't recall. I
15 can recall the high level of what was going on today, but at
16 the time I think I was probably more clear on it.

17 Q So were these interactions with Mr. Ergen during the
18 Sprint-Clearwire transaction, for lack of a better word, were
19 these telephonic, or live, or a combination?

20 A They were primarily telephonic, but there were --
21 there was at least one occasion I remember, there may have
22 been another that I can't remember, where I was in Colorado
23 skiing at Vail, and he called me not knowing that I was at
24 Vail, and I remember seeing him on my way -- I'd left Vail,
25 you know, instead of leaving -- I can't -- I'm going to

1 propose something that is consistent with my recollection but
2 may not be exactly to the minute. But I recall leaving
3 earlier than I otherwise would to stop and talk with him on my
4 way to the airport, because I generally flew out of Denver, as
5 opposed to Eagle because it was more reliable. That's too
6 much information, but --

7 Q Too much information, you're right. And was your
8 family accompanying you on this trip there?

9 A I believe that was a -- I believe so, but I can't --
10 I think my wife was. I can't remember how old the kids --

11 Q So I'm going to try to see if I can capture all of
12 the interactions. So your first interaction was in or about
13 early 2000 on the SBC transaction?

14 A I don't know what year that was. But it was early
15 2000's.

16 Q And then over the course of the next however many
17 years he would call you maybe once a year or less.

18 A Yeah. And it continued even after I left serving as
19 a financial advisor and I was just an investor.

20 Q Did you have any social interactions with Mr. Ergen
21 -- so let me summarize again. So then the next transaction
22 was the Sprint-Clearwire transaction where the calls became
23 more frequent?

24 A Yes.

25 Q And those were generally -- those were all

1 telephonic?

2 A Generally speaking. I don't -- I recall the one
3 meeting that was in person to discuss it. There could have
4 been another, but that's what I recall.

5 Q Did you over the course of this time frame -- I
6 don't know exactly where that takes us to, is it what, 2010,
7 '11, '12?

8 A Something like that.

9 Q Did you have any social interaction with Mr. Ergen
10 or was it all business related?

11 A With Mr. Ergen I don't ever to this day recall
12 having a social anything with him. But there may have been
13 one or two, but I don't recall having any social discussions
14 with him.

15 Q They were all business related?

16 A They remain -- for whatever reason that's the nature
17 of our --

18 Q So you know Cantey Ergen?

19 A I did.

20 Q And how did you come to know Cantey Ergen?

21 A Cantey Ergen has a relationship with my wife.

22 Q And what is the nature of that relationship that
23 Cantey Ergen has with your wife? And your wife's name is
24 Allison?

25 A My wife's name is Allison. Cantey Ergen knows my

1 wife's mother. And when my wife came to -- my wife grew up in
2 a place that you would colloquially call the Outback in
3 Australia. It's not technically the Outback, but it's 17
4 miles from the nearest gas station.

5 Q So she's Australian?

6 A She's Australian. And she came to America, to New
7 York to work when she was a young adult, I don't know exactly
8 what age. And I believe that she was introduced to Cantey
9 Ergen by her mother as someone she could call because she was
10 in America and they knew each other previously.

11 Q Okay. So when did you meet Cantey Ergen due to this
12 relationship that Cantey had with your wife, Allison?

13 A Well, my wife and I eloped in Pitkin County Aspen in
14 2004. And so I believe it was after that.

15 Q Okay.

16 A So she was my -- I guess my fiancée before that. I
17 don't recall meeting her before that time. And I'm sure I met
18 her after that. She --

19 Q She kept in contact from time to time, then, with
20 Allison?

21 A I'm sure she -- I'm sure she did. It wasn't -- it
22 didn't really elevate itself. You know, I wasn't particularly
23 aware of it at that time. But --

24 Q So there -- I think we know this from Jacksonville,
25 and I think we know it here today, that Cantey Ergen is the

1 godmother of your son?

2 A That's correct.

3 Q Not your daughter? I think Mr. Baron got that

4 wrong, but I wanted to make it clear.

5 A You're right.

6 Q Okay. What involvement did you have, if any, in the

7 selection of Cantey Ergen as your son's godmother?

8 A Well, for both my son and my daughter it was the

9 practice, at least in our family -- there is no significance

10 to this -- that I chose the godfathers and she chose the

11 godmothers.

12 Q We know that Cantey Ergen was chosen by your wife,

13 then, to be a godmother of your son.

14 A And to be clear, I consented to that, yes.

15 Q Of course. And then with respect -- you have

16 another child, a daughter, do you not?

17 A I do.

18 Q And is Mrs. Ergen a godmother to your daughter?

19 A No, she is not.

20 Q So what is the nature of your relationship, if any,

21 with Cantey Ergen other than through your wife as you

22 described it?

23 A I have a relationship with Cantey because she's on

24 the board of DISH.

25 Q Okay.

1 A My wife has never actually been to a DISH board
2 dinner, to my recollection. I think I'm right in that. So my
3 interaction with her tends to be focused in that context. I
4 think over the course of, you know, 15 years -- we're now
5 2020, I'm just going back -- we may have seen them socially
6 less than once a year.

7 Q They meaning the Ergens?

8 A Cantey Ergen. Charlie Ergen I'm not --

9 Q You're talking about Allison and Cantey would have
10 seen each other socially?

11 A Yeah. And I may have seen them in New York once or
12 twice over the last 15 years in that context. Three times.

13 Q When you say they, you're talking about Cantey and
14 your --

15 A Cantey or Charlie.

16 Q Or Charlie. Okay.

17 THE COURT: Mr. Peek, can we break for lunch?

18 MR. PEEK: Absolutely, Your Honor.

19 THE COURT: I was just wondering, because, you know,
20 you were on a roll.

21 MR. PEEK: I was told by Ramsey that you had to
22 break at -- he gave me a certain time period.

23 THE COURT: I usually do, but you were on a roll, so
24 I was trying to let you keep going. And it was like, yeah,
25 he's not --

1 MR. PEEK: I'd like to be on a roll, Your Honor.

2 THE COURT: I understand. I'm going to get the
3 Black Knight and bring him back.

4 MR. PEEK: Oh. Thank you. As long as all his
5 appendages attached, I'm okay with that.

6 (Court recessed at 12:08 p.m., until 1:12 p.m.)

7 THE COURT: Sir, I'd like to remind you you're still
8 under oath.

9 THE WITNESS: Thank you.

10 THE COURT: Mr. Peek, you may continue. And we're
11 breaking at 4:45, and if you're not done I don't know what
12 we're going to do.

13 MR. PEEK: So we're not -- if we're not done, we're
14 not doing it tomorrow?

15 THE COURT: No.

16 MR. PEEK: Okay.

17 THE COURT: I have another case and things tomorrow.

18 MR. PEEK: No, I know you have a lot of things, Your
19 Honor. I'll try to wrap it up. It's important to me, as
20 well, to get it done.

21 DIRECT EXAMINATION (Continued)

22 BY MR. PEEK:

23 Q We were discussing before the lunch break your
24 relationship with both Charlie Ergen and Cantey Ergen, and I
25 think you've adequately described it. But I want to have some

1 followup questions that --

2 A Okay.

3 Q -- I know will come out. Have either one or both of
4 the Ergens ever stayed in your house in New York?

5 A I know that they -- Cantey Ergen once suggested it.
6 It's not my recollection that they actually ended up staying
7 there. It was a good idea, but they never actually followed
8 through on it. And I did ask my wife whether she stayed there
9 to refresh my recollection, because I wasn't present when it
10 happened. But I could have been traveling, because I was
11 traveling four days a week back then. And she said it was not
12 her recollection that they actually ended up doing it.

13 Q Now, I know it's come out, as well, that from time
14 to time you have -- when you've been in Denver for various
15 board meetings that you have stayed at the Ergens' residence.
16 So let's talk about that.

17 A Yes. I do stay at the -- in the garage apartment at
18 the Ergens when I'm there for board meetings.

19 Q Is that just for board meetings?

20 A If for DISH related, I mean, over the years.
21 There's also, as an example, quarterly strategic reviews that
22 occur, and most of the other board members all live in Denver
23 so they, you know, they just drive, but not all I don't think
24 anymore. But I might, you know, might have stayed there for
25 one of those as well, for sure.

1 Q Have some of the SLC meetings coincided with board
2 meetings of DISH?

3 A Partly because I --

4 Q That was a simple yes or no question.

5 A Yes.

6 Q Okay.

7 A Yeah. Yeah, they have.

8 Q Thank you. And at some of the meetings that
9 coincided with the SLC and the DISH board, did you stay at Mr.
10 Ergens?

11 A Yes, I'm sure I did.

12 Q On occasions that did not coincide with the DISH
13 board meeting and there was SLC meeting, did you stay with Mr.
14 Ergen in the garage apartment?

15 A I may have.

16 Q Other than DISH related business do you have any
17 other social interaction with Mr. Ergen?

18 A I have no ordinary core social interaction with Mr.
19 Ergen other than with -- for DISH business.

20 Q And with respect to Mrs. Ergen, other than the
21 relationship she has with Allison, your wife, you have -- you
22 personally have a social relationship with --

23 A Yeah. And --

24 Q Let me finish the question.

25 A Sorry. Sorry.

1 Q With Cantey?

2 A By virtue of being married to my wife, you know, I
3 have a relationship with her. But other than that, no, not
4 independently.

5 Q When you stay at the garage apartment for board
6 meetings do you have any interactions with Charlie related to
7 either socially or business wise?

8 A Well there's two. Generally speaking, the board
9 dinners -- or not always, but often the board dinners are at
10 their house.

11 Q At their house meaning Charlie --

12 A At Charlie and Cantey's house. So, and to the
13 extent I stay in town for those board dinners there's that
14 interaction. And then customarily what I would do is have
15 breakfast with Charlie in the morning prior to the board
16 meeting and get a brief from him on, you know, issues for
17 consideration and related to DISH.

18 Q Okay. Do you have any financial ties first to Mr.
19 Ergen? And then I'll ask you the same thing about Cantey
20 Ergen.

21 A Other than as a member of the board of DISH, no.

22 Q You don't manage any investments that Mr. Ergen may
23 have?

24 A I do not.

25 Q Are you compensated for serving on the DISH board?

1 A I am.

2 Q And do you know what that compensation is previously
3 and today?

4 A Well, until recently it was approximately \$65,000 a
5 year with additional -- smaller compensation for meetings and
6 so on, and board -- committee participation. Recently at my
7 recommendation and a recommendation was adopted, the board has
8 taken a 20 percent pay cut to -- I think to reflect, you know,
9 the current circumstances in the world and to participate in
10 some of the challenges that, you know, that the employees and
11 so on are going through, as well. And we also, as part of
12 that package, reduced senior level compensation by as much as
13 30 percent, including that of Mr. Ergen. Just to make sure I
14 got it right. In addition to that cash compensation there is
15 5,000 options, 5-year options granted annually to each board
16 member.

17 Q Annually?

18 A They're annually, and there's options are struck at
19 the then prevailing market price.

20 Q Has that turned out to put any money in your pocket?

21 A Not as of yet.

22 Q Is the amount of compensation that you -- oh, by the
23 way, and you're also compensated as a member of the SLC, are
24 you not?

25 A I am.

1 Q And I think we heard \$5,000 a month?

2 A That's correct.

3 Q Was that cut, as well?

4 A No, that was not cut.

5 Q Is there a reason why that wasn't cut, just
6 overlooked?

7 A No. I think it was discussed, and I think the
8 feeling was that it was coming to an end and it would just --
9 the board compensation was cut -- the cash compensation was
10 cut 20 percent with the expectation that it'll be either
11 continued or reconsidered in six months.

12 Q Okay. Is the amount of compensation that you
13 receive as a director -- oh, by the way, do you get additional
14 compensation for serving on any other committees?

15 A There's some. I can't tell what it is, but there is
16 some compensation for that.

17 Q So as a compensation that you receive as a director,
18 committee member, or an SLC member in part a material portion
19 of your income?

20 A No.

21 Q Is it a material portion of any of your wealth?

22 A No.

23 Q Would you say that it's rather immaterial to your
24 annual income?

25 A I might characterize it as such.

1 Q In other words --

2 A Yes.

3 Q -- if it went away tomorrow it would not affect

4 yours or Allison or your childrens' lifestyle?

5 A That's correct.

6 Q When you joined the SLC did you believe that as a

7 member of the SLC that you were independent?

8 A I did.

9 Q Did you believe that it was independent from any

10 personal interest of the Ergens?

11 A Yes.

12 Q And would you please explain why.

13 A I believe that I expected myself, by serving on a

14 board, to behave correctly and to represent the interest of

15 shareholders. And I believe I can do that.

16 Q Is that the same for the SLC?

17 A For the SLC, yes, that would be the same. Now I was

18 not -- I chose to join the SLC. I was not forced to join the

19 SLC, and I wouldn't have done so if I didn't think I could act

20 in that manner.

21 Q Does your relationship with the Ergens influence

22 whether or not you would be willing to recommend pursuing

23 claims against Charlie Ergen?

24 A If it was the right thing to do I would do it.

25 Q And similarly the same question for Cantey Ergen.

1 A That's correct. The same answer. I would be
2 prepared to do it.

3 Q Have you, as a member of another public company,
4 been involved in a situation where you were in a dispute with
5 a number of -- member of the board or management with whom you
6 had a personal relationship?

7 A Yes, I have.

8 Q And what was that? Would you please describe that.

9 A I was the Vice Chairman of a company called Alico,
10 and the CEO and fellow board member of that company was a
11 business partner and a 30-year friend.

12 Q Who's that?

13 A His name was Remy Trafelet.

14 Q That's the individual you described earlier was a
15 partner with you in the company called Trafelet Brokaw?

16 A Yeah. I was a business partner in Trafelet Brokaw
17 with him.

18 Q Okay. And describe what that situation was with Mr.
19 Trafelet and how you handled it.

20 A Well, I'm going to describe it in the context of the
21 agreements that were part of the settlement. But Mr. Trafelet
22 approached me as a member of the board. He asked me to
23 support initiatives related to his compensation and other that
24 I told him I could not support, because I did not think it was
25 in the best interest of the corporation. And the result of my

1 and others I guess, the other board members, you know, took a
2 similar position, it was the result of that failure to agree
3 on that went forward ultimately resulted in litigation between
4 him, me, the company, the other shareholders -- the other
5 board members, excuse me, that I helped lead as Vice Chairman,
6 and the consequence of all of that colloquially it would have
7 been called quasi proxy fight litigation.

8 There were specifics to it that are important that
9 make it slightly different, but that's accurate for the
10 substance of this discussion.

11 Q In other words, you took a position adverse to Mr.
12 Trafelet?

13 A I did. I took a position adverse to Mr. Trafelet,
14 and the consequence of that action was that he left the
15 company as CEO, the company retained, as part of the
16 settlement, most of his incentive compensation that he had
17 garnered in the form of options as CEO. It resulted in my
18 terminating my relationship with that business partnership,
19 and I haven't spoken to him since. I told him if he pursued
20 these requests that I didn't think they were in the best
21 interest of the company that our relationship would be
22 severed.

23 Q Does he have any relationship with your children?

24 A He does.

25 Q And what is that?

1 A He's the godfather of my daughter.

2 Q And I think you described that Mr. Trafelet's
3 actions were not in the best interest of Alico?

4 A In my opinion, yes.

5 Q And then [unintelligible] said he sued you
6 personally?

7 A He sued myself and other board members, but I would
8 -- and actually some of the legal costs associated with it I
9 actually paid personally and did not seek reimbursement,
10 because I thought it was -- from the company, because it was
11 the right thing to do. But I would characterize that as a --
12 you know, at a high level it was a complex corporate
13 disagreement on certain principles.

14 Q Do you know whether or not it caused any financial
15 harm to Mr. Trafelet?

16 A I have a view on that, yes.

17 Q And what is that?

18 A The potential loss of -- the loss of the options
19 that he otherwise would have been able to retain and
20 potentially exercise in the future depending on the
21 performance of the stock as they were long-dated options could
22 have resulted in many, many millions of dollars of
23 compensation.

24 The termination of his role of CEO cost him -- there
25 was a kind of a -- there was a consulting agreement entered

1 into as part of the separation, but he didn't receive a bonus,
2 and he stopped receiving CEO-level compensation which would
3 have, you know, an aggregate annually added up to, you know,
4 more than a million dollars. And my departure from that
5 business partnership effective immediately upon his
6 unwillingness to back away from what I thought was, you know,
7 something he should not do resulted in financial consequences
8 that I don't know, because I'm gone. I can estimate them, but
9 they're -- I think the other -- the cost to him directly by a
10 virtue of him departing from the public company and losing
11 that incentive comp and otherwise was meaningful.

12 Q So given that you lost a close personal friend and
13 godfather to your daughter, how do you feel now about what
14 transpired with Mr. Trafelet?

15 A I'm very much at peace with it.

16 Q You think you did the right thing?

17 A I think so.

18 Q And you think with respect to the Ergens that you
19 would also do the right thing if you felt that they were
20 engaged in any misconduct to cause damage to DISH?

21 A I believe so, yes.

22 Q So we've gone over briefly the appointment to the
23 SLC what your powers were under that. So now I want to talk a
24 little bit about the investigation inquiry if I might, please.

25 A Yes.

1 Q So, first of all, once you were appointed and began
2 to understand the role and powers you were given, what did you
3 understand to be your primary task? I don't want to say
4 primary task, your tasks generally.

5 A Yeah. I mean, at a high level we needed to gather
6 -- pursue an investigation and do those things and collect
7 that information and understand those things necessary to
8 determine whether or not pursuing these claims or other claims
9 we may have come upon were DISH's -- in the best interest of
10 the company.

11 Q Can you describe to me some of the steps that you
12 took in completing those tasks.

13 A Okay. Is it all right, Mr. Peek, that I just
14 proceed to the structuring of the investigation, or do you
15 want me to start with the formation and the --

16 Q I would like you to start with the formation and go
17 from there and what the various inquiries that you conducted.

18 A Okay. So, look, once we met for the first time --

19 Q Can I back you up a little bit about --

20 A Yeah.

21 Q -- but did you undertake a determination as to
22 whether the other two members were independent?

23 A I was going to go there. We did undertake that
24 process, and Chuck -- you know, I had a better understanding
25 of his history, because we had served on the board almost for

1 the same period, save a month. And we've been through
2 Jacksonville together. We brought down, if you will, in a
3 diligence term to make sure that nothing had changed and there
4 were no new relationships with any of the director defendants.
5 Tony, we also, with the help of counsel sought background
6 information and made inquiry as to his independence, and that
7 was the first step.

8 Q And then once you determined that independence I
9 take it you met?

10 A We met, and we considered the engagement of counsel
11 to proceed and assist with the investigation.

12 Q So we know that there's a complaint in -- or a
13 decision from the court in Krakauer; correct?

14 A Uh-huh.

15 Q So did you review that? Well, let me back up a
16 minute. Let me have you take a look at Exhibit 106, which is
17 the verified consolidated shareholder derivative complaint.

18 A Thank you for expanding it. I see that.

19 Q And did you understand what your role was with
20 respect to this verified complaint brought by the Plumbers
21 Union?

22 A Once the committee was formed and we began the
23 investigation I believe I understood what my role was.

24 Q And what was it?

25 A I think my role was to evaluate the claims that were

1 made in here. Also, based on our charter or our mandate from
2 the written consent to evaluate other claims that may arise.
3 We then were to determine whether or not it was in the best
4 interest of the corporation, based on our investigation, to
5 proceed to assert these or other claims.

6 MR. PEEK: So if we could I think -- bring up, if
7 you would, Exhibit 102, and I believe it's on page 286. So
8 the TX102-286.

9 BY MR. PEEK:

10 Q Now, there's recitation there in that first
11 paragraph on Exhibit 102, page -- actually, it's 285 of the
12 report. But did you appreciate that these were the claims
13 that were being asserted by the Plumbers Union? And there's I
14 think five enumerated complaints, and then there's withdrawals
15 of a couple of those.

16 A Yes. I mean, I think that's right.

17 Q And then I think you'll see in the next couple of --
18 the next sentence that a couple of those claims that were
19 withdrawn by the Plumbers Union. Do you see that next
20 sentence?

21 A Yeah, I did.

22 Q That they withdrew the claims for abuse of power and
23 gross mismanagement?

24 A Yeah.

25 Q Okay. So was your focus, then, to investigate all

1 theories of liability that Plumbers Union sought to bring
2 against the director defendants for, in this case, breach of
3 fiduciary duty, abuse of control, and corporate waste were the
4 remaining claims?

5 A That's what we endeavored to do.

6 Q So when you started your investigation was that one
7 of the first things that you looked at?

8 A We did. We got assistance from counsel in
9 understanding the theories of liability and what they were,
10 because in order to understand the theories of liability you
11 need to understand what the standards are to achieve judgment.
12 And therefore when you pursue your investigations you have to
13 go and seek those things that would be consistent with
14 establishing the standards of proof necessary to successfully
15 pursue a claim.

16 Q And what did you understand that those standards of
17 proof were that the Plumbers Union needed to prove to
18 establish liability against the director defendant?

19 A Broadly speaking, my understanding is that we needed
20 to find evidence in our investigation that could prove that
21 the -- what was likely to be would be sufficient to make it
22 worthwhile pursuing a claim. That the director defendants
23 knowingly caused or permitted DISH to breach the DNC laws as
24 set forth in --

25 Q Did you also appreciate that the theory of liability

1 on the part of the Plumbers Union was premised upon two
2 judgements: one called Krakauer versus DISH, a class action.
3 The other one called U.S. DISH, which was brought by the FTC
4 in four states?

5 A Yes, I do understand that.

6 Q Going back now, then, so I'm going to ask you
7 separately. So did the SLC investigate whether the directors
8 knowingly caused or permitted the violations that gave rise to
9 liability in Krakauer?

10 A Yes, we did.

11 Q And what did you do to do that?

12 A We asked for broad categories of information,
13 including things that I would call subjective and objective
14 evidence or what could be subjective and objective evidence of
15 behavior that would meet that standard.

16 Q Meet that standard of knowingly cause?

17 A Correct. And that information included, I'm sure
18 it's not limited to, but I'll give you my description --

19 Q Your best recollection.

20 A My best recollection was 40,000 documents roughly
21 went to the counsel. I think they evaluated them for
22 relevance to the case, because the requests were broad. And
23 then we reviewed as a committee something like 1500 documents.
24 We generally -- we did a lot of that document review, and then
25 based on that document review and otherwise we set up the

1 first sets of interviews. And then obviously these processes,
2 as you can imagine, are irritative so some information, which
3 document information generally I would characterize not always
4 as objective. Subjective information from interviews and the
5 like would also lead to further inquiry.

6 Q So how did you go about determining what documents
7 you wanted to review?

8 A Well, you know, I think I would start at the top and
9 say we established what theories of liability at least
10 initially we were pursuing and what kind of information would
11 be consistent with proving those theories of liability. And,
12 you know, one of the benefits of having a committee is that
13 each person brings, hopefully, different skills, strengths,
14 you know, to the discussion. And, you know, Mr. Lillis was
15 the CEO of a Fortune 100 company. You know, Mr. Federico was
16 a very senior executive at one of the more storied, you know,
17 U.S. corporations. They may have had, and I think you've
18 heard in their testimony, they came at it from -- Mr. Federico
19 was very much an operational, had a very -- everyone had a
20 different focus that contributed to the substance of the
21 requests and the kinds of things that people wanted to
22 consider. And I thought that the combination was certainly
23 from my perspective was benefited from everyone participating
24 in that.

25 We also asked counsel to help us think through what

1 other kinds of things should we ask for. What can, you know,
2 and so that in numerous times in the inquiry we would ask what
3 else can we go -- what else can we ask for. And that was the
4 nature, as I recall, of the inquiry -- I don't know if that's
5 responsive to your question.

6 Q It is.

7 A But that's the nature of the kind of inquiry that we
8 went on and on. I think there was initial, you know, an
9 initial sort of easy -- not easy, but what I would say in
10 business terms an initial due diligence list, these are the 10
11 things we'd like to see. And then certainly for each of us
12 had different areas of focus. I was very focused in seeing
13 whether, you know, finding out information and asking about
14 information related to --

15 THE COURT: You can keep going. I'm listening.

16 THE WITNESS: Oh. Sorry.

17 MR. PEEK: Please continue. I just -- I'm trying --

18 THE COURT: It's all right. I'm listening.

19 MR. PEEK: I know you are. I'm just trying to --

20 THE WITNESS: Whether they were -- one of the
21 reasons we interviewed people in the organization below the
22 director defendants from my perspective anyway was that I
23 wanted to understand whether the subjective perspectives of
24 the director defendants we interviewed were supported by both
25 the subjective recollections of either -- both internal and

1 external persons and then sought information to otherwise
2 objectively collaborate that information. That was I guess
3 the matrix at least in part in my head that I started with.
4 And that just kept filling out, you know, frankly having the
5 benefit of someone who was a dean of a business school and
6 senior executive at a, you know, two senior executives of
7 major corporations, which I never was, helped me better
8 understand what was needed, as well.

9 MR. PEEK: So, Brian, would you bring up TX102, page
10 14124.

11 BY MR. PEEK:

12 Q And I think you probably have seen this as a member
13 of the, you know, watching the others.

14 A Yeah.

15 Q So are these documents that the SLC directed counsel
16 to obtain?

17 A Yeah. I mean, I've seen this document before, so
18 I'm familiar with -- it was -- we asked for this information.

19 Q And even though this -- this was the initial request
20 for documents, was it not?

21 A I assume it was the initial one, but I don't know if
22 we asked for stuff before that. But certainly this was an
23 early one.

24 Q Were there documents even after this --

25 A It says, first set, so yes.

1 Q Yeah. It does say first set. Were there other
2 documents, as the process continued, that you also asked
3 counsel to obtain for you?

4 A We were asking for documents. I can't remember when
5 we ever stopped asking for documents, to be honest, in the
6 investigation.

7 Q Why did you start with documents first in your
8 investigation?

9 A Well, you know, I think if you're going to -- as
10 opposed to interviews or -- I think common sense, at least to
11 my mind, would suggest that being prepared with an
12 understanding of the court documents and, frankly, the initial
13 email discovery would make the quality of the interviews
14 better and would enhance our ability to assess the credibility
15 of the witnesses or the interviewees.

16 Q So as you began the process of your investigation
17 did you know what the outcome of that investigation was going
18 to be?

19 A I did not. I don't -- I didn't -- I mean, I can
20 speak for myself, most certainly. I don't believe the others
21 did, but I certainly did not.

22 Q I think you used the word that this was a way to
23 determine both the objective and subjective. What did you
24 mean by that?

25 A Well I think some information if somebody tells you

1 -- I mean, I guess my -- going in premise for me would be that
2 if you ask someone did you break the law, unless it's
3 collaterally estopped because they were convicted of
4 something --

5 Q Let's not go there, Mr. Brokaw.

6 A No. No. But unless --

7 THE COURT: That's the problem with the legally
8 trained. Yeah, they understand there's other issues, yes.

9 MR. PEEK: I know. I know. I --

10 THE WITNESS: It's taken me 20 years to use that
11 term --

12 THE COURT: Okay. All right. I appreciate that.
13 Let's keep going.

14 BY MR. PEEK:

15 Q Please continue.

16 A Generally speaking you would expect people to say
17 that they believe that they were complying with the law, okay.

18 Q If you ask them.

19 A You ask them. I didn't know what they was say
20 before I went, but I just -- you have to assume skepticism.
21 So I think part of the structure of the investigation was to
22 assess objective hard --

23 Q Hard documents.

24 A -- documents to put other information in context and
25 to support or not, refute whatever we later found. And so I

1 think it's -- I think we try -- no one's perfect, but we
2 sought to get -- we sought to pursue every area of inquiry we
3 could, you know, reason to come up with.

4 Q I guess then -- so the collection of documents or
5 what was being contained of the documents it'd be what you
6 described as objective?

7 A Generally. I mean, my -- it would be objective. I
8 don't know how you characterize email traffic, but I think
9 there's probably some of both in there. There's people's
10 opinions and things, but generally it would be objective to
11 the extent that at the time they wrote it they -- people state
12 of mind was potentially captured there or would be potentially
13 captured there.

14 Q So as you were reviewing the documents were you
15 attempting to determine whether or not the director defendants
16 knowingly caused or permitted DISH to violate the laws as set
17 forth in Krakauer and U.S. versus DISH?

18 A Well I think ultimately that's the question we
19 needed to answer with the -- with all of the data. I think
20 initially we were just going through and reading and absorbing
21 the data before we could even start framing, you know, framing
22 any conclusions. But ultimately the -- I'd say the idea was
23 to collect the information necessary to prove, if we could,
24 those assertions to, you know, to a level that was sufficient
25 to make it --

1 Q So as you're going through this process did you
2 review the Krakauer memorandum, both the jury verdict as well
3 as the memorandum decision of Judge Eagles?

4 A I did.

5 Q And did you appreciate what the jury found in its
6 verdict form?

7 A I did.

8 Q And you reviewed the jury verdict form?

9 A I reviewed the jury form, and we asked for
10 information to make sure we understood what it said. And,
11 yes.

12 Q And did you also review the memorandum decision of
13 Judge Eagles?

14 A I did, and we did.

15 Q And you understood that Judge Eagles, based upon the
16 jury's verdict of finding that DISH was liable for SSN was
17 then going to determine whether or not to treble damages?

18 A I did understand that.

19 Q Did you appreciate that?

20 A I did appreciate that.

21 Q And did you review each and every theory upon which
22 Judge Eagles found that DISH was liable or a trebling of those
23 damages?

24 A I believe we did, yes. And I remember doing so.

25 Q When you were reviewing Judge Eagles's decision were

1 you looking to somehow set it aside or ignore it?

2 A Actually, quite the contrary. We accepted it. I
3 accepted --

4 Q What do you mean you accepted it?

5 A We accept it as fact, the findings both of the jury
6 and of Judge Eagles trebling opinion.

7 Q And how did those -- accepting of those findings
8 inform your decision as to whether or not the DISH director
9 defendants knowingly caused or permitted DISH to violate the
10 DNC laws and the AVC?

11 A Well, we took it into account. You know, I would
12 certainly say that a decision like that would cause concern.

13 Q In other words, you didn't take it lightly?

14 A No, we didn't take it lightly. But, you know, I
15 think what we investigated for the purposes of determining
16 whether it was in DISH's best interest to pursue this
17 litigation was a different issue than was specifically
18 considered in Krakauer. But we considered the facts in
19 Krakauer as a given, and with those taken we evaluated whether
20 or not there was among the director defendants individually
21 and as a group a -- whether any of them knowingly caused --
22 permitted DISH to violate those laws.

23 Q Were you, in reviewing Judge Eagles's decision
24 investigating whether or not the DISH defendant directors not
25 only breached the fiduciary duty but also did so knowingly and

1 knowingly caused that judgement?

2 A Yeah. Yes. Sorry.

3 Q And you've listened to the testimony of others here
4 about, you know, each of the paragraphs that Mr. Baron likes
5 to go over?

6 A I recall swaths of it.

7 Q Lots of them? Did those, given what Judge Eagles
8 said, inform your decision as to whether or not the director
9 defendants knowingly caused the violations as Judge Eagles
10 found to occur?

11 A We took it into account, for sure.

12 Q So getting back now. So once you collected
13 documents was there a process by which you and the other
14 committee members would meet to discuss the documents that had
15 been collected?

16 A Yeah. So we met numerous times, roughly half, I
17 think it was either six in person and four teleprompter, vice
18 versa. I did once know the answer. I don't remember that,
19 but it was roughly 10 to a dozen times formally where -- and I
20 think as it went on --

21 Q My question was really did you discuss the
22 documents --

23 A Yes.

24 Q -- that you had received.

25 A We took documents we received. We read them, and we

1 discussed them.

2 Q Did you discuss them with other members of the
3 committee?

4 A Correct.

5 Q And did that assist you -- what was that -- so that
6 was part of your evaluation process was reviewing not only
7 yourself but also other members of committee.

8 A Correct.

9 Q And the purpose of that was, again, to determine
10 whether or not the DISH directors had knowingly violated or
11 knowingly caused DISH to violate the DNC laws and the AVC?

12 A Yes.

13 Q And when I say AVC you know what I mean by that?

14 A I do.

15 Q And what is it?

16 A It was a agreement between DISH and 46 Attorneys
17 General. I think the date was July 16th of 2009, and I just
18 remembered that because it's around now. But it may be wrong.
19 It's approximately then. And we, you know, we read and
20 considered that document.

21 Q Did you, in reviewing that AVC, see the assertions
22 that were being made by the 46 States' Attorneys Generals
23 about agency?

24 A We did. I did.

25 Q And did you also read those provisions within the

1 AVC where DISH denied that it was ever a principle of the
2 retailers as agents?

3 A I did.

4 Q Did you also appreciate what the obligations were
5 that were imposed upon DISH pursuant to the AVC?

6 A I believe we evaluated that and -- yes, we did. I
7 read it many times.

8 Q And did you appreciate that Judge Eagles, in her
9 decision, made, you know, certain findings about whether DISH
10 did or did not comply with the AVC or whether DISH did or not
11 -- whether its agent did or did not comply with the AVC with
12 its own obligations?

13 A Yes.

14 Q Did you appreciate the basis upon which DISH was
15 found liable for trebling damages?

16 A Yes.

17 Q And what did you understand those reasons to be that
18 Judge Eagles found for liability?

19 A Do you want me to get into substance?

20 Q No. I just want you to tell me what --

21 A Oh. Yes. I'm sorry. So yeah, yeah.

22 Q -- you understood it to be, and then we'll talk
23 about the process that you went through to investigate that.

24 A Okay. So there would two alternative sources I
25 think of liability that she set forth. One was given that the

1 jury determined that SSN was the agent of DISH and she then
2 determined that SSN's violations of the DNC were willing and
3 knowing. On that basis and one other, which I'll come to she
4 attributed the willing and knowing violations of SSN to DISH,
5 and therefore had a basis for trebling.

6 My understanding, as best I can recall, is that the
7 alternative source of liability that she set forth was that
8 DISH knew or should have known or something to that effect
9 that SSN's willing and knowing violations were -- occurred.
10 And so I don't know if that's two sides of the same coin, but
11 those were to my recollection probably a poor missed
12 restatement of what the sources of liability were, but those
13 are the best to my recollection.

14 Q Was there, to your understanding, any finding by
15 Judge Eagles that any of the director defendants knowingly
16 caused or permitted SSN to violate the DNCs?

17 A In Krakauer there was no such finding.

18 Q Did you investigate what role if any the director
19 defendant had with respect to the retailers for which Judge
20 Eagles found -- the jury found liability and later Judge
21 Eagles trebled those damages?

22 A Yes.

23 Q And what did you do?

24 A Well, the first thing we did is we tried to
25 understand and get information, and we got some of this

1 actually interestingly through interviews, because there was
2 things even though I've been on the board for a long time I
3 didn't appreciate what the organizational structural matrix
4 was around Retail Services and how that was managed.

5 And I will say that for example, Tony, who
6 understands organizational structures could be particularly
7 helpful in that. But I was very interested in that, as well.
8 So through interviews and otherwise we first established
9 change of command, who did -- tried to the best of our ability
10 to understand who's responsible for what. And then from there
11 say what we actually doing. And then I guess from there what
12 was your state of mind, like, was your state of mind
13 consistent with what you were actually doing and trying to
14 evaluate all of that.

15 Q Did you understand -- or excuse me. Did you
16 investigate what activities the director defendants in this
17 case what role that they had in OE Retailers?

18 A Yes.

19 Q And what did you do in that regard?

20 A We sought -- well, other than understanding the
21 organizational matrix we also we also looked at large amounts
22 of documents back and forth where we could understand how
23 could Retail Services business was being directed in
24 particular with respect to DNC compliance and AVC compliance,
25 which were weighted. And so we sought a lot of data that --

1 or documentary evidence through emails and later interviews,
2 you know, trying to granularize it a little bit -- or for at
3 least for me as to how it all worked and what people were
4 actually doing. If someone -- if you were to see emails that
5 people were directing certain activities or other things you
6 could get a better understanding of how -- what the state of
7 mind was and what the actual objective activities were.

8 Q Well, give me some examples of those investigatory
9 processes that you undertook to inform your decision.

10 A Well, I mean, first of all, if you put up the list
11 of the interviewees, and it wasn't first because we did that
12 second, but we talked to Katide [phonetic], Blum --

13 Q Let me put that up --

14 A Oh. Yes. Sorry.

15 Q -- for you, then, so you can go over that --

16 THE COURT: It's up, Mr. Peek.

17 MR. PEEK: Pardon?

18 THE COURT: It's already up.

19 THE WITNESS: Thank you. And so --

20 MR. PEEK: I forgot Brian was much faster than --
21 more fast than I am, Your Honor.

22 THE WITNESS: You know, I think I was in particular
23 -- I mean, everyone I think had -- I do remember, maybe not
24 exclusively, that I had particular interest in understanding
25 what the direct reports and below them were actually doing and

1 saying. So, you know, we talked to, you know, Lori Kalani.
2 Ken Sponsler, who's an outside vendor was very interesting to
3 talk to, because DISH used him as a vendor. And we talked to
4 -- we got to understand how he interacted with DISH, what kind
5 of guidance he was getting from inside counsel. Blake Van
6 Ernst, VP of retail services, again, we interviewed him to
7 understand his approach. He was very involved. Patrick
8 Halbach, internal audit, again, what was he doing, what kind
9 of activities was he doing. I mean I can go down the list,
10 but the ones that were sort of, you know, I guess
11 nonconventional, Amir Ahmed, Brett, Katide, Blake Van Ernst,
12 Patrick, you know, Halbach were examples, not a complete
13 example, of trying to understand how that side of the business
14 from an operational perspective worked.

15 And then on the legal side, which, you know, they
16 had a -- we inquired as to what sort of committees might have
17 been formed or internal compliance activities were taking
18 place, and the people we interviewed around that activity
19 included, you know, folks who you've discussed here, and I can
20 name them, but who were responsible both before the claim
21 period and after in those sorts of activities.

22 BY MR. PEEK:

23 Q So there's a couple of outside counsel here that we
24 see that are -- that are interviewed.

25 A Yeah.

1 Q What does --
2 A Lew Rose.
3 Q Yeah, Lew Rose, Alyssa Hutnik, that's the Kelley
4 Drye law firm, and then Helen Mac Murray --
5 A Yeah.
6 Q -- of Mac Murray --
7 A And Lori actually is, today, an outside lawyer.
8 Q Let's just focus --
9 A Okay.
10 Q -- on Lewis Rose and Alyssa.
11 A Yes. I'm familiar with -- we asked for information
12 that was provided by Kelley Rose [sic] --
13 Q Kelley Drye.
14 A Kelley Drye. Lew Rose, Kelley Drye, Lew Rose, and
15 we actually interviewed her, Lew and Alyssa, to --
16 Q So why did you interview those two --
17 THE COURT: Can you let him finish.
18 MR. PEEK: I'm sorry. I thought he --
19 THE COURT: Sir, were you done?
20 MR. PEEK: Sorry.
21 THE WITNESS: Yes, I was. Thank you.
22 THE COURT: Okay.
23 MR. PEEK: My apologies --
24 THE COURT: It's all right.
25 MR. PEEK: -- to the Court and to the witness.

1 BY MR. PEEK:

2 Q Why were you interviewing Lewis Rose and Alyssa
3 Hutnik for purposes of appreciating whether or not the
4 director defendants knowingly caused or permitted DISH to
5 violate the DNC laws?

6 A Well, Kelley Drye was a law firm that specialized in
7 at least this, I'm sure they do other things, but one of their
8 practices is to provide FTC and FCC guidance. They're
9 particularly well regarded according to, you know, all
10 accounts in providing advice on those issues, and both general
11 -- the general counsels and other members of management
12 received guidance from Kelley Drye.

13 Kelley Drye was also writing and drafting memos on
14 behalf of DISH that were part of the negotiations that led to
15 the AVC, and they provided advice subsequent to the AVC in the
16 discussions with the FTC around Agency in particular, which
17 was one of the two elements required for, you know, for
18 liability and certainly -- well, actually the establishment of
19 Agency was relevant, you know, to both cases that created, you
20 know, created to U.S. v. DISH and Krakauer. So they were --

21 Q Did you appreciate the advice that they gave to the
22 board?

23 A I read it and I appreciated it.

24 Q And similarly now with Mac Murray I think it is,
25 yeah, Helen Mac Murray, what was -- was that something you

1 also reviewed?

2 A I believe we did, but I don't remember sitting here
3 with as much clarity, because I read there was a great deal of
4 information from Kelley Drye.

5 Q Now, you mentioned Lori Kalani as being currently
6 outside counsel.

7 A Right.

8 Q At the time was she -- in the relevant period that
9 you were investigating was Lori Kalani to your understanding
10 in house at DISH?

11 A As I recall, that's correct.

12 Q And do you know what role she played, if any, with
13 respect to the allegations of the complaint about seeking to
14 hold the director defendants liable?

15 A Well, she was -- if my recollection is correct, I
16 believe she was involved internally in the discussions with
17 the Attorneys General.

18 Q The 46 Attorneys General?

19 A Yeah. Yes.

20 Q So why was it important to talk to her about the AVC
21 and the 46 Attorneys General?

22 A Well, I think it was important to get all the
23 context we could around what her state of mind, what she
24 believed the government's state of mind might have been, and,
25 you know, I believe there's -- you know, we reviewed

1 statements in the AVC around DISH's point of view on agency in
2 particular. And I think she would have had context for all of
3 those things. She is also now -- anyway, that's -- I mean, I
4 can -- I remember well her interview, or at least I remember
5 it, and so I remember she had --

6 Q So the interview -- was there anybody that you felt
7 -- well, first of all, was there anybody that you wanted to
8 interview that refused to be interviewed?

9 A Well, we -- I think there was only one interview
10 request that the potential interviewee declined.

11 Q And who was that?

12 A The plaintiffs.

13 Q Were each and every one of these interviewees on
14 this list cooperative?

15 A That was my impression. I wasn't in the Brandon
16 Erhart interview, I don't believe, and so I can't attest to
17 all, but the vast majority that I was -- that I recall, they
18 were all very cooperative.

19 Q Did you participate in the interviews?

20 A I believe I participated in the vast majority of
21 them, yes.

22 Q And did you ask questions?

23 A I did ask questions.

24 Q And did the other members of the SLC ask questions?

25 A The other members of the SLC did ask questions.

1 Q And did counsel ask questions?

2 A Counsel did ask questions.

3 Q Did you believe that during the course of the

4 questioning of these individuals that you interviewed that you

5 were thorough?

6 A I believe so.

7 Q Did you use documents, for example, that you had

8 collected during the course of the interviews to show those --

9 show the interviewees?

10 A We would.

11 Q Pardon?

12 A Yes, we did.

13 Q During the course of the interviews were you

14 attempting to assess the credibility of those individuals

15 that you were interviewing?

16 A Yes.

17 Q And how did you go about doing that?

18 A We would cross-reference what they were saying with

19 observations about behavior and documentary evidence that we

20 saw,

21 Q So you were trying to see if they were consistent

22 with others you'd interviewed?

23 A Yeah.

24 Q Consistent with what the documents were that they or

25 others had written?

1 A Correct.

2 Q Did you -- one of the director defendants that you
3 interviewed I think was Mr. DeFranco. Had you also as part of
4 your investigation reviewed the testimony that Mr. DeFranco
5 had given in the Krakauer case?

6 A Yes.

7 Q Did that inform you as to whether or not DeFranco
8 had knowingly caused the company or permitted the company to
9 violate the DNC laws or the AVC?

10 A We took his testimony and other facts into
11 consideration in making that determination.

12 Q Did you appreciate that the DISH director defendants
13 viewed the OE retailers as independent contractors and not as
14 their agent?

15 A Sorry. Say that again.

16 Q Did you appreciate during the course of your
17 investigation that the director defendants believed that the
18 OE retailers were independent contractors and not the agents
19 of DISH?

20 A Well, what I would say is we sought information as
21 to their state of mind about that. They -- there was
22 testimony from all of them on that subject, and we also saw
23 documentary legal, other evidence to see if --

24 Q That's the Kelley Drye memo that you referred to.

25 A -- to see if that belief was consistent, correct.

1 Q Did you see memos and the like from in-house counsel
2 to the board respecting whether or not the OE retailers were
3 independent contractors or agents of DISH?

4 A I believe we did. I also -- certainly there was a
5 broader set of information that we reviewed that went to
6 manager -- like, you know, executive directors who were
7 managing the businesses. But we also reviewed information
8 that the board got on the topic.

9 Q Did you have some understanding, if any, as to
10 whether or not the decision of Judge Eagles or the U.S. versus
11 DISH case somehow found -- or any way found that the DISH
12 directors knowingly caused or permitted DISH to violate the
13 DNC laws or the AVC?

14 A We did. I mean, we didn't find that they did. We
15 had an opinion on it.

16 Q And I haven't gone over this, but the interviews
17 were independent of your 10 meetings; correct?

18 A Correct. There were other -- we used opportunities,
19 because we had, as I recall, interviews in both Washington,
20 D.C., and in Denver in person, and we took opportunities to
21 discuss after the interviews what we heard. And in some cases
22 there were multiple interviews on the same day, if I recall
23 correctly, and we would use one interview to inform new
24 questions that we might want to ask the subsequent
25 interviewee, for example.

1 Q Did there come a time when you began to sort of I
2 guess digest and discuss all the information that you had
3 received?

4 A Yeah.

5 Q And did you have meetings with the other members of
6 the director and your counsel to discuss everything that you
7 had learned during the course of the document review and the
8 interviews and everything that had transpired before that?

9 A You mean other members of the SLC?

10 Q Yeah, other members of the SLC.

11 A Yes.

12 Q Did you begin to -- or did you ask counsel then to
13 begin based upon what you had learned to prepare a report
14 about what you had learned?

15 A Yes.

16 Q And before they prepared that report did you give
17 them some guidance about what your thoughts were that you
18 wanted to have incorporated into that report?

19 A Yes.

20 Q Was the report in draft form reviewed from time to
21 time by you?

22 A Yes, it was.

23 Q And on how many -- do you recall how many different
24 drafts you reviewed?

25 A I don't. Many.

1 Q It was certainly more than one or two?
2 A Yeah. I have a bad habit of reading --
3 Q Of what?
4 A Yes. I read many drafts and, you know, I was still
5 reading information that we gathered because it was, you know,
6 seven boxes in my office in Jackson Hole that took time to
7 read and consider, and some things you had to read again, you
8 know, especially I think legal opinions and things that
9 sometimes become more clear the more you read them.
10 Q Okay.
11 A So it was an iterative process that involved
12 sometimes going back to things.
13 Q It was dynamic.
14 A For sure. Yes, it was.
15 Q Did you provide comments on each of these drafts
16 that you were asked to review?
17 A I recall that I did, yes.
18 Q And to your knowledge were those comments
19 incorporated into the report, your thoughts?
20 A To the best of my knowledge, yes.
21 Q Do you consider the report to be the thoughts of
22 your counsel, or the thoughts of the SLC committee?
23 A Very much the thoughts of the committee.
24 Q One of the committee -- or one of the individuals
25 that you interviewed here that I didn't go over was the

1 individual from KPMG. Why did you want to interview the
2 outside auditor for DISH?

3 A So Jason Waldren -- the outside auditor for DISH
4 participates in evaluating, among other things, when it's
5 appropriate to account for litigation -- potential litigation
6 liabilities and the financial statements, and we wanted to
7 understand from him his thought process around the liabilities
8 associated with the litigation that's referenced in the
9 complaint.

10 Q Now, outside auditors are considered to be -- or
11 have to be independent from the company, don't they?

12 A They do.

13 Q And did you consider KPMG to be independent of the
14 company and forthright in their audit?

15 A Yes.

16 Q And is that one of the reasons why you wanted to
17 interview them?

18 A Yeah. We wanted to interview them because we
19 thought they were [unintelligible] an outside source, but they
20 also had information that might be helpful to us in assessing
21 the issues that we were -- you know, we were considering.

22 Q Were there any issues that you personally -- on
23 which you were personally focused?

24 A Yes.

25 Q And what were those?

1 A I took different categories. So the first category
2 of information I think I really was in part responsible -- I'd
3 like to think I added some value, is figuring out how to take
4 behavioral -- like learning as much as we could about the
5 behavioral activities to either kind of determine whether --
6 what was going on down in the -- you know, in the organization
7 was consistent or not with the beliefs of what was going up
8 top, because that might -- we might learn something from that.

9 I also thought that Ken Sponsler from PossibleNOW
10 was really interesting to me, because it gave me context for
11 what was going on in terms of compliance efforts not only by
12 DISH, but by other organizations, because my understanding --
13 PossibleNOW provided us -- we asked for information and got
14 information about the activities from PossibleNOW, as an
15 example. You know, they provided audits for DNC compliance
16 for DISH itself. They managed or helped manage databases of
17 numbers and understanding how that all worked was -- how the
18 registry which was discussed earlier actually worked
19 mechanically and to better understand how problems could arise
20 from failure to not call names that were on the registry, and
21 also to understand what the standard of care might or might
22 have been in the industry broadly, because PossibleNOW outside
23 vendors' evaluation of DISH's internal policies might or might
24 not be a relevant fact in trying to assess whether -- and what
25 they were telling DISH management about the quality of their

1 compliance might have affected their state of mind as to
2 whether they thought they were knowingly causing DISH to
3 violate or not. So I found that kind of information helpful
4 in respect of the specific DNC activities. And until I got
5 into this case I didn't really appreciate the nuances of
6 agency law. I understood them I guess in a common-sensical
7 way --

8 THE COURT: But not the legal way, huh?

9 THE WITNESS: Well --

10 THE COURT: So you haven't done apparent authority
11 yet and, you know, all that stuff. Okay.

12 THE WITNESS: No. It's been -- you know, I'd like
13 to one day do some pro bono work and get better at it, but --

14 THE COURT: Not on this issue.

15 MR. PEEK: Not unless you really practice.

16 THE WITNESS: But, I mean, partly because of my
17 background and the agency issue was complex, I found
18 particular interest in understanding the implications of that,
19 just, you know, and internally, you know, for DISH and what
20 the state of mind and why it was important. And it thought
21 that that was an area of particular interest. And it was the
22 -- you know, it was also for me interesting to understand how
23 that was the nexus, you know, between the activities of, you
24 know, some OE retailers and DISH and how that all interacted.
25 I thought understanding all of that -- you know, how much of

1 that we used in the report, you know, I can't -- I don't know
2 how that all balanced out. But if you asked me what I found
3 area of particular interest and focus that I'd like to think
4 we did -- at least I made efforts to really understand as best
5 I could, I'd say that those were very interesting.

6 I also found -- we asked for information that spoke
7 to culture, the kind of things that people were trying to do
8 or not do, and I thought it's -- it's very interesting to look
9 into a time capsule through emails and others to understand
10 people's state of mind. And I found that to be just, again,
11 intellectually really interesting, and it led to inquiry that
12 I think helped us come to our determination.

13 BY MR. PEEK:

14 Q Ultimately the report was -- final product was
15 submitted to the Court?

16 A On my birthday.

17 Q Oh.

18 A I think I know the date.

19 Q Okay. I didn't know that myself.

20 Did you approve that final report that was submitted
21 to this Court?

22 A Yes, I did.

23 Q Do you stand by that report that was submitted to
24 the Court?

25 A I do.

1 Q Do you believe that you ignored any theories of
2 liability that Mr. Baron through the Plumbers Union seeks to
3 impose on the director defendants?

4 A No, I don't believe we did. I believe we tried to
5 enter into a process to consider those, and I hope we did a
6 good job.

7 Q And I think ultimately your conclusion was that you
8 didn't find proof, sufficient proof to pursue the claim that
9 the director defendants knowingly caused or permitted DISH to
10 violate the DNC.

11 A That's correct.

12 Q Now, I know Mr. Baron's going to ask you about, you
13 know, can you point to a page in the report. Aside from that,
14 do you believe that everything that you did, all the
15 thoroughness, all the conclusions, all of the evaluations of
16 the fiduciary duty, abuse of power, knowing violations all
17 were in that report?

18 A I believe we did a very thorough job and that they
19 are in there, and I believe we had -- were fortunate to have,
20 myself excluded because I'm just a, you know, failed lawyer,
21 but two very competent corporate executives to compliment my
22 best efforts in trying to come to that determination.

23 Q And did you also determine whether it would be in
24 DISH's best interest to pursue the claims brought by Plumbers
25 Union against the director defendants?

1 A We did.

2 Q And what did you conclude?

3 A We decided that it would not be in DISH's best
4 interest to pursue those or other claims.

5 MR. PEEK: May I have a moment, Your Honor, just to
6 consult with my counsel --

7 THE COURT: You may.

8 MR. PEEK: -- make sure I covered everything?

9 THE COURT: Do you want me to actually take a break,
10 or can we watch you consult?

11 MR. PEEK: Yeah. Can we have just a very short
12 break, Your Honor, because I want to be able to wrap this up.

13 THE COURT: How about we take five. Five minutes.

14 (Court recessed at 2:29 p.m., until 2:37 p.m.)

15 THE COURT: All right. Go.

16 BY MR. PEEK:

17 Q Did the SLC investigate the Plumbers Union's claim
18 for breach of fiduciary duty based upon any breaches of the
19 2009 AVC in Krakauer? Wait a minute.

20 THE COURT: You can just stop after AVC. It's the
21 same question.

22 MR. PEEK: Yeah. As identified in Krakauer.

23 THE WITNESS: Yes.

24 MR. PEEK: That's all I have.

25 THE COURT: All right. Sir, I need to ask you a

1 question before we go to Mr. Baron. Your son, how old is he?
2 THE WITNESS: Today he's 12.
3 THE COURT: Twelve. Okay. Thank you.
4 Mr. Baron, you're up.
5 I'm just trying to get a context with the godparent
6 thing.
7 MR. GOODMAN: Thank you, Your Honor.
8 THE COURT: Mr. Goodman.
9 MR. GOODMAN: Mr. Goodman this time. And we have
10 no questions.
11 THE COURT: Thank you.
12 You can step down, sir.
13 Next witness.
14 MR. PEEK: Your Honor, we have no further witnesses.
15 THE COURT: Do you have any additional evidence that
16 you'd like to present at this time?
17 MR. PEEK: Let me just make sure on my list, but I
18 don't believe so. We have -- I want to make sure what we have
19 in evidence so far, Your Honor. We have Exhibit 102 --
20 THE COURT: Why don't you come check with Dulce.
21 MR. PEEK: Thank you.
22 THE COURT: Mr. Baron, you're welcome to come up and
23 look over his shoulder, or you could send Mr. O'Mara, who's
24 quietly in the corner trying to work on other stuff. Because
25 he's got a hearing on Monday that he's trying to get ready

1 for.

2 (Pause in the proceedings)

3 MR. PEEK: We have no further exhibits, Your
4 Honor --

5 THE COURT: Thank you.

6 MR. PEEK: -- we'll offer at this time.

7 THE COURT: All right. Thank you.

8 Mr. Baron, do you have an additional evidence,
9 witnesses, or documents you'd like to offer for purposes of
10 this evidentiary hearing?

11 MR. BARON: Your Honor, no witnesses -- additional
12 witnesses. We will move in the remaining exhibits on
13 plaintiffs' evidence list, which is Exhibit 1 through 51. I'm
14 happy to identify which ones we have already admitted, but our
15 motion -- in the abundance of caution those are the additional
16 exhibits that were part of our opposition to the motion for
17 summary judgment.

18 THE COURT: Let me ask the question of Mr. Peek
19 differently.

20 Mr. Peek, are there any of the documents that are
21 identified as 1 through --

22 MR. BARON: 51.

23 MR. PEEK: To which we have an objection, Your
24 Honor? Is that the question?

25 THE COURT: Yes.

1 MR. PEEK: Yes, Your Honor. You may recall that I
2 previewed this before we started with respect to sealing.

3 THE COURT: Just give me numbers.

4 MR. PEEK: Exhibit 17, summary of the interview of
5 Charlie Ergen.

6 THE COURT: Okay.

7 MR. PEEK: Exhibit 18, summary of Carl Vogel.

8 THE COURT: Okay.

9 MR. PEEK: Exhibit 19, the summary of the interview
10 of Brandon Erhart.

11 THE COURT: Okay.

12 MR. PEEK: Exhibit 20, summary of interview of
13 Steven Goodbarn. Exhibit 21, summary of interview of David
14 Moskowitz. Exhibit 31, summary of interview of Jim DeFranco.
15 Exhibit 32, summary of interview of Amir Ahmed. Exhibit 37,
16 summary of interviews of Jeffrey Blum. Exhibit 38, summary of
17 interview of Kenneth Sponsler. Exhibit 43, summary of
18 interview of Stanton Dodge. Did I miss any [inaudible]?

19 We have objections to those, Your Honor, as I
20 have --

21 THE COURT: Any others besides those?

22 MR. PEEK: Pardon?

23 THE COURT: Any others besides those?

24 MR. PEEK: No.

25 THE COURT: Mr. Baron, with respect to the

1 objections made to the summary of the interviews, since the
2 summary of the interviews were not used for purposes of this
3 hearing in the examination of the SLC members, why are you
4 proffering them to me at this time, understanding they're
5 attached to your opposition?

6 MR. BARON: And it was in the abundance of caution
7 based on the conversation that we had at the beginning. There
8 is nothing in particular about those that were discussed or
9 were part of the examinations here today.

10 THE COURT: Because of the sealing issues only, I am
11 going to sustain the objections. They are already part of the
12 record attached to your written pleadings and remain sealed
13 under the Court's proceedings. But I am not going to admit
14 the documents, and I am going to order them to remain sealed
15 pursuant to the order that was previously entered related to
16 the opposition to your motion which was filed last year -- or
17 was it April?

18 MR. BARON: I think it was April.

19 THE COURT: In April.

20 MR. BARON: Maybe before all of this craziness.

21 MR. GOODMAN: January 31st, Your Honor, this year.

22 THE COURT: And there was a motion to seal that was
23 filed at the same time as the opposition, I remember, and I
24 remember ruling separately on that order to seal. We'll just
25 have to find it so we can cross-reference it.

1 For purposes of your minutes, sealing the documents
2 that were offered by Mr. Baron, objected to by Mr. Peek, and
3 sustained by me solely on the sealing issue. Okay. They were
4 offered so --

5 THE CLERK: But some of these were depo transcripts.
6 Are the rest --

7 THE COURT: Everything else was admitted.

8 THE CLERK: Thank you.

9 THE COURT: Okay. So would you like to argue?

10 MR. FLINN: Yes, Your Honor.

11 MR. PEEK: No, Your Honor, I wouldn't. But Mr.
12 Flinn would.

13 THE COURT: He gets two bites at the apple, so --

14 MR. PEEK: And he asked me if he got two bites. I
15 said of course.

16 THE COURT: He does. Yeah. Of course. His burden.

17 MR. FLINN: Your Honor, may I approach to turn that
18 a little bit in my direction? I will be looking at the
19 screen.

20 THE COURT: Sure.

21 MR. FLINN: Or would you prefer --

22 THE COURT: No. Someone who's not going to fall
23 over when they touch it. Thank you.

24 (Pause in the proceedings)

25 SLC'S CLOSING ARGUMENT

1 MR. FLINN: Your Honor, while we respectfully submit
2 that the SLC has met its burden under DISH I --

3 THE COURT: And which burden do you think that is?

4 MR. FLINN: To establish that the SLC was
5 independent. Which burden?

6 THE COURT: What kind of burden do you think it is?

7 MR. FLINN: Preponderance of the evidence and the
8 factual findings.

9 THE COURT: And why do you think that?

10 MR. FLINN: Because the Jacksonville court, Your
11 Honor, rejected the alternative standard, which was the
12 summary judgment-like standard, which we all go home -- in
13 which the --

14 THE COURT: Not really.

15 MR. FLINN: I'm sorry?

16 THE COURT: Your reading is that they decided I have
17 to apply the preponderance of the evidence standard?

18 MR. FLINN: They clearly, Your Honor, said that Your
19 Honor should make factual findings by way of the evidence.

20 THE COURT: I understand that. But the question is
21 what burden do I use in making those factual findings.

22 MR. FLINN: I think Your Honor --

23 THE COURT: There are multiple burdens of proof.
24 There's this huge spectrum of things.

25 MR. FLINN: I appreciate that, Your Honor. And we

1 believe it would be the usual burden, which would be
2 preponderance of the evidence. There's no --

3 THE COURT: Because I don't see the words
4 "preponderance of the evidence" anywhere in that decision in
5 DISH I.

6 MR. FLINN: I think -- Your Honor, I didn't see it
7 there, either.

8 THE COURT: Okay.

9 MR. FLINN: But the -- I think the only alternative
10 standard would be clear and convincing evidence, and there's
11 no indication it should be that. So we [unintelligible] the
12 right of a standard --

13 THE COURT: Okay.

14 MR. FLINN: And there are cases in which the courts
15 who have done something similar have said that the SLC bears
16 the burden of proof to establish X. And usually when a court
17 says that a party bears the burden of proof to establish X and
18 they don't specify that it's one of the heightened burden
19 standards --

20 THE COURT: Or lower burdens.

21 MR. FLINN: -- or lower burden standards that it
22 would be one of those. So [inaudible].

23 THE COURT: Okay.

24 MR. FLINN: So, Your Honor, on the first of the
25 DISH I requirements we submit that the SLC members have

1 demonstrated that they were independent. This is certainly
2 the case for the requisite majority of the SLC, consistent
3 with Mr. Lillis and Mr. Federico, and it was also true of Mr.
4 Brokaw. Mr. Lillis was already found independent in DISH I
5 from nearly all the same directors at issue here. He
6 testified yesterday without contradiction that his
7 relationship with the director defendants has not changed
8 since then. Even if we did not have the benefit of DISH I and
9 the Supreme Court's decision there, it should be completely
10 clear that Mr. Lillis is independent. He does not have any
11 relationship, financial, social, or otherwise, with any
12 director defendant apart from contemporaneous board service.
13 And contemporaneous board service does not undermine
14 independence.

15 We have cited the uniform cases on this point in our
16 briefs. And in DISH I Your Honor held that Mr. Lillis was
17 independent despite his contemporaneous board service, and the
18 Supreme Court affirmed that ruling. Also, we submit that
19 during his testimony he showed himself to be wholly
20 independent.

21 Moving to Mr. Federico, he, too, is independent. He
22 has no relationship with any director defendant apart from
23 contemporaneous board service in his case with just two of the
24 director defendants on the board of EchoStar, an affiliate of
25 DISH. That Ergen supported Federico's election to serve on

1 the EchoStar board is immaterial as a matter of law. The same
2 is true of Lillis in DISH I, that he was found independent
3 there. And we have cited the uniform authority that the mere
4 election to the board with the support of a controlling
5 stockholder does not undermine a director's independence.
6 Moreover, during his testimony he showed himself to be
7 independent, we submit.

8 So, as plaintiffs do not dispute, if a majority of
9 the SLC is independent, the SLC as a whole is independent.
10 And this is because if a majority of the SLC is independent,
11 it cannot act without the affirmative vote of an independent
12 director. Since Mr. Lillis and Mr. Federico constitute the
13 majority of the SLC, they were unquestionably independent.
14 The SLC as a whole is independent regardless of what the Court
15 finds with respect to Mr. Brokaw.

16 And yet Mr. Brokaw, too, is independent. We
17 respectfully submit that during his testimony he showed
18 himself to be independent. Save for his relationship with the
19 Ergens, he has no relationship with any director defendant
20 apart from contemporaneous board service. And as for his
21 relationship with the Ergens, we submit that he testified
22 convincingly that he would not have and did not let his social
23 relationships with them interfere in his exercise of
24 independent business judgment in the best interests of DISH
25 and all its stockholders.

1 A remarkably similar setting as a director of
2 another public corporation, he has demonstrated his
3 independence for the benefit of the stockholders of another
4 public corporation, Alico, he took action against another
5 director and officer of the corporation although he was a
6 friend and godparent of one of Mr. Brokaw's children. When
7 Mr. Brokaw said that if the evidence supported claims against
8 the Ergens he would have voted to assert such claims
9 [inaudible]. He has done something very similar before
10 without regard to the consequences for his personal
11 relationships.

12 Although the SLC need establish only that a majority
13 of its members was independent, all three members were in fact
14 independent. We ask that Your Honor find -- or the Court find
15 that the SLC as a whole was independent.

16 Turning to the second requirement, the SLC plainly
17 conducted a good-faith, thorough investigation. As Mr. Peek
18 summarized in his opening argument and we have detailed in our
19 papers, under DISH I the good-faith thoroughness requirement
20 tests procedural thoroughness. As the Supreme Court explained
21 in DISH I, the requirement concerns the, quote,
22 "appropriateness and sufficiency of the investigative
23 procedures chosen and pursued by the Committee." As the
24 Supreme Court also explained in that case, the substantive --
25 and I'm quoting, "The substantive aspects of a decision to

1 terminate a shareholder's derivative action made by an
2 independent SLC are beyond judicial inquiry under the business
3 judgment doctrine." By this measure, and it is the correct
4 measure, the SLC conducted a good-faith, thorough
5 investigation.

6 As they testified, the SLC members were deeply and
7 personally involved in their investigation. Each member
8 personally invested hundreds of hours in the investigation.
9 They met formally no less than 10 times, more including the
10 interviews, on several occasions in person for hours to
11 determine what they needed to know, to make sure they
12 understood the issues and the evidence, and to deliberate.
13 They received legal advice concerning their duties as members
14 of the SLC. They received legal advice concerning the law
15 that would apply to the claims in the plaintiffs' complaint.
16 They considered the applicable legal standard. They went down
17 numerous paths to understand what happened and to make sure
18 that they had looked at everything they needed to consider
19 before making their determination. Each member personally
20 reviewed many hundreds of documents, including the Krakauer
21 trebling decision. Many of the exhibits from Krakauer and
22 U.S. versus DISH, the 2009 AVC, the DeFranco testimony, all
23 correspondence on DNC issues to and from the director
24 defendants on DNC issues. Substantial --

25 And I stop, Your Honor, to make sure we all know

1 that DNC means do not call and not the Democratic National
2 Committee. So -- it's getting late.

3 THE COURT: So did you have a chuckle there? The
4 record will not reflect the sarcasm that you were giving me at
5 the expense of Mr. Peek.

6 MR. FLINN: Thank you, Your Honor.

7 THE COURT: And I am returning the Black Knight to
8 the drawer, because Mr. Peek didn't get it out. He didn't
9 have any limbs removed today.

10 MR. FLINN: They had correspondence with --
11 substantial correspondence among DISH management regardless of
12 whether it was shown to a director defendant or not. And they
13 reviewed the legal advice of inside and outside counsel
14 concerning whether DISH was complying with the DNC laws. I'm
15 sure the Court will remember Mr. Lillis's detailed responses
16 to the Court's questions concerning the SLC's review of the
17 legal advice that the director defendants and DISH management
18 were getting from multiple sources, including highly respected
19 outside DNC counsel Kelley Drye concerning whether DISH was
20 complying with the DNC laws and the 2009 AVC.

21 The SLC's counsel reviewed tens of thousands more
22 documents. Plaintiffs have not identified a single document
23 that the SLC or its counsel failed to consider. The SLC also
24 interviewed more than 20 witnesses, including all director
25 defendants, save one who was terminally ill; multiple lower-

1 level managers involved in the DNC compliance; DISH's inside
2 and outside legal counsel; an internal auditor and DISH's
3 external auditor. They compared the witnesses' statements to
4 each other and to the underlying documentary record, including
5 testimony from the underlying DNC actions. Plaintiffs have no
6 identified a single relevant witness that the SLC or its
7 counsel failed to interview. Plaintiffs themselves declined
8 to be interviewed.

9 The SLC addressed all issues relevant to the
10 investigation. Plaintiffs have not identified a single issue
11 that the SLC actually failed to consider. They have suggested
12 that the SLC did not investigate whether the director
13 defendants may be held liable for breach of fiduciary duty
14 based upon DISH's breach of the 2009 AVC. As Mr. Federico and
15 Mr. Brokaw testified and the SLC report shows, the SLC plainly
16 investigated that issue. And, Your Honor, I'll have more on
17 that in a moment when I address their arguments.

18 The SLC deliberated across multiple meetings before
19 making their determinations. They directed counsel on the
20 drafting of the report. They thereafter reviewed and revised
21 multiple drafts of what was ultimately a lengthy, detailed,
22 and thoughtful report. It's hard to imagine a more thorough
23 investigation. The SLC members generally wanted to understand
24 what had happened at DISH that led to the damages awarded in
25 Krakauer and U.S. versus DISH and what role, if any, the

1 director defendants played in it. The SLC's process, we
2 submit, does not come close to failing the DISH I standard.
3 We respectfully submit that the SLC has met its burden to show
4 that it conducted a good-faith, thorough investigation.

5 That should end the analysis. We respectfully
6 submit that both of DISH I's requirements are satisfied.
7 Deference to the SLC is therefore warranted. So let's take a
8 moment to address plaintiffs' arguments.

9 Let's take the plaintiffs' most recent argument
10 first. Plaintiffs contend that the SLC's investigation was
11 incomplete because it did not address the director defendants'
12 potential liability for DISH's breach of the 2009 AVC as found
13 by the Krakauer court. This argument is, charitably put,
14 incorrect. The SLC clearly addressed this issue.

15 Let's first look at the complaint to see how
16 plaintiffs describe the claim.

17 Would you please turn to Exhibit 106, Brian. So
18 this is the complaint. Would you please turn to page 21. We
19 want to look more at the bottom of the half of paragraph 56,
20 please.

21 That last sentence says, "In short, defendants
22 Charles Ergen, DeFranco, Cantey Ergen, Goodbarn, Moskowitz,
23 Ortolf, Vogel, and Brokaw and each of them breached their
24 fiduciary duties of good faith and --" probably means loyalty
25 "-- and loyal legal compliance," excuse me, "by ignoring the

1 promises DISH made to the 46 states' Attorneys General in the
2 compliance agreement." They allegedly breached duties of
3 loyalty and good faith by ignoring DISH's breach of the 2009
4 AVC. That's the allegation.

5 Now please turn to page 24, and would you please
6 highlight that first cause of action and bring it up. The
7 title will do.

8 It says, "First Cause of Action for Breach of
9 Fiduciary Duty of Loyalty and Good-faith." And then if you
10 look at the very last sentence of that paragraph, that's where
11 it talks about the breach of fiduciary duty by failing to, in
12 the last words of that paragraph, "comply with the provisions
13 of the compliance agreement." So the alleged breach of
14 fiduciary duty with respect to the 2009 AVC in the complaint
15 was a claim for breach of the duty of loyalty and good faith.

16 What we note from that is that the plaintiffs did
17 not make a claim that the director defendants were strictly
18 liable for DISH's breach of the 2009 AVC. The claim for a
19 breach of the duty of loyalty and good faith requires proof of
20 an awareness that what one is doing is disloyal. It requires
21 bad faith. And so plaintiffs alleged. As we saw, they allege
22 that the director defendants ignored DISH's breaches of the
23 2009 AVC.

24 And there's also no such thing as a director having
25 strict liability for a corporation's breach of contract

1 regardless of whether the contract names directors. As an
2 aside I'll point out that it would be pretty absurd to
3 construe Section 3.1 of the 2009 AVC as making the listed
4 persons strictly liable for violations of the 2009 AVC as the
5 plaintiffs were suggesting. That's absurd, because the list
6 also includes shareholders. And surely the parties to the
7 2009 AVC did not mean to make DISH's shareholders strictly
8 liable for DISH's breaches of the 2009 AVC. Moreover, under
9 NRS 78.138(7)(b)(2) DISH could not recover from the director
10 defendants without establishing that they knowingly caused or
11 permitted DISH to violate the law.

12 So the claims that the plaintiffs pled required
13 scienter on the part of the director defendants. It required
14 the director defendants to know of the breach of the 2009 AVC.
15 In all events, however pled, the SLC investigated the claim,
16 as made clear by Mr. Federico's testimony, Mr. Brokaw's
17 testimony earlier, and, most importantly, the contemporaneous
18 record of what the SLC investigated, which is the SLC report.

19 So, Brian, would you please bring up the SLC report.
20 That's Exhibit 102. And turn to page 285. And we'll look at
21 the last two lines on the page.

22 It says, "Plaintiffs allege that the named
23 defendants participated in, approved, and/or permitted
24 violations by DISH of the TCPA and the 2009 AVC." So there
25 the SLC acknowledges the claim in the complaint concerning the

1 2009 AVC.

2 Would you please turn to page 294 now, Brian, in the
3 middle of the page, the first sentence. And there it says,
4 "The primary claim that the plaintiffs would have DISH assert
5 is that the director defendants breached their fiduciary
6 duties of good faith and loyalty by knowingly participating
7 in, approving, and/or permitting violations by DISH of the
8 TCPA and the 2009 AVC." So there we have another
9 acknowledgement by the SLC that the plaintiffs are asserting a
10 claim for breach of fiduciary duty based upon the violation of
11 the 2009 AVC.

12 Now let's look at some of the SLC's conclusions and
13 analysis on the issue.

14 Would you please turn, Brian, to page 213. And
15 there's a section there that starts with the word
16 "Furthermore." Yes. Right there. End of that first
17 paragraph.

18 "Furthermore, the board understood DISH's management
19 to be taking the steps required to comply with the 2009 AVC."
20 So there is the SLC addressing the mental state of the board,
21 director defendants, concerning what DISH was doing to comply
22 with the 2009 AVC. And right there it says that they
23 understood that management was taking steps that were required
24 to comply with the 2009 AVC. Among other things, Ergen and
25 DeFranco -- and now we're singling out the management

1 directors were copied on emails in which DISH's Legal
2 Department provided businesspeople within DISH with legal
3 advice concerning the 2009 AVC.

4 So there the SLC set forth reasons why the director
5 defendants did not engage in a knowing violation of the law
6 with respect to the 2009 AVC. They believed that DISH was
7 complying with the 2009 AVC.

8 Please turn to page 221, bottom of the page.

9 And there there's more. For example, halfway
10 through that paragraph it states -- first three sentences
11 relate to the issue, but even more so the end of that
12 paragraph -- "Conversely, on the day that DISH signed the
13 2009 AVC management believed that with the benefit of the
14 changes made while negotiating the 2009 AVC DISH was already
15 doing essentially everything required with respect to DNC
16 compliance. DISH's agreement to continue these practices
17 provided a benefit to the AGs," and it goes on from there.

18 And there's more.

19 Would you please turn to page 322, last paragraph.

20 The SLC sets forth its conclusion on the issue and
21 provides more rationale. Based upon its thorough
22 investigation the SLC has determined that the board and
23 management, including DeFranco, believed in good faith that
24 DISH was complying with the 2009 AVC. DISH couldn't assert a
25 claim against the director defendants for breach of fiduciary

1 duty concerning the 2009 AVC. The SLC found they lacked the
2 knowing, the mental state in order to do so.

3 Finally let's go to pages 22 and 23, the last
4 carryover paragraph 122.

5 The evidence uniformly shows -- "Based upon its
6 thorough investigation the SLC has determined that the board
7 and management and DeFranco believed in good faith that DISH
8 was complying with the 2009 AVC. The board had virtually no
9 involvement in the situation. The evidence uniformly shows
10 that after consultation with counsel DISH management,
11 including DeFranco and Ergen, believed that before executing
12 the 2009 AVC DISH was already investigating complaints of
13 retailer compliance of the DNC laws in the manner required by
14 the 2009 AVC."

15 The SLC addressed in multiple places in its report
16 whether the director defendants had the requisite mental state
17 to have breached their fiduciary duties of loyalty and good
18 faith and for DISH to recover monetary damages from them. The
19 SLC addressed the claim in a fulsome way.

20 It hardly matters that Mr. Lillis could not remember
21 this. Mr. Federico and Mr. Brokaw could. And, as Your Honor
22 pointed out, this is not a memory contest. After nearly two
23 years it's not surprising that some memories failed. But I
24 should point out that even if the claim did not get even more
25 play in the SLC's report, it was only because, no matter how

1 prominently featured in the plaintiffs' complaint, it was
2 really something of a tangential issue for purposes of
3 determining whether DISH could assert claims against the
4 director defendants. Regard of whether DISH could prove that
5 the director defendants knowingly caused or permitted DISH to
6 violate the 2009 AVC, DISH could not recover from the director
7 defendants without also proving that the director defendants
8 knowingly caused or permitted DISH to violate the DNC laws.
9 This was because DISH had been found liable and was paying
10 damages only for breach of the DNC laws, and [unintelligible]
11 breach of the DNC laws DISH would not suffer liability. DISH
12 would not have suffered liability.

13 No party to the 2009 AVC has recovered from DISH for
14 breach of the 2009 AVC or even argued that DISH breached its
15 DNC provisions. And if DISH could prove that the director
16 defendants knowingly violated the DNC laws, it would not need
17 to prove that they also knowingly caused or permitted DISH to
18 violate the 2009 AVC.

19 But, in any event, the SLC addressed the claim
20 because it was pled in the complaint, and it hit on it in
21 multiple parts of its report. No matter any remaining quibble
22 on this issue by plaintiffs or on thoroughness generally, we
23 respectfully submit that the SLC surely satisfied the good-
24 faith thoroughness requirement from DISH I. As the Supreme
25 Court explained in that case, quoting Auerbach, quote,

1 "Consistent with the principles underlying the application of
2 the business judgment doctrine, the good-faith thoroughness
3 requirement requires only that the process be so restricted in
4 scope, so shallow in execution, or otherwise so pro forma or
5 half hearted as to constitute a pretext or sham." This
6 clearly was not the case for the SLC's investigation.

7 Turning to their argument they were running earlier,
8 as we've explained, the good-faith thoroughness standard tests
9 only the procedural thoroughness of the SLC investigation. As
10 the Court apparently appreciates, the substance of the SLC's
11 determinations is not subject to review even for purposes of
12 assessing the SLC's good faith. This was made clear in
13 DISH I. There the Supreme Court wrote, quote, "The inquiry
14 into whether the SLC made its determinations in good faith
15 focuses on the process used by the SLC, rather than the
16 substantive outcome of the process."

17 And it was also made clear in Wynn Resorts. There
18 the Supreme Court went through a full analysis of Nevada's
19 business judgment rule and concluded, quote, "While a
20 reasonableness of the directors' action would be useful in
21 determining good faith, doing so would thoroughly undermine
22 the legislature's decision to reject the model Act's
23 substantive component. Of course, this means it does not
24 matter whether the SLC's determinations conflict with those of
25 the Krakauer court." They don't really conflict with the

1 Krakauer court, as the SLC report shows and we've detailed in
2 our briefs. But even if they had, the SLC was permitted to
3 make its own determinations and deference to them would be
4 required, because the SLC is independent and conducted a good-
5 faith, thorough investigation.

6 For the same reason Mr. Lillis's disagreements with
7 some of the Krakauer court's determinations, primarily those
8 that were characterizations, do not matter if substantive
9 disagreement is substantive. But they do not matter also for
10 another reason. Mr. Lillis agreed on redirect the SLC's
11 determinations do not depend upon any disagreement with the
12 Krakauer court. The SLC made this clear in multiple places in
13 its report. The SLC in the Krakauer court were looking at
14 different issues. The SLC was looking at the director
15 defendants' understanding as to whether DISH was violating the
16 DNC laws, primarily, and also the 2009 AVC. The Krakauer
17 court was looking at whether DISH actually was violating the
18 DNC laws, including wilfully and knowingly as those terms are
19 construed out of the TCPA.

20 During Mr. Lillis's redirect we looked at page 23 of
21 the SLC report. We also looked at page 26. I'll show Your
22 Honor one additional place where this issue was address.

23 Please turn to page 323, and we'll look at the last
24 line.

25 So this is page 323 of the SLC report. The last

1 line in the middle begins with the words, "Without revisiting
2 the Krakauer court's conclusion that DISH did not comply with
3 the 2009 AVC -- without revisiting the Krakauer court's
4 conclusion that DISH did not comply with the 2009 AVC, the SLC
5 concludes that DISH believed," believed "that it was
6 complying." If DISH were to relitigate this issue against the
7 director defendants, DISH would need to reckon with the full
8 record, not the limited sections of the 2009 AVC presented to
9 the Krakauer court. And Your Honor may recall the testimony
10 that indicated why the Krakauer court had only seen a portion
11 of the 2009 AVC and very little evidence concerning its
12 meaning, because it was actually excluded on DISH's motion.
13 The SLC's determinations were not dependent upon any
14 disagreement with Krakauer. And as we repeatedly explained,
15 substance would not be subject to review in all events.

16 I'll take a moment, Your Honor, before winding up to
17 talk about the argument about the summary judgment standard.
18 Plaintiffs are arguing it's a summary judgment-like standard
19 that somehow applies in an evidentiary hearing. As Mr. Peek
20 explained in his opening with lengthy quotations from the
21 DISH I case, this standard was explicitly rejected by DISH I
22 and it would be inconsistent with the approach taken in Shoen
23 requiring an evidentiary hearing for demand futility.

24 However, there is one thing that I wanted to correct
25 from Mr. Baron's opening. DISH I had adopted the standard for

1 reviewing SLC determinations set forth in the New York Court
2 of Appeals case Auerbach. Mr. Baron read a portion of the
3 case suggesting that the SLC bore the burden to establish that
4 there was no genuine issue of material fact as to the SLC's
5 independence and good-faith thoroughness. This was an unfair
6 use of that case. The Court of Appeals said that the SLC bore
7 the burden only because the SLC had itself moved for summary
8 judgment on its independence and good-faith thoroughness. Of
9 course they had to show there was no genuine issue. It's
10 moved for summary judgment. But the court did not suggest
11 that if the summary judgment motion failed the SLC would have
12 been free to proceed with this claims that the SLC process
13 would have been at end. To the contrary, the court stated
14 that whatever genuine issue had prevented summary judgment in
15 favor of the SLC would have to be resolved at a trial.

16 In all events, the DISH I court expressly rejected
17 the summary judgment standard and could not have made clearer
18 that an evidentiary hearing was required. The court wrote
19 that if a genuine issue were found, such issue would, quote,
20 "require a trial of any material issue of fact as to the
21 adequacy or the appropriateness of the modus operandi of that
22 committee."

23 Your Honor, we respectfully submit that the SLC has
24 satisfied its burden to show that it was independent and
25 conducted a good-faith, thorough investigation. Under DISH I,

1 therefore, the Court should defer to the SLC's business
2 judgment that pursuit of the claims would not be in DISH's
3 best interest.

4 And, Your Honor, with that I conclude subject to my
5 -- one of my colleagues is trying to give me a message that
6 might answer one of Your Honor's questions.

7 THE COURT: I'll go have you get that message before
8 you --

9 MR. FLINN: If I could just take one moment, please.

10 THE COURT: Yes.

11 (Pause in the proceedings)

12 MR. FLINN: Your Honor, I think my colleagues are
13 not disappointed with my presentation.

14 THE COURT: All right. Thank you, Mr. Flinn.

15 MR. PEEK: We didn't say that, Your Honor.

16 THE COURT: Mr. Baron, Mr. Goodman.

17 PLAINTIFFS' CLOSING ARGUMENT

18 MR. BARON: I do not believe we could be in a better
19 court to go over these issues, and I found it quite
20 enlightening, the complexities we're dealing with and indeed
21 sort of the knife's edge that Court was attempting to keep me
22 on. I don't think that there is a court in the country that
23 understands these issues better than this Court. You lived
24 through this --

25 THE COURT: That's unfortunate.

1 MR. BARON: It may be, but you've lived through Wynn
2 and DISH I and you're living through this, and I think I fully
3 understand that you have a great grasp of this record. So I'm
4 going to try to be brief, but I do sort of want to start with
5 the foundation that you asked, which is what is the standard.

6 And before that I think I want to start with what
7 Justice Pickering said in her dissent in DISH I, which was
8 that in the SLC procedures established by DISH I, while she
9 accepted that Auerbach was correct, she noted, quote,
10 "Enormous power to seek dismissal of a derivative suit brought
11 against their director colleagues, a power rife with the
12 potential for abuse and the cynicism and mistrust such abuse
13 engenders."

14 And what I think she was saying, because she
15 accepted the standard, and her issues I believe were with the
16 issue of independence in DISH I, but I think she understood
17 that if you give this a liberal view, if you give Auerbach an
18 extremely liberal view, meaning that you're not holding them
19 to a very high standard of their conduct, then it is rife for
20 abuse. And this is a prime example of one in which you have
21 two courts who made factual findings to find wrongdoing to the
22 tune of \$340 million. And what process went into determining
23 that that does not make sense for the people in charge aren't
24 there. And again I acknowledge that that's -- you're not
25 supposed to look at that conclusion for good faith, but it

1 does set forth the importance of a strict review of that
2 process.

3 So looking at what we know from DISH I was that they
4 adopted Auerbach and that under Auerbach the SLC must be
5 independent and it must have undertaken a good-faith
6 investigation, a good-faith and thorough investigation that
7 clearly the Court placed that burden on the SLC with no
8 presumptions, bearing the burden of the proof, bearing the
9 burden of moving forward. And that is significant, because in
10 this state we give a lot of credence to the business judgment
11 rule. But in the context of an SLC they must earn it. They
12 must prove it. And it is only when they meet their burden do
13 they get the business judgment rule or do they get the
14 deference to which in most circumstances in this state they
15 get right up front.

16 The idea as to how they go about that we get from
17 Auerbach. And what Auerbach said is in looking the what the
18 process is it's not just a question of do we look at a lot of
19 documents and have we interviewed a lot of witnesses. Because
20 if that were the case, then the very abuse that Justice
21 Pickering was talking about is rampant, because attorneys of
22 the caliber of Mr. Peek and his cohort, they understand that
23 that is very simple to just put a lot of documents in front of
24 the SLC, talk to a lot of people. It must mean more. And
25 what Auerbach said was they must look into, quote, "the areas

1 and subjects to be examined and make sure those are reasonably
2 complete," and this is at Auerbach, 393 N.E.2d at 103, "that
3 there has been good-faith pursuit of inquiry into such areas
4 and subject matters."

5 A couple of sentences after that is the block quote
6 in DISH that we have all seen time and again, which was pro
7 forma and half-hearted investigations that are shallow in
8 execution will not receive business judgment rule protection,
9 that was expressly quoted in DISH, and the ultimate question
10 is if those triable -- if there are -- and this was from
11 Auerbach again in that very same section at 393 N.E.2d at 103,
12 if the SLC's investigation appears thorough, if evidence,
13 quote, "raises a triable issue of fact as to the good-faith
14 pursuit of the SLC's examination." There is nothing to
15 indicate when the Supreme Court said, we are adopting
16 Auerbach, that they are not going to follow the very same
17 language in Auerbach. And the argument that, well, there was
18 a summary judgment motion made in Auerbach applies here,
19 because that is the means by which the defendants chose to
20 gain dismissal here, by moving for summary judgment. That is
21 what their papers say. There is no reason that that standard
22 of whether or not there is a material issue of fact as to
23 whether they meet either their independence -- and I will say
24 that in Auerbach they used that phrase twice, both for
25 reasonable issue of fact as to independence -- or whether

1 there is a material issue of fact as to whether or not they
2 were good faith and thorough in their investigation.

3 The idea that the court in Nevada perhaps went one
4 step further or it was inclined in their view in Auerbach,
5 which is if you are going to have an evidentiary proceeding
6 and you are going to look into this evidence and have to weigh
7 that evidence to see what was thorough or not, that the
8 Supreme Court is not going to come down and say, well, I
9 wasn't there, I didn't get to see the witnesses, I didn't get
10 to hear the testimony, and I am going to nonetheless second
11 guess the Court's conclusion. But the idea that they are
12 going to review it for abuse of discretion, rather than de
13 novo, doesn't change the standard of summary judgment. And,
14 again, were the Court to want to make it a higher standard,
15 meaning that there was a preponderance of the evidence, they
16 could have. I'll say that we're maybe, you know, apples -- or
17 apples and oranges on that, because I'm not sure that if you
18 raise those issues of fact and you have the heavy burden that
19 defendants do that that is not failed to meet that
20 preponderance when there are material issues of fact,
21 especially in a case like this.

22 So our view is that in this case there are material
23 issues of fact as to whether or not the SLC undertook all of
24 what they should have based upon what is in our complaint to
25 determine whether or not viable claims proceed. What they did

1 in a general manner was looked for ways to find exculpation,
2 rather than looking at the very types of evidence and the
3 theories that could find liability. If they looked at them,
4 whatever their conclusion is we would have to accept under
5 Auerbach. But they must look at it through not only the lens
6 that these people may not be liable, but what types of
7 processes there are.

8 Again, I'm not sure what the argument was about
9 whether our complaint raises the issue of whether there was a
10 breach of the AVC as well as a failure to meet the do not call
11 rules, but it is clear that what we have done, and they showed
12 the paragraphs, paragraphs 55, 57, somehow there is this
13 specifically claimed the theory of breach of fiduciary duty
14 for wilful ignorance of the duties of the DCA. To the extent
15 that they claim that because those words are not repeated in
16 count itself, they sort of overlooked that paragraph 64 right
17 before they showed was that plaintiff incorporates by
18 reference all of the prior paragraphs. I think, you know,
19 that's -- if they're claiming that the reason for not doing
20 that is they didn't like how we pled the case, I don't think
21 that's a fair basis. Paragraph 55 and 57 specifically talk
22 about that.

23 I will note that while they say that there is --
24 indeed was an investigation of that claim, even Mr. Brokaw
25 three times on the stand when asked what the theory they were

1 investigating was said time and again whether or not they
2 knowingly caused a violation of the DNC. He did not until
3 specifically asked, didn't you also look at AVC, make that
4 determination. I'd say that this determination by the Court
5 could be easy in that because the Nevada Supreme Court has
6 said we need to have an evidentiary proceeding, there has to
7 be more than you just being given a report and read the report
8 that was drafted by lawyers.

9 THE COURT: I'm not actually supposed to understand
10 the substance of the report, you know.

11 MR. BARON: No.

12 THE COURT: That's really what it says, its
13 substance doesn't matter.

14 MR. BARON: It does. But it says you're supposed to
15 look at evidence; right?

16 THE COURT: I'm supposed to look at the process.

17 MR. BARON: The process. But you're supposed to
18 look at evidence of the process.

19 THE COURT: Absolutely.

20 MR. BARON: Right. As opposed [unintelligible] just
21 it made it into the report, then you wouldn't need any. If
22 they could meet their burden simply by saying, the lawyers
23 managed to get the word "AVC" in the report seven times or
24 however many times, then that would not be the evidentiary
25 analysis that this Court needs to do. I would argue that when

1 you have evidence like we did in this proceeding, which is
2 unique, and you have multiple SLC members saying different
3 things, that that in and of itself raises an issue of fact as
4 to whether or not the process was thorough, because they don't
5 -- you know, it's not a memory test. But, again, you have a
6 number of topics in which two of the SLC members at least
7 disagree on whether Mr. DeFranco was aware of SSN's
8 violations, whether there was an agency relationship, whether
9 DISH created the situation in which there was unscrupulous
10 salespersons, whether DISH did nothing beyond telling SSN to
11 use [unintelligible], whether DISH fiduciaries could be liable
12 for business judgment rule under Krakauer. All of these
13 comments were inconsistent, and I think, again, that's
14 evidence.

15 But I think that the better way to approach this is
16 to look at the two theories of liability that [unintelligible]
17 theories of liability for breach of fiduciary duty. And they
18 are different. And only one of them is addressed, and even
19 that is not addressed with all of the theories appropriate to
20 determine whether there could be or could not be liability.
21 And again I want to emphasize were they to take those
22 analyses, we couldn't challenge the reasonableness, we accept
23 that. But they have to undertake that analysis.

24 So let's go through them one at a time. There's
25 two. The first is obviously breach in connection with the

1 AVC. Again, I think that there's evidence that they didn't
2 look at that at all. I believe that that's what Mr. Lillis
3 said. What they've shown us in the SLC report is analysis of
4 the AVC. There is not word one of the analysis of what those
5 elements are of that claim, what they talked about as being a
6 Caremark claim that is not this claim. I have trouble a
7 little bit with what a Caremark claim is, and I'll talk about
8 that in a minute. But there is no analysis in the report of
9 what are those elements, how does one prove them, and in
10 particular the scienter standard, which is not what Mr. Brokaw
11 kept saying, which was knowingly caused, it is a wilful
12 ignorance. Because it's scienter standard, but it is not the
13 standard that they analyzed.

14 So looking at the elements of the AVC breach of
15 fiduciary duty, you have three elements. And I acknowledge
16 that you have to have a duty, you have to have failed in that
17 duty, and you have to have scienter. They acknowledge that
18 there was a duty. I don't think that that was an issue. I
19 believe at least some of the directors acknowledge that there
20 was a failure in that duty, since DISH did not comply with
21 that and since it seems as though if any of the senior
22 directors did, then that would be inconsistent. We have what
23 some of the directors say they accepted as factual findings,
24 some did not. But if you accept those as factual findings,
25 then the second element is there, that there was indeed a

1 failure to act.

2 So the question then becomes did the adequately
3 investigate the third element, scienter, whether they were
4 wilfully ignorant. And in doing that what it appears that
5 their approach was was -- if they looked at it at all, was to
6 look for some smoking gun that says, oh, we know what we're
7 supposed to do, we're not doing it. They didn't do that.
8 That didn't exist. And, as we know, finding scienter in
9 almost any claim you're not going to find smoking guns, and if
10 we do, we're really fortunate. In general you're doing so
11 through inferences. And, again, there is no discussion within
12 the SLC report as to what reasonable inferences could be drawn
13 or what unreasonable inferences and why they chose to draw
14 them or not. Again, that is the process that they were
15 obligated to go through. And when you have a situation of a
16 wilfully ignoring your job, a wilful ignorant situation is
17 conscious disregard. And it's not strict liability. But if
18 you know that there is a duty, you know that duty is not being
19 complied with, and it is an important duty, that is conscious
20 disregard. And that inference is available that they did
21 nothing to try and investigate or analyze.

22 In addition to that you have a change of corporate
23 policy. You have a letter that says that the Legal Department
24 said, go away, if you have a problem go sue SSN. Which was
25 admitted by one of the SLC members that would be in direct

1 contravention to the agreement in the AVC. But, again, if
2 there is a change in corporate policy, once again it is
3 inferential that you could apply that to the senior management
4 and in particular DeFranco. There is no discussion, there is
5 no analysis of that.

6 Finally, there is the concept that if there was a
7 finding of wilfulness on behalf of the corporation, the
8 corporation could not be bound unless its senior officers were
9 the people who acted. Mr. DeFranco was the person and the
10 only person who testified in Krakauer. To find that wilful
11 behavior on the corporation, again, it is inferential that you
12 could find it against Mr. DeFranco. And again, they did not
13 undertake that analysis.

14 I think the other issue on scienter, the other way
15 that is applied is through the collateral estoppel argument
16 that we've been making. And again, if you are looking through
17 it, if you are doing the investigation evenly, doing more than
18 simply looking for excuses or smoking gun, you say, what
19 theories of liability are available to DISH in this case in a
20 lawsuit against the officers and directors, against DeFranco
21 and Ergen, then you have to look at that issue. And I think
22 what was telling was the best the lawyers could come up with
23 in, yes, we looked and analyzed that issue. Remember at least
24 two of the witnesses had no idea what either collateral
25 estoppel was or when we explained it, and I think the Court

1 did a great job doing so, they didn't recognize that concept,
2 either.

3 So if we could, do you mind, Brian, if we pull up
4 page 349 and 350 of the SLC report.

5 THE COURT: Exhibit 102?

6 MR. BARON: 102.

7 THE COURT: Yeah.

8 MR. BARON: Brian, and that would be internal page,
9 please.

10 If you take a look at the very lines that were
11 identified by counsel, what you have -- and this is in our
12 briefing, that on 349 it talks about -- the very bottom, the
13 last line on 349 talks about the director defendants would be
14 able to take different positions on issues than those found in
15 the underlying actions.

16 If you look a little lower, you can see -- and this
17 is on page 350, starting on "If DISH." It says, "If DISH were
18 judicially estopped from disputing that it intended to violate
19 DNC law," et cetera, "this is the defense of collateral
20 estoppel. This is saying, look, there could be some issues
21 that DISH could be limited from doing. That may be true --

22 THE COURT: And you're talking about defense to
23 further governmental action or other consumers who sue them
24 for TCPA violations.

25 MR. BARON: Exactly.

1 THE COURT: Right.

2 MR. BARON: And they're not talking about offensive
3 collateral estoppel, which is what we're saying, which is if
4 you are presenting the case against Mr. DeFranco, Mr. DeFranco
5 can't say, no, it wasn't knowing and wilful, because there's
6 cases like Biandi [phonetic], et cetera, that we cited in our
7 briefing that show that a finding of scienter or finding
8 against a corporation can be used against the officers and
9 directors in subsequent action. Again, they don't have to
10 agree. They just have to have undertaken that analysis to
11 demonstrate that that was a theory of liability that was
12 viable.

13 Ironically, the lawyers in the reply brief raised
14 the issue of why that may be difficult on privity and other
15 issues, and that may be true. But that was not the analysis
16 that was undertaken by the SLC. So both because of inferences
17 and the collateral estoppel issue the possibility of a viable
18 claim for breach of the AVC, breach of fiduciary duty in
19 connection with the AVC was a matter that was not thoroughly
20 analyzed by the SLC.

21 On the second issue -- and I find this [inaudible].
22 The second theory, which was the direct violation of the DNC
23 laws, again, to the extent that they did talk about it, and I
24 don't question that there was indeed discussion amongst them
25 and they did -- analyzed the idea of it, and that's exactly

1 what Mr. Brokaw was saying time and again, which was whether
2 they caused the violation, knowingly caused the violation, and
3 in that that's not quite a Caremark claim, and the reason is
4 because there's actual knowledge and there's the prior
5 decisions. And also in Caremark when we're talking about
6 Caremark claims we are almost always talking about -- on
7 demand futility motions we're talking about whether or not
8 there are either lack of systems or red flags sufficient to
9 conflict the board from making that decision. So it is a hard
10 thing to call it a Caremark claim. But I agree that it's a
11 direct claim and I agree that there's elements that they did
12 look at, and the elements are whether there was a violation
13 that occurred and I think everybody's assented that SSN did
14 undertake a number of violations, nobody's questioned that,
15 whether there was an agency relationship and whether or not
16 there was scienter, whether or not they caused or they
17 believed that they caused that or they knowingly caused.

18 On the agency relationship, again, I think that
19 there is a material facts to whether or not they undertook
20 that analysis. You have some directors saying that they
21 accepted it from the beginning and all the way through.
22 You'll have other directors say, no, they never believed there
23 was an agency relationship. I think on that issue alone you
24 can determine that they did not undertake a process to
25 actually determine whether or not they accepted it or not.

1 But I think a more intriguing question is the
2 scienter question. And I broke down the idea of scienter in
3 two ways. There is was there a knowing violation, did the
4 directors or in this case Mr. Ergen and DeFranco particularly
5 know that there were violations. Again, I think that that
6 analysis was done. I don't think that we have some questions
7 about whether or not they found that it was or not. I think
8 that Mr. Lillis said, oh, yeah, he absolutely knew. Other
9 directors said, no, he didn't know. But they did not do an
10 analysis on that on the same two premises, which is, one,
11 whether there are inferences that could be accepted that he
12 knew and whether there's collateral estoppel once again that
13 would preclude him, or them, Mr. Ergen and Mr. DeFranco in
14 particular, from saying that they did not know.

15 The other issue, and I think this is the one that is
16 perhaps the most interesting, was what the Court was raising,
17 which was not whether there was agency, but whether or not the
18 senior officers believed that there was agency.

19 THE COURT: Based on advice of counsel.

20 MR. BARON: Well, I think it was in general. But I
21 think that based on the advice of counsel was clearly a
22 portion of it.

23 THE COURT: Well, especially since our statutes
24 allow them to rely on advice of counsel in exercising your
25 business judgment.

1 MR. BARON: And I think -- well, yes. There is no
2 question about that. But this is where the question really
3 gets complicated. And I thought one that was interesting that
4 that far more appeared to be what the Court was thinking than
5 either of the SLC members.

6 THE COURT: Or you guys.

7 MR. BARON: Huh?

8 THE COURT: Or you guys.

9 MR. BARON: Well, I wasn't going to bring it up.

10 THE COURT: Okay.

11 MR. BARON: But that said, I actually think that
12 that raises the question to like if it was -- if they made the
13 finding that there was not a reasonable belief that they were
14 agents, then there would not be the scienter. I think that's
15 the theory. They can rely on advice -- they could have relied
16 on advice of counsel in making that determination. But,
17 again, that is only a piece of evidence. The way that advice
18 of counsel works is you can raise it, you have to show what
19 that counsel's advice is, and a trier of fact --

20 THE COURT: In Nevada you don't have to for the
21 business judgment rule under the Wynn case. Don't have to
22 produce it. Just have to say it. It's really scary. I was
23 overruled. But, you know, that's what the Supreme Court
24 decided.

25 MR. BARON: But the trier of fact has to decide

1 whether or not they believe that the person actually utilized
2 that advice for their basis.

3 THE COURT: Nope. Can't invade that. They just
4 have to say it in the business judgment context.

5 MR. BARON: Ah. I think that's something, because
6 that makes a little bit of lack of sense how you can just say
7 there was a lawyer who told me something, I can't tell you
8 what it is and I don't even have to tell you if I believed it.
9 But --

10 THE COURT: Or whether I provided them all the
11 information before they gave me advice.

12 MR. BARON: And all of that may be true. And even
13 if that were true, the theory around that would be collateral
14 estoppel. A theory around that would -- could be that you had
15 a court that made a particular decision that there was knowing
16 violations, there was knowing and wilful violations. And if
17 that court made that decision, you couldn't go back -- and if
18 the court accepted that you were collaterally estopped from
19 challenging that, you couldn't then go back and challenge that
20 by saying, I relied on my advice of counsel. All of that
21 purportedly would have been available for you to use in that
22 prior jurisdiction or that prior finding.

23 So, again, the point isn't where they would have
24 come out. The point is they needed to undertake that
25 analysis. They could have undertaken that analysis and said

1 once again, privity issue, we did it, we don't think it's
2 true, we think that, you know, because they didn't have an
3 opportunity to rely on advice of counsel or the different
4 rules in a different jurisdiction would have been different,
5 then it may not have applied and then thrown it out. At which
6 point I couldn't be here saying, well, that was an
7 unreasonable decision. But they can't come here now not
8 having done so and saying that they undertook the process that
9 was thorough and complete.

10 Again, the issue that it cannot be shallow. It
11 doesn't -- being wide, looking at all the documents, saying
12 you looked at all the things is not enough. Otherwise it's
13 rife for abuse. They have to look at it through a lens, a
14 lens that says, look, this could be the potential for
15 liability, this could work for X, Y, and Z, and make that
16 determination and once they do that they can decide whether
17 it's appropriate to proceed or not proceed, whether it's
18 appropriate to dismiss the case for that reason or because
19 it's just not good for the company to go forward. All of
20 those are bases that we're not allowed to take under the
21 standard. But they can't get that deference until they do
22 everything that is reasonable. And in particular, given the
23 extent to which we make arguments both about the AVC and about
24 the opinions and about the intent behind those that they can
25 just not consider those, that is a violation of our -- that is

1 a failure to act in good faith and thorough, and that is a
2 basis for denying their motion.

3 THE COURT: Thank you.

4 Mr. Flinn, anything else?

5 MR. FLINN: I have a little bit more, Your Honor.

6 THE COURT: Okay. Thank you, Mr. Baron.

7 SLC'S REBUTTAL

8 MR. FLINN: Thank you, Your Honor. Mr. Baron when
9 he went off on a collateral estoppel point, Your Honor,
10 offensive collateral estoppel is addressed by the Special
11 Litigation Committee, and it was actually shown earlier during
12 Mr. Federico's redirect examination.

13 Brian, would you please bring up the Special
14 Litigation Committee report -- I guess it's 102 now -- at
15 page 349. And move to the bottom of that page.

16 This was I think what Mr. Baron focused on.
17 "Conversely, the director defendants are not themselves
18 litigants and/or in actions. The director defendants would be
19 able to take different positions on issues than was found in
20 the underlying DNC actions. And as a footnote --

21 Would you drop down to the footnote, please.

22 Footnote 1327 cites a case which is setting forth
23 the elements for collateral estoppel under these
24 circumstances. The issue of collateral estoppel was
25 addressed. The SLC concluded that collateral estoppel --

1 offensive collateral estoppel couldn't be used. Mr. Baron may
2 want a longer explanation, but this is the explanation. And
3 then he went on, he's fundamentally quibbling about substance.

4 But another point on collateral estoppel that hasn't
5 really been raised is that for collateral estoppel to apply
6 it's only the facts to be found in Krakauer that could be
7 used. And the SLC report goes on for pages and pages to
8 explain how those facts, even if taken as true, don't
9 establish that even Mr. DeFranco believed that DISH was
10 violating the DNC laws or the 2009 AVC. It was addressed.
11 They don't like the substance. They're just quibbling with
12 substance.

13 Mr. Baron mentioned -- started off talking about
14 some different -- the notion that the theory of liability that
15 they asserted relating to the breach of fiduciary duty
16 concerning the 2009 AVC was not addressed, and he acknowledges
17 that a breach of fiduciary duty claim concerning the 2009 AVC
18 was addressed. And I went through that in great detail in my
19 opening closing argument. So it's difficult to figure out
20 where they think the SLC missed it. Because he also said that
21 he understands that that claim would require scienter and that
22 it would require a conscious disregard. And the SLC addressed
23 that issue, whether there was a conscious disregard. That was
24 addressed all over the SLC's report.

25 On the issue of the -- otherwise, Your Honor, I

1 think they're really just quibbling over issues that I didn't
2 properly list all of the elements, in the SLC report properly
3 list all the elements. Did it address the significance of a
4 letter? I think, Your Honor, that falls into the bucket of
5 they're probably not deficiencies, but even if they were,
6 they're really just quibbling with the substance of the
7 report, and it's certainly nothing like the procedural -- the
8 massive procedural deficiency that would be needed under
9 DISH I to conclude that the SLC had engaged in a sham.

10 On the issue of the standard, Your Honor, we had a
11 summary judgment motion, now we have an evidentiary hearing
12 that they requested. So they applied the standard that would
13 apply at an evidentiary hearing. And under the DISH I case,
14 under those circumstances can they proceed forward with their
15 claims and bypass the SLC unless the Court weighs the evidence
16 at an evidentiary hearing and determines that the SLC lacks
17 independence or did not conduct a good-faith, thorough
18 investigation. So here we are. And so if they want to go
19 back to the summary judgment motion, well, if Your Honor found
20 there was a genuine issue of material fact, what would you
21 need to do? You'd have an evidentiary hearing, which we just
22 did the whole thing all over again, and here we are.

23 One moment, please. That's all. Thank you.

24 THE COURT: Thank you, Mr. Flinn.

25 The matter will stand submitted.

1 Counsel, I want to thank you for the very thorough
2 way in which you have tried this evidentiary hearing in the
3 two days I allotted you under the difficult circumstances we
4 have this public health emergency.

5 I also want to thank the witnesses for coming. I
6 must tell you it is so much easier for me as a judge to listen
7 to you when you're in person, rather than on video. So I
8 appreciate the inconvenience that you came from where you live
9 to come to Nevada for our hearing.

10 I should have a written decision out to you before
11 the end of the week. Otherwise, we'll be in real trouble,
12 because I'm going to start that trial for several months.

13 THE PROCEEDINGS CONCLUDED AT 3:55 P.M.

INDEX

<u>NAME</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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SLC'S WITNESSES

Anthony Federico		3	35/55	48
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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.

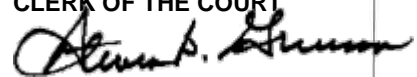
**FLORENCE HOYT
Las Vegas, Nevada 89146**

Florence M. Hoyt

FLORENCE HOYT, TRANSCRIBER

7/8/20

DATE



FFCL

DISTRICT COURT

CLARK COUNTY, NEVADA

PLUMBERS LOCAL UNION NO. 519
PENSION TRUST FUND, Derivatively on
Behalf of DISH NETWORK
CORPORATION,

Plaintiff,

vs.

CHARLES W. ERGEN, et al.,

Defendants,

– and –

DISH NETWORK CORPORATION, a
Nevada corporation,
Nominal Defendant

Case No.: A-17-763397-B

Dept.: XI

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on for an evidentiary hearing on the Motion for Summary Judgment Deferring to the Special Litigation Committee's Determination that the Claims Should be Dismissed filed December 20, 2018 ("Motion to Defer")¹ before the Honorable Elizabeth Gonzalez on July 6 and 7, 2020; Plaintiffs Plumbers Local Union No. 519 Pension Trust Fund and City of Sterling Heights Police and Fire Retirement System appeared by and through their counsel of record, Randall J. Baron, Benny C. Goodman III, and Erik W. Luedeke of Robbins Geller Rudman & Dowd LLP, and David C. O'Mara of The O'Mara Law Firm, P.C.; the Special Litigation Committee appeared by and through their counsel of record, J. Stephen Peek and Robert J. Cassity of Holland & Hart LLP, and C. Barr Flinn and Emily V. Burton of Young Conaway

¹ The Court scheduled an evidentiary hearing on the Motion to Defer at the joint request of the parties in conformance with the requirements of an evidentiary hearing set forth in *Dish 1*, 133 Nev. 438 (2017). (Case No. A686775) To avoid confusion, this case, A763397, is *Dish 2* and A797799 is *Dish 3*.

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1 Stargatt & Taylor, LLP; the Director Defendants appeared by and through their counsel of record
2 Ian P. McGinn of the law firm of Kemp Jones; the Court having read and considered the pleadings
3 filed by the parties; having reviewed the evidence admitted during the hearing; having heard and
4 carefully considered the testimony of the witnesses called to testify and weighing their credibility;
5 having considered the oral and written arguments of counsel, and with the intent of rendering a
6 decision on only the Motion to Defer pending before the Court; the Court makes the following
7 findings of fact and conclusions of law:
8

9 PROCEDURAL POSTURE

10 1. On October 19, 2017, Plumbers Local Union No. 519 Pension Trust Fund filed
11 this shareholder derivative action.²
12

13 2. On November 13, 2017, Plaintiff City of Sterling Heights Police and Fire
14 Retirement System filed a second derivative action in this Court seeking to assert similar claims
15 on behalf of DISH. Those complaints were consolidated into the present action.

16 3. On January 12, 2018, Plaintiffs filed their operative consolidated complaint,
17 alleging, among other things, that DISH's directors breached their legal obligations to conduct
18 DISH's business in accordance with the TCPA after promising to do so under the terms of the
19 2009 AVC.
20
21
22

23 ² Plaintiffs Plumbers Local Union No. 519 Pension Trust Fund and City of Sterling Heights Police and Fire
24 Retirement System ("Plaintiffs") asserts claims, derivatively on behalf of DISH Network Corporation ("DISH" or the
25 "Company") against Charles Ergen, James DeFranco, Cantey Ergen, Steven Goodbarn, David Moskowitz, Tom
26 Ortolf, Carl Vogel, George Brokaw, and Gary Howard (collectively "Defendants"), each of whom was or is a
27 director of DISH. Plaintiffs assert that the Defendants "did nothing to ensure DISH's compliance with the TCPA or
28 the Compliance Agreement" and thereby knowingly and intentionally caused DISH to commit the violations of
telemarketing laws found by *Krakauer v. DISH Network LLC*, No. 14-cv-333, 2017 WL 2242952 (M.D.N.C. May
22, 2017) ("*Krakauer*") and *United States v. DISH Network LLC*, 256 F. Supp. 3d 810 (C.D. Ill. 2017) ("*U.S. v.*
DISH" and, together with *Krakauer*, the "DNC Actions"). Plaintiffs would have DISH seek a money judgment
against the Defendants under NRS 78.138(7)(b)(2) to make DISH whole for most of the roughly \$340 million in
damages awarded against DISH in the DNC Actions.

1 4. The Complaint asserts that the Defendants “abandoned and abdicated their
2 responsibilities and fiduciary duties” to cause DISH to comply with the DNC Laws, in connection
3 with third-party Retailers’ calls made on DISH’s behalf. (Compl. ¶ 70.) Plaintiffs would have
4 DISH sue the Defendants to recover from them for most of the judgments entered against DISH
5 in *U.S. v. DISH* and *Krakauer*. Plaintiffs claimed standing to derivatively assert these claims
6 belonging to DISH because Plaintiffs named as Defendants eight of the then ten members of the
7 Board of Directors of DISH (“DISH Board”).

9 5. On February 26, 2018, Defendants moved to dismiss the Complaint for failure to
10 state a claim. DISH, separately, moved to dismiss for failure to adequately plead demand futility.
11 In the alternative, DISH asked that this action be stayed “pending final resolution” of the DNC
12 Actions.

13
14 6. While the motions to dismiss were pending, the DISH Board, on April 11, 2018,
15 unanimously resolved by written consent (“Unanimous Written Consent”) to form a special
16 litigation committee (“SLC”) of the DISH Board to assume control of the claims of DISH
17 asserted in this action on DISH’s behalf.

18 7. The SLC is composed of Charles Lillis, a non-party and now former director of
19 DISH; George Brokaw, a director of DISH who is named as a Defendant in this action; and
20 Anthony Federico, a director on the board of EchoStar Corporation (“EchoStar”), a non-party
21 affiliate of DISH.

22
23 8. The Unanimous Written Consent fully delegated all rights and powers of the DISH
24 Board with respect to the claims asserted in this action to the SLC. It provided:

25 [T]he Board of Directors hereby delegates to the Special Litigation Committee the power
26 and authority of the Board of Directors to: (1) review, investigate and evaluate the claims
27 asserted in the Derivative Litigation; (2) file any and all pleadings and other papers on
28 behalf of the Corporation that the Special Litigation Committee finds necessary or
advisable in connection therewith; (3) determine whether it is in the best interests of the
Corporation and/or to what extent it is advisable for the Corporation to pursue any or all

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1 of the claims asserted in the Derivative Litigation, taking into consideration all relevant
2 factors as determined by the Special Litigation Committee; (4) prosecute or dismiss on
3 behalf of the Corporation any claims that were or could have been asserted in the
4 Derivative Litigation; and (5) direct the Corporation to formulate and file any and all
5 pleadings and other papers on behalf of the Corporation and the Special Litigation
6 Committee finds necessary or advisable in connection therewith, including, without
7 limitation, the filing of other litigation and counterclaims or cross-complaints, or motions
8 to dismiss or stay the proceedings if the Special Litigation Committee determines that
9 such action is advisable and in the best interests of the Corporation.

10 9. The Unanimous Written Consent provided the SLC with broad authority to
11 investigate all matters related to this action:

12 (1) the officers of the Corporation are hereby authorized and directed to provide to the
13 Special Litigation Committee, each Committee Member and any of their advisors, agents,
14 counsel and designees, such information and materials, including without limitation, the
15 books and records of the Corporation and any documents, reports or studies pertaining to
16 the Derivative Litigation as may be useful or helpful in the discharge of the Special
17 Litigation Committee's duties or as may be determined by the Special Litigation
18 Committee; (2) the Special Litigation Committee is authorized and empowered to meet
19 with both present and past members of the Board of Directors who are not members of the
20 Special Litigation Committee and/or with both present and past officers of the
21 Corporation to gather information from such directors and/or officers pertaining to the
22 Derivative Litigation as may be useful or helpful in the discharge of the Special Litigation
23 Committee's duties or as may be determined by the Special Litigation Committee, or any
24 member thereof, to be appropriate or advisable in connection with the discharge of the
25 duties of the Special Litigation Committee[.]

26 10. The SLC retained Holland & Hart, LLP and Young Conaway Stargatt & Taylor,
27 LLP as its independent counsel.

28 11. On April 24, 2018, the SLC filed a Motion for Stay Pending Investigation of the
Special Litigation Committee of DISH Network Corporation ("Motion to Stay") to permit it to
conduct an investigation of "the allegations asserted by Plaintiffs Plumbers Local Union No. 519
Pension Trust Fund and City of Sterling Heights Police and Fire Retirement System in their
Complaint in this action."

12. The Court stayed this action for six months to permit the SLC to conduct its
investigation.

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13. On December 19, 2018, the SLC filed its Motion for Summary Judgment Deferring to the Special Litigation Committee’s Determination That the Claims Should Be Dismissed (“Motion to Defer”). Although the Motion to Defer asserted that there was no genuine issue of material fact, such that this Court should rule in the SLC’s favor based upon the summary judgment standard, this Court does not rule on the Motion to Defer on that basis, but rather on the basis of factual determinations made upon the record presented at the evidentiary hearing under a preponderance of the evidence standard.³

14. From January 14, 2019 through July 31, 2019, Plaintiffs took discovery related to the SLC.

15. On January 10, 2020, the parties filed a Joint Motion for Evidentiary Hearing on the SLC's Motion to Defer, seeking to schedule an evidentiary hearing in accordance with *Dish 1*.

16. On July 6 and 7, 2020, consistent with the Nevada Supreme Court’s direction in *Dish 1*, this Court held the evidentiary hearing on the Motion to Defer.

FINDINGS OF FACT

17. DISH is a Nevada corporation in good standing.

18. Charles Ergen, Cantey Ergen (together the “Ergens”) and James DeFranco founded DISH in 1980. In 1995, DISH became publicly traded on the NASDAQ. The Ergens beneficially hold 48% of DISH’s Class A common stock, 85.8% of DISH’s Class B common stock and 78.4% of its voting power. Report of the Special Litigation Committee of DISH Network Corporation, dated Nov. 7, 2018 (“SLC Report”, admitted Ex.⁴ 102) at Ex. 52 at 9-10. DeFranco holds roughly 2.1% of DISH’s Class A common stock. Ex. 102 at Ex. 44 at 9-10. The

³ If the evidence presented at the evidentiary hearing were evaluated under a summary judgment standard a different result would be reached.

⁴ All "Ex. " references refer to the exhibits admitted during the evidentiary hearing.

1 other Defendants are each stockholders of DISH, each holding less than 1% of DISH's Class A
2 common stock.

3 19. DISH is a company focused on connectivity. Through its subsidiaries, DISH
4 provides television entertainment and technology to customers with its satellite DISH TV and
5 streaming Sling TV services. During the time period addressed by Plaintiffs' Complaint (the
6 "Relevant Time Period"), DISH used a variety of marketing channels, including telemarketing, to
7 market DISH TV and Sling TV services. DISH also authorized third-party businesses, which it
8 referred to as "Retailers," to market and sell DISH's services to businesses and consumers in
9 exchange for commissions. Some of those Retailers used telemarketing.

10 20. Companies that engage in telemarketing are subject to multiple state and federal
11 laws, including the Telephone Consumer Protection Act, 47 U.S.C.A. § 227 ("TCPA") and the
12 Telemarketing Sales Rule, 16 C.F.R. § 310 ("TSR" together with the TCPA, collectively the
13 "DNC Laws"). The TSR is enforceable by the Federal Trade Commission ("FTC"). 15 U.S.C.A.
14 § 6102(a)(1). The TCPA gives both State Attorneys General and individual consumers standing
15 to pursue claims for violations. 47 U.S.C.A. § 227 (b)(3), (c)(5), (g) (2018). Both of these DNC⁵
16 Laws impose per-call fines or damages on companies for telemarketing activities found to be in
17 violation above and beyond specified "safe harbors."

18 21. In 2009, DISH entered into an Assurance of Voluntary Compliance ("2009 AVC")
19 with 46 states' Attorneys General, including Nevada's Attorney General, to resolve disputes
20 between DISH and the 46 states regarding DISH's consumer protection obligations, including
21 with respect to its telemarketing. *See* Ex. 2, at 3-4, 8.

22 22. Under the 2009 AVC, DISH paid \$5,991,000 to the Attorneys General. (Ex. 2 at §
23 6.1.) The 2009 AVC fully resolved, among other things, all DNC Law violations asserted against
24

25
26
27 ⁵ The abbreviation DNC stands for do not call.
28

1 DISH by the 46 states that participated in the 2009 AVC. Through the 2009 AVC, DISH also
2 undertook obligations for specified monitoring and oversight of Retailers who telemarketed
3 DISH's products, but explicitly reserved its position that the Retailers were independent
4 contractors rather than DISH's agents. (*Id.* § 1.14.) No party to the 2009 AVC has alleged that
5 the agreement has been breached in connection with DNC issues.
6

7 23. In 2009, Defendants James DeFranco, Charles W. Ergen, Cantey M. Ergen, Joseph
8 P. Clayton, David K. Moskowitz, Tom A. Ortolf and Carl E. Vogel ("Managing Director
9 Defendants") were briefed on the terms of the 2009 AVC. Ex. 102 at 212-13.

10 24. Between 2007 and 2014, several consumers, the federal government and the four
11 states that declined to join the 2009 AVC brought lawsuits against DISH, seeking to hold DISH
12 liable for violations of the DNC Laws based on calls made by Retailers purporting to sell DISH
13 pay-tv services.
14

15 25. The first two of those lawsuits to reach resolution – *Charvat v. EchoStar Satellite,*
16 *LLC*, 676 F. Supp. 2d 668 (S.D. Ohio 2009) ("*Charvat*") and *Zhu v. DISH Network, LLC*, 808 F.
17 Supp. 2d 815 (E.D. Va. 2011) ("*Zhu*") – were resolved in DISH's favor.

18 26. Although DISH settled with 46 state attorneys general through the 2009 AVC, the
19 other four state Attorneys General and the federal government, through the FTC, continued
20 pursuit of claims that DISH was regularly violating the TCPA. This action was litigated in the
21 U.S. District Court for the Central District of Illinois.
22

23 27. In 2009, the FTC (through the Department of Justice) and the states of California,
24 Illinois, North Carolina and Ohio brought *U.S. v. DISH*, alleging that DISH had violated the
25 TCPA, TSR and state telemarketing laws through telemarketing calls that DISH made directly
26 and that six Retailers made on DISH's behalf from 2003 to 2011. Ex. 102 at Ex. 776. *See also*
27
28

1 *U.S. v. DISH*, 256 F. Supp. 3d at 936-37. DISH opposed the claims, arguing that the Retailers
2 were not DISH's agents and that DISH's calls fell within safe harbors of the DNC Laws.

3 28. After a bench trial, the *U.S. v. DISH* court concluded that DISH and telemarketers
4 under its control had placed approximately 7.6 million calls in violation of the DNC Laws. *See*,
5 *e.g.*, *U.S. v. DISH*, 256 F. Supp. 3d at 931-32, 954, 959. The court also found that the Retailers
6 had placed over 90 million calls in violation of the DNC Laws and held that DISH was liable for
7 these calls because the Retailers placed the calls on DISH's behalf. *Id.* at 913, 915, 917-18, 919-
8 20, 930, 943-45, 953-54 (C.D. Ill. 2017). The *U.S. v. DISH* court entered a \$280 million
9 judgment against DISH. *Id.* at 983.

10
11 29. On April 18, 2014, Thomas Krakauer brought a consumer class action lawsuit
12 against DISH for violations of the TCPA and DNC laws because one of DISH's Retailers,
13 Satellite Systems Network ("SSN"), had placed calls to the plaintiff and other class members in a
14 manner that violated the TCPA. SSN placed the calls at issue in *Krakauer* between 2010 and
15 2011. DISH opposed the claims in *Krakauer*, in substantial part by arguing, as it did successfully
16 in prior cases with respect to other Retailers' calls, that SSN was not an agent of DISH and that
17 DISH could not be held liable for calls made by SSN. DeFranco testified on DISH's behalf at
18 trial in *Krakauer*.
19

20
21 30. On January 19, 2017, the jury in *Krakauer* found DISH liable for violations of the
22 TCPA resulting from, among other violations, over 50,000 calls made between May 2010 and
23 August 2011 in violation of the DNC Laws by SSN, and awarded the plaintiff class \$400 per
24 violation. Ex. 102 at Ex. 88.

25 31. The jury found that SSN was DISH's agent and awarded the plaintiff class a total
26 of \$20,447,600 in damages against DISH. Ex. 102 at Ex. 88 and Ex. 102 at 271-73.
27
28

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1 32. The U.S. District Court considered Krakauer's request for treble damages. The
2 U.S. District Court issued a strongly worded opinion concluding that DISH's conduct met the
3 TCPA's knowing and willful standard. Ex. 1., *Krakauer*, at *10. The Court ordered DISH to pay
4 \$65.1 million in trebled damages. Ex. 1, *Krakauer*, at *37.

5
6 33. DISH appealed the decisions in *Krakauer* and *U.S. v. DISH* on May 4, 2018 and
7 October 6, 2017, respectively.

8 34. On May 30, 2019, the United States Court of Appeals for the Fourth Circuit
9 unanimously affirmed the trial verdict and judgment in *Krakauer*, finding that the *Krakauer*
10 judgment rested on "solid evidence." *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643 (4th Cir.
11 2019). The Fourth Circuit held, in pertinent part:

12
13 The district court also noted the half-hearted way in which Dish responded
14 to consumer complaints, finding that the "evidence shows that Dish cared about
15 stopping complaints, not about achieving TCPA compliance." . . . The court then
16 assessed Dish's arguments to the contrary, finding that its refrain that it knew
17 nothing of SSN's widespread violations was simply not credible: "Given the tens
18 of thousands of violative calls SSN made in a span of just over a year, even a
19 cursory investigation or monitoring effort by Dish would have uncovered the
20 violations. Under these circumstances, what Dish calls a mistaken belief is
21 actually willful ignorance."

22 * * *

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

29 * * *

30 Dish seems to think that so long as it includes certain language in a contract or
31 issues the occasional perfunctory warning to a retailer the court will not look past
32 the formalities and examine the actual control exercised by Dish. Moreover, Dish
33 failed to recognize that repeated expressions of ignorance as to a widespread
34 problem can evince more than simply negligence; they can also be a sign that the

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1 violations are known, tolerated, and even encouraged. Trebling is never to be
2 done lightly. Given the consequences for a company, a trebled award must rest on
3 solid evidence. Here [it] was.

4 925 F.3d at 661-63.

5 35. On March 26, 2020, the U.S. Court of Appeals for the Seventh Circuit largely
6 affirmed the U.S. District Court's decision in *U.S. v. DISH*, but vacated the U.S. District Court's
7 holding that DISH violated the TSR by substantially assisting one Retailer in making "abandoned
8 calls." 954 F.3d 970, 977-78 (7th Cir. 2020). The Seventh Circuit also vacated the damages
9 award entered in *U.S. v. DISH* and remanded the case to the U.S. District Court to re-calculate
10 damages. *Id.* at 980.

11 36. On October 15, 2019, DISH filed a Petition for a *Writ of Certiorari* of the
12 *Krakauer* opinion with the U.S. Supreme Court, seeking review of a single issue: "The question
13 presented is whether a call placed in violation of the Telephone Consumer Protection Act, without
14 any allegation or showing of injury – or even that Plaintiffs heard the phone ring – suffices to
15 establish concrete injury for purposes of Article III." Ex. 8, at i. On December 16, 2019, the U.S.
16 Supreme Court denied DISH's Petition for a *Writ of Certiorari*. Ex. 9.

17 37. The SLC met for the first time on May 9, 2018. Ex. 108 at 00001-00002. In
18 addition to the twenty-one interviews discussed below the SLC also met in person or
19 telephonically ten times during the course of its investigation. Ex. 108; Ex. 102 at 33. At these
20 meetings, the SLC received advice of counsel concerning the duties of the SLC, the legal
21 standards relevant to the claims under investigation and Nevada law concerning directors'
22 fiduciary duties. Ex. 108 at 00005-00006. The SLC also discussed the information that it had
23 gathered, additional topics of interest, and topics on which it would like legal advice. Plaintiffs
24 have identified no relevant subject on which the SLC was unadvised.
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1 38. The SLC began its investigation by assessing its own independence and the
2 independence of its counsel. The SLC concluded that each of its members and the SLC's counsel
3 were independent with respect to the matters to be investigated. Plaintiffs have raised no
4 challenge to the independence or competence of the SLC's counsel.
5

6 39. On June 1, 2018, the SLC sent its First Set of Documents Requested ("First
7 Request") to DISH. Ex. 102 at Ex. 742. After receiving the documents called for in the first
8 Request, the SLC sought and received several additional groups of documents from DISH and
9 DISH's outside legal counsel to further explore topics suggested through the SLC's document
10 review and interviews. The SLC gathered and, through its counsel, reviewed more than 44,000
11 documents related to the SLC's investigation. Ex. 102 at 30. The SLC members themselves
12 reviewed more than 1,500 documents. *Id.*
13

14 40. The SLC began by reviewing the Complaint in this action. The SLC requested and
15 reviewed foundational documents concerning the DNC Actions, such as the decisions in the DNC
16 Actions, including the jury verdict sheet issued in *Krakauer*, the decision trebling damages issued
17 in *Krakauer*, and the Findings of Fact and Conclusions of Law issued in *U.S. v. DISH*, and the
18 trial records for the DNC Actions, including the trial exhibits, the exhibits cited in the decisions
19 and the transcripts of the trial testimony and depositions. The SLC also reviewed the relevant
20 DISH Board-level materials, including Board and Audit Committee meeting minutes and
21 handouts, and communications to the full Board concerning DNC issues whether or not
22 connected to a Board meeting from January 1, 2003 through December 31, 2013. The SLC
23 reviewed internal DISH communications involving the Defendants related to DNC issues,
24 including communications of Mr. Ergen, Mr. DeFranco and Mr. Moskowitz related to DNC
25 issues and the legal advice provided to the DISH Board regarding DNC issues. The SLC also
26 reviewed management-level internal communications and documents regarding telemarketing
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1 policies and practices and DNC complaints, including both internal and external communications
2 relating to DISH's entry into the 2009 AVC and subsequent efforts related to the 2009 AVC.

3 41. From DISH's outside regulatory and litigation counsel, the SLC requested and
4 received communications between outside counsel and DISH employees and communications
5 between the outside counsel and relevant third parties, such as the FTC and states' Attorneys
6 General. *See* Ex. 102 at 30-32. Plaintiffs have not identified any documents relevant to the
7 matters at issue in this litigation that the SLC did not gather and consider.

8
9 42. The SLC identified individuals that the SLC believed likely to have information
10 relevant to the claims in this action. Between July 16, 2018 and September 21, 2018, the SLC
11 conducted twenty-one interviews of this group, including the members of the DISH Board during
12 the Relevant Time Period.⁶ Beyond the DISH Board, the SLC interviewed DISH management,
13 including Blake Van Emst (Vice President of Retail Services) and Amir Ahmed (Senior Vice
14 President of Sales). The SLC also interviewed inside and outside counsel who advised DISH on
15 these issues, including DISH's former General Counsel Stanton Dodge, DISH's Corporate
16 Secretary Brandon Ehrhart, and DISH's other inside counsel responsible for DNC: Jeffrey Blum,
17 Lori Kalani and Brett Kitei. The outside counsel interviewed included Lewis Rose and Alysa
18 Hutnik of Kelley Drye & Warren LLP (regulatory counsel to DISH)⁷ and Helen Mac Murray of
19 Mac Murray & Shuster LLP (DISH's primary counsel for negotiating the 2009 AVC). The SLC
20 interviewed DISH's inside and outside auditors, DISH's Vice President of Internal Audit, Patrick
21 Halbach, and Jason Waldron of KPMG. The SLC interviewed DISH's third-party telemarketing
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26 ⁶ The only individual affiliated with DISH that the SLC did not interview was Mr. Clayton, a member of the DISH
27 Board, who was suffering from serious health issues during the SLC's investigation and who has since passed.

28 ⁷ The SLC conducted a joint interview of Lewis Rose and Alysa Hutnik.

1 consultant, Ken Sponsler of PossibleNow, Inc. and a former member of the Retail Sales and
2 Services team responsible for DNC compliance, Reji Musso.⁸

3 43. At the conclusion of its investigation, the SLC met and deliberated with respect to
4 its conclusions. After reaching high-level determinations, the SLC directed its counsel to draft
5 the SLC Report and reviewed multiple drafts of the Report until ultimately approving it in its
6 final form. The SLC Report described the process that the SLC undertook with respect to its
7 investigation as well as the conclusions that the SLC reached based upon its investigation. The
8 SLC Report incorporated 792 exhibits. The SLC filed the SLC Report under seal on November
9 27, 2018.

11 44. The SLC determined that it would not be in DISH's best interest to pursue the
12 claims articulated by Plaintiffs or other claims against the Defendants related to the judgments
13 entered against DISH in the DNC Actions. Ex. 102 at 352-53.

15 45. The SLC determined that, under NRS 78.138(3)-(7), for DISH to recover damages
16 from the Defendants, DISH would need to show that one or more of the Defendants had
17 knowingly caused or permitted DISH to violate the DNC Laws in a manner that caused DISH to
18 suffer the judgments entered in the DNC Actions. Ex. 102 at 299.

19 46. The SLC concluded that Defendants had an objectively reasonable belief that
20 DISH and they were complying with the law. The SLC concluded DISH could not prevail on the
21 claims against each of the Defendants. *See* Ex. 102, at 17, 22-23, 96, 149-50, 201-11, 216-22,
22 293, and 306.

24 47. With respect to the Defendants who were directors of DISH at the time the
25 conduct occurred ("Director Defendants"), the SLC determined that they did not knowingly cause
26

27 ⁸ The SLC sought to interview one or more representatives of Plaintiffs; however, Plaintiffs declined to make a
28 representative available for an interview by the SLC.

1 or permit DISH to violate the DNC Laws. The SLC concluded that – to the extent that they were
2 aware of the situation – the Director Defendants believed that the Retailers were not DISH’s
3 agents and that DISH was not legally responsible for the Retailers’ compliance with the DNC
4 Laws. Ex. 102 at 327-33. The SLC observed that this belief was reached following the receipt of
5 advice of counsel. The SLC stated that it found no evidence that any Director Defendant
6 knowingly caused or permitted DISH to violate the DNC Laws.
7

8 48. The SLC concluded that telemarketing compliance was not an issue considered
9 sufficiently material during the Relevant Time Period to be brought to the attention of the full
10 DISH Board. The SLC observed that minutes of DISH Board meetings and DISH Board
11 materials did not reflect discussion of DNC compliance until *U.S. v. DISH* was filed on March 25,
12 2009 and that, prior to the judgment entered in the DNC Actions, claims of the types asserted in
13 those actions were generally settled for thousands, not millions, of dollars. The SLC concluded
14 that the Director Defendants who were not executives of DISH could not have knowingly caused
15 or permitted DISH to violate the DNC Laws through Retailers’ telemarketing for the additional
16 reason that the non-executive directors had little, if any, awareness of or role in Retailers’ DNC
17 compliance during the Relevant Time Period. Ex. 102 at 175, 315-17.
18

19 49. The SLC examined whether the oversight systems in place at DISH suggested that
20 the DISH Board knowingly or willfully permitted DISH to violate the DNC Laws by knowingly
21 failing to monitor serious compliance issues. Ex. 102 at 334-36. The SLC determined that this
22 was not the case. The SLC noted that the DISH Board had regular reports from DISH’s General
23 Counsel, had an audit committee tasked with such oversight and retained both outside and inside
24 auditors to monitor DISH’s regulatory risk, among other precautions. Ex. 102 at 240-42, 246-56.
25 DISH has and then-had a Compliance Department with specific responsibility in respect of TCPA
26 compliance (Compl. ¶ 55), which “had weekly meetings with Dish’s Legal Department”
27
28

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1 concerning “all areas of Order Entry Retailer compliance, including telemarketing,” and imposed
2 “real changes . . . in late 2008 and 2009.” *U.S. v. DISH*, 256 F. Supp. 3d at 852, 987.

3 50. As the SLC found that no Defendant knowingly caused or permitted DISH to
4 violate the DNC Laws, the SLC concluded that NRS 78.138(7)(b)(1)-(2) would bar DISH from
5 recovering damages from the Defendants and that the claims thus lacked merit.
6

7 51. The SLC concluded that it would not be in DISH’s best interest to pursue them:
8 pursuit of non-meritorious claims would not justify the burdens such litigation would impose on
9 DISH, including litigation costs and disruption to DISH’s operations and strategic plans
10 stemming from the distraction attendant upon suing the majority of the current DISH Board and
11 senior executives. *See* Ex. 102 at 348.

12 52. If any findings of fact are properly conclusions of law, they shall be treated as if
13 appropriately identified and designated.
14

15 CONCLUSIONS OF LAW

16 53. The question before the Court is whether the Court should defer to the SLC’s
17 recommendation that the claims asserted in this action be dismissed.

18 54. In *Dish I*, the Nevada Supreme Court adopted the *Auerbach* standard, which sets
19 forth the process for judicial deference to a special litigation committee’s recommendation
20

21 55. The SLC, as the moving party, is entitled to no presumption and bears the burden
22 of proof. Only if a special litigation committee meets its burden are its conclusions protected by
23 the business judgment rule.

24 56. The SLC members bear the burden of showing the SLC conducted a good faith
25 and thorough investigation.
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1 57. The SLC must show: (1) “that the areas and subjects to be examined are
2 reasonably complete *and* [(2)] there has been a good-faith pursuit of inquiry into such areas and
3 subjects.” *Dish I*, at 443-444.

4 58. If the SLC fails to meet its burden related to the independence, good faith and/or
5 thoroughness of the special litigation committee and/or its investigative process or work product,
6 then a court cannot defer to a special litigation committee’s business judgment and adopt as its
7 own the findings of that committee.

8 59. The first prong of *Dish I* asks whether the special litigation committee was
9 independent. Under this standard, the Court assesses “whether the [SLC] that would be
10 addressing the demand can impartially consider its merits without being influenced by improper
11 considerations,’ such that it could ‘properly exercise[] its independent and disinterested business
12 judgment[.]’” *Id.* at 446.

13 60. “[T]he independence standard that applies to directors in the demand-futility
14 context is equally applicable” here. *Id.*, at 446. However, a special litigation committee is not
15 presumed to be independent; rather, this Court must make a determination as to the independence
16 of the committee. *Id.* at 446.

17 61. *Dish I* held that a special litigation committee is independent where the committee
18 cannot act without the approval of at least one independent member. *Id.* at 449.

19 62. Mr. Lillis has substantial business experience, including serving, at the
20 appointment of the Governor of Oregon, as the Chair of the Board of Trustees of the University
21 of Oregon, and serving on the boards of Agilera, Inc., Ascent Entertainment Grp., Charter
22 Communications, Inc. and various affiliates, Medco Health Solutions, Inc., On Command
23 Corporation, SUPERVALU Inc., Time Warner Entertainment Company, L.P., Williams
24 Companies, Inc. and Washington Mutual Inc. and affiliated entities.

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1 63. Mr. Lillis joined the DISH Board effective November 5, 2013. He satisfies the
2 independence requirements for a board member of NASDAQ and the SEC rules and regulations.
3 Mr. Lillis has no personal or professional relationship with any Director other than his service on
4 the DISH Board. Mr. Lillis resigned from the DISH Board, effective May 1, 2020.

5 64. There is no evidence that any aspect of Mr. Lillis's service on the DISH Board
6 compromised Mr. Lillis's independence. Indeed, Mr. Lillis retired from the DISH Board on May
7 1, 2020. Based upon all evidence presented, including Mr. Lillis's testimony, the Court finds him
8 to be independent of all Defendants.

9 65. Mr. Lillis is not interested in this action and he is clearly independent.⁹

10 66. Mr. Federico has never served on the DISH Board and had no involvement in any
11 of the events at issue.

12 67. Mr. Federico joined the board of directors of EchoStar, a DISH affiliate, in May
13 2011 He satisfies the independence requirements for a board member of NASDAQ and the SEC
14 rules and regulations. Federico brings to the EchoStar board and to the SLC years of technical
15 and managerial experience. Federico spent almost fifty years at the Xerox Corporation, during
16 which time he held various product and general management positions, as well as numerous
17 engineering, solutions, information management and process re-engineering positions.

18 68. Mr. Federico is disinterested in the claims under investigation and is independent.

19 69. Mr. Brokaw joined the DISH Board effective October 7, 2013. He satisfies the
20 independence requirements for a board member of NASDAQ and the SEC rules and regulations.
21 Mr. Brokaw is an attorney with years of investment banking and board experience. Mr. Brokaw
22 has served on the boards of directors of multiple companies, including Alico, Inc., Capital
23

24
25
26
27 ⁹ In *Dish 1*, this Court found Mr. Lillis to be independent. That conclusion remains unchanged after presentation of
the evidence during the evidentiary hearing.

1 Business Credit LLC, Exclusive Resorts, LLC, Ovation LLC, Timberstar Southwest LLC, Value
2 Place Holdings LLC and North American Energy Partners Inc.

3 70. A strong argument can be made that Mr. Brokaw lacks independence with respect
4 to the claims based upon his personal relationship with the Ergens.¹⁰ Mr. Brokaw's "ties with the
5 Ergens represent the type of improper influences that *could* inhibit the proper exercise of
6 independent business judgment." *Id.* at 448.

7
8 71. Even though Mr. Brokaw has social relationships with the Ergens, that does not
9 undermine the independence of the SLC. Under Nevada law, the SLC had to act by the majority
10 approval of its members.¹¹ The SLC could not act without – at minimum – the affirmative
11 approval of either Mr. Lillis or Mr. Federico, each of whom is undeniably independent; thus the
12 unanimous SLC approval here was independent regardless of Mr. Brokaw's independence. There
13 is no evidence that Mr. Brokaw exerted control over the SLC's investigation in a way that might
14 neutralize Mr. Lillis's and Mr. Federico's voting control over the SLC. Thus, the independence
15 of the SLC ultimately does not depend upon Mr. Brokaw's disinterest or independence.

16
17 72. The Court finds the SLC to be independent.
18
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21 ¹⁰ These personal relationships were detailed in *Dish I* and remain the same. Although Mr. Brokaw is clearly a strong
22 personality able to stand his ground, the relationship of Cantey Ergen as godmother to his 12 year old son and the
continuing social relationship between his wife and Cantey Ergen remain of concern.

23 ¹¹ See NRS 78.125(1) ("Unless it is otherwise provided in the articles of incorporation, the board of directors may
24 designate one or more committees which . . . have and may exercise the powers of the board of directors . . ."); NRS
25 78.315(1) ("[T]he act of directors holding a majority of the voting power of the directors, present at a meeting at
26 which a quorum is present, is the act of the board of directors."); Ex. 102 at Ex. 53, Am. and Restated Bylaws of
27 DISH Network Corp. § 4.15 (Mar. 28, 2018) ("Committee Rules. Unless the Board of Directors otherwise provides
28 and subject to Section 4.1 of these Bylaws, a majority of the entire authorized number of members of such committee
shall constitute a quorum for the transaction of business, the vote of a majority of the members present at a meeting at
the time of such vote if a quorum is then present shall be the act of such committee, and in other respects each
committee shall conduct its business in the same manner as the Board of Directors conducts its business pursuant to
this Article IV of these Bylaws."); Ex. 102 at Ex. 20, Am. and Restated Bylaws of EchoStar Communications Corp.
§ 4.15 (May 8, 2007) (same).

1 73. The second prong of the *Dish I* standard – that the special litigation committee
2 conducted a “good faith, thorough investigation” – concerns “the appropriateness and sufficiency
3 of the investigative procedures chosen and pursued by the committee.” *Id.* at 443.

4 74. “In accordance with the business judgment rule, courts can ‘inquir[e] into the
5 procedural indicia of whether the directors resorted in good faith to an informed decision making
6 process.’” *Id.* at 449-50, (quoting *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev.
7 369 (2017)).

8 75. For this analysis, “[c]ourts look to indicia of the SLC’s investigatory
9 thoroughness, such as what documents were reviewed and which witnesses interviewed.” *Id.* at
10 449-50.

11 76. As with any director action protected by the business judgment doctrine, the
12 process employed by the special litigation committee must not be so deficient as to constitute bad
13 faith:
14

15 [P]roof[] . . . that the investigation has been so restricted in scope, so
16 shallow in execution, or otherwise so *pro forma* or halfhearted as to
17 constitute a pretext or sham, consistent with the principles underlying the
18 application of the business judgment doctrine, would raise questions of
19 good faith or conceivably fraud which would never be shielded by that
20 doctrine.

21 *Id.* at 450.

22 77. This analysis does not, however, permit inquiry into the substance of the
23 committee’s determinations, into the merit of its analysis, or its conclusions: “The inquiry into
24 whether the SLC made its determination in good faith and on an informed basis ‘focuses on the
25 process used by the SLC, rather than the substantive outcome of the process.’” *Id.* at 449-50. A
26 “court ‘may not under the guise of consideration of such [procedural] factors trespass in the
27 domain of business judgment.’” *Id.* at 443. “[T]he substantive aspects of a decision to terminate
28 a shareholders’ derivative action against defendant corporate directors made by a committee of

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1 disinterested directors appointed by the corporation's board of directors are beyond judicial
2 inquiry under the business judgment doctrine." *Id.* As codified in NRS 78.138, the business
3 judgment rule in Nevada does not permit inquiry into the reasonableness of the director's
4 decision. *Wynn Resorts*, 133 Nev. at 377.

5
6 78. The evaluation to be made by the Court is whether the SLC's procedures were
7 designed to provide an independent, thorough and good faith analysis of the issues raised in the
8 Complaint. The issues investigated related to the Retailers' violations of the TPCA and the legal
9 responsibility of DISH for supervision or control of those Retailers as well as the efforts to insure
10 compliance with the 2009 AVC.

11 79. For purposes of the SLC's investigation, the members accepted as fact the findings
12 made in the decisions in the DNC Actions. Although damning, these findings do not end the
13 inquiry into whether the Defendants are entitled to protection under the business judgment rule¹²
14 or whether a breach of fiduciary duty occurred by the Defendants.

15
16 80. Board members are entitled to rely upon advice of counsel in exercising their
17 business judgment.¹³ The SLC inquired of the attorneys who during the Relevant Time Period
18

19 ¹² NRS 78.138(3) provides in pertinent part: Except as otherwise provided in subsection 1 of NRS 78.139,
20 directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis
21 and with a view to the interests of the corporation. A director or officer is not individually liable for damages as a
22 result of an act or failure to act in his or her capacity as a director or officer except as described in subsection 7.
23 NRS 78.138(7) provides in pertinent part: Except as otherwise provided in NRS 35.230, 90.660, 91.250, 452.200,
24 452.270, 668.045 and 694A.030, or unless the articles of incorporation or an amendment thereto, in each case filed
25 on or after October 1, 2003, provide for greater individual liability, a director or officer is not individually liable to
26 the corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his or her
27 capacity as a director or officer unless:

28 (a) The presumption established by subsection 3 has been rebutted; and

(b) It is proven that:

(1) The director's or officer's act or failure to act constituted a breach of his or her fiduciary duties as a
director or officer; and

(2) Such breach involved intentional misconduct, fraud or a knowing violation of law.

¹³ NRS 78.138(2) provides in pertinent part: In exercising their respective powers, directors and officers may, and
are entitled to, rely on information, opinions, reports, books of account or statements, including financial statements
and other financial data, that are prepared or presented by:

1 had provided the white paper and advice related to the relationship of the Retailers and oversight
2 obligations as part of its investigation and had the opportunity to test, from its perspective, the
3 appropriateness of reliance upon that advice.¹⁴

4 81. Based upon the evidence presented, including the SLC's Report, the SLC
5 members' testimony, the document requests made, and the minutes of the meetings held by the
6 SLC during the course of its investigation, the SLC approached its investigation without any
7 prejudgment of the outcome.

8 82. The SLC met to plan their investigation, to receive legal advice and to deliberate
9 over the evidence they gathered and their conclusions through ten separate meetings. Some of
10 these meetings were in person; others were telephonic.

11 83. During the SLC's investigation, the SLC, through counsel, reviewed over 44,000
12 documents. Ex. 102 at 30. Each SLC member personally reviewed over 1,500 documents. *Id.* at
13 30. The SLC requested, received and reviewed internal DISH Board materials and
14 communications and the trial court opinions in the DNC Actions, as well as the underlying
15 documents in those actions, such as deposition transcripts, trial testimony and trial exhibits. *See*
16 Ex. 102 at Ex. 742. The SLC members further reviewed hundreds of internal and external DISH
17 communications related to DNC compliance and the 2009 AVC, including legal advice received
18 by DISH from outside counsel related to DNC issues. *See* Ex. 102 at 30-32.

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23 (b) Counsel, public accountants, financial advisers, valuation advisers, investment bankers or other persons as to
24 matters reasonably believed to be within the preparer's or presenter's professional or expert competence; or
25 ***
26 but a director or officer is not entitled to rely on such information, opinions, reports, books of account or statements if
27 the director or officer has knowledge concerning the matter in question that would cause reliance thereon to be
28 unwarranted.

¹⁴ While prior cases also agreed with the advice apparently given by counsel, it is unclear whether under NRS 78.138(2) the board members are entitled to rely upon those trial court decisions (i.e. *Charvat* and *Zhu*) in exercising their judgment.

1 84. The SLC also interviewed twenty-two individuals, including each current Director
2 Defendant, DISH's inside counsel, DISH's outside counsel in the DNC Actions, and DISH's
3 independent auditor. Ex. 102 at 32, 41-47. Based upon the evidence presented, it is apparent that
4 the SLC challenged the interviewees and tested the honesty and veracity of the answers the
5 interviewees provided to the SLC. The SLC members each testified as to the thoroughness of
6 their investigation.
7

8 85. Although clearly DISH disagrees with the decision in the DNC Actions, the SLC
9 accepted the decisions as fact and reviewed those determinations and considered them in reaching
10 its conclusion. Nineteen pages of the SLC Report directly address those decisions. Ex. 102 at
11 20-23, 265-73, 281-83, 318-24. Under *Dish I*, the test of a special litigation committee's good-
12 faith thoroughness relates to the procedures that the committee followed, its process and the scope
13 of its investigation. The procedure used by the SLC in considering these decisions confirms that
14 there is no issue with respect to the good-faith thoroughness of its investigation in that regard.
15

16 86. The SLC analyzed the decisions in the DNC Actions. The SLC decided that
17 neither decision addressed the questions put before the SLC, which was not whether DISH
18 violated a DNC Law, but whether the Board may be liable for such violation. To assess whether
19 the SLC's determination conflicted with the DNC Actions would necessarily revisit the substance
20 of the SLC's determinations. *Dish I* does not permit that review.
21

22 87. The standard set by the Nevada Supreme Court in *Dish I* governs the SLC's
23 Motion to Defer. Based upon the evidence presented at the evidentiary hearing, this Court
24 concludes that the SLC is independent and has conducted a good-faith, thorough investigation.
25 Therefore, under *Dish I*, this Court defers to the business judgment of the SLC and accepts its
26 determination that it would not be in the best interest of DISH to litigate these claims. Consistent
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1 with Nevada law, this Court will not review the substantive merits of the SLC's determination.

2 The SLC's Motion to Defer is granted.

3 88. This decision reflects the Court's factual findings based upon weighing the
4 evidence and evaluating witness testimony presented at the evidentiary hearing and through
5 briefing on the Motion to Defer.
6

7 89. If any conclusions of law are properly findings of fact, they shall be treated as if
8 appropriately identified and designated.

9 Based upon the foregoing Findings of Fact and Conclusions of Law:


10 **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that the Motion to Defer
11 is granted.

12 DATED this 17th day of July, 2020.

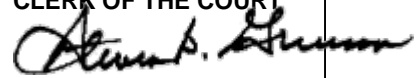
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15 
16 Elizabeth Gonzalez, District Court Judge

17 **Certificate of Service**

18 I hereby certify that on the date filed, a copy of the foregoing Findings of Fact and Conclusions of
19 Law was electronically served, pursuant to N.E.F.C.R. Rule 9, to all registered parties in the Eighth
20 Judicial District Court Electronic Filing Program.

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20 *Corporation*

21 **DISTRICT COURT**

22 **CLARK COUNTY, NEVADA**

23 PLUMBERS LOCAL UNION NO. 519
24 PENSION TRUST FUND and CITY OF
25 STERLING HEIGHTS POLICE AND FIRE
26 RETIREMENT SYSTEM, derivatively on
27 behalf of nominal defendant DISH
28 NETWORK CORPORATION,

Plaintiffs,

v.

CHARLES W. ERGEN; JAMES
DEFRANCO; CANTEY M. ERGEN;
STEVEN R. GOODBARN; DAVID
MOSKOWITZ; TOM A. ORTOLF; CARL
E. VOGEL; GEORGE R. BROKAW;
JOSEPH P. CLAYTON; and GARY S.
HOWARD,

Defendants,

DISH NETWORK CORPORATION, a
Nevada corporation,

Nominal Defendant

CASE NO.: A-17-763397-B
DEPT. NO.: XI

**NOTICE OF ENTRY OF FINDINGS OF
FACT AND CONCLUSIONS OF LAW**

Hearing Date:
Hearing Time:

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 222-2500 ♦ Fax: (702) 669-4650

1 PLEASE TAKE NOTICE that Findings of Fact and Conclusions of Law were entered
2 on the 17th day of July 2020. A copy is attached.

3 DATED this 31st day of July 2020.
4

5 By /s/ J. Stephen Peek
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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of July 2020, a true and correct copy of the foregoing **NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW** was served by the following method(s):

X Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

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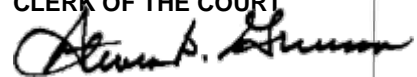
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FFCL

DISTRICT COURT

CLARK COUNTY, NEVADA

PLUMBERS LOCAL UNION NO. 519
PENSION TRUST FUND, Derivatively on
Behalf of DISH NETWORK
CORPORATION,

Plaintiff,

vs.

CHARLES W. ERGEN, et al.,

Defendants,

– and –

DISH NETWORK CORPORATION, a
Nevada corporation,
Nominal Defendant

Case No.: A-17-763397-B

Dept.: XI

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on for an evidentiary hearing on the Motion for Summary Judgment Deferring to the Special Litigation Committee's Determination that the Claims Should be Dismissed filed December 20, 2018 ("Motion to Defer")¹ before the Honorable Elizabeth Gonzalez on July 6 and 7, 2020; Plaintiffs Plumbers Local Union No. 519 Pension Trust Fund and City of Sterling Heights Police and Fire Retirement System appeared by and through their counsel of record, Randall J. Baron, Benny C. Goodman III, and Erik W. Luedeke of Robbins Geller Rudman & Dowd LLP, and David C. O'Mara of The O'Mara Law Firm, P.C.; the Special Litigation Committee appeared by and through their counsel of record, J. Stephen Peek and Robert J. Cassity of Holland & Hart LLP, and C. Barr Flinn and Emily V. Burton of Young Conaway

¹ The Court scheduled an evidentiary hearing on the Motion to Defer at the joint request of the parties in conformance with the requirements of an evidentiary hearing set forth in *Dish 1*, 133 Nev. 438 (2017). (Case No. A686775) To avoid confusion, this case, A763397, is *Dish 2* and A797799 is *Dish 3*.

JA017636

1 Stargatt & Taylor, LLP; the Director Defendants appeared by and through their counsel of record
2 Ian P. McGinn of the law firm of Kemp Jones; the Court having read and considered the pleadings
3 filed by the parties; having reviewed the evidence admitted during the hearing; having heard and
4 carefully considered the testimony of the witnesses called to testify and weighing their credibility;
5 having considered the oral and written arguments of counsel, and with the intent of rendering a
6 decision on only the Motion to Defer pending before the Court; the Court makes the following
7 findings of fact and conclusions of law:
8

9 PROCEDURAL POSTURE

10 1. On October 19, 2017, Plumbers Local Union No. 519 Pension Trust Fund filed
11 this shareholder derivative action.²
12

13 2. On November 13, 2017, Plaintiff City of Sterling Heights Police and Fire
14 Retirement System filed a second derivative action in this Court seeking to assert similar claims
15 on behalf of DISH. Those complaints were consolidated into the present action.

16 3. On January 12, 2018, Plaintiffs filed their operative consolidated complaint,
17 alleging, among other things, that DISH's directors breached their legal obligations to conduct
18 DISH's business in accordance with the TCPA after promising to do so under the terms of the
19 2009 AVC.
20
21
22

23 ² Plaintiffs Plumbers Local Union No. 519 Pension Trust Fund and City of Sterling Heights Police and Fire
24 Retirement System ("Plaintiffs") asserts claims, derivatively on behalf of DISH Network Corporation ("DISH" or the
25 "Company") against Charles Ergen, James DeFranco, Cantey Ergen, Steven Goodbarn, David Moskowitz, Tom
26 Ortolf, Carl Vogel, George Brokaw, and Gary Howard (collectively "Defendants"), each of whom was or is a
27 director of DISH. Plaintiffs assert that the Defendants "did nothing to ensure DISH's compliance with the TCPA or
28 the Compliance Agreement" and thereby knowingly and intentionally caused DISH to commit the violations of
telemarketing laws found by *Krakauer v. DISH Network LLC*, No. 14-cv-333, 2017 WL 2242952 (M.D.N.C. May
22, 2017) ("*Krakauer*") and *United States v. DISH Network LLC*, 256 F. Supp. 3d 810 (C.D. Ill. 2017) ("*U.S. v.*
DISH" and, together with *Krakauer*, the "DNC Actions"). Plaintiffs would have DISH seek a money judgment
against the Defendants under NRS 78.138(7)(b)(2) to make DISH whole for most of the roughly \$340 million in
damages awarded against DISH in the DNC Actions.

JA017637

1 4. The Complaint asserts that the Defendants “abandoned and abdicated their
2 responsibilities and fiduciary duties” to cause DISH to comply with the DNC Laws, in connection
3 with third-party Retailers’ calls made on DISH’s behalf. (Compl. ¶ 70.) Plaintiffs would have
4 DISH sue the Defendants to recover from them for most of the judgments entered against DISH
5 in *U.S. v. DISH* and *Krakauer*. Plaintiffs claimed standing to derivatively assert these claims
6 belonging to DISH because Plaintiffs named as Defendants eight of the then ten members of the
7 Board of Directors of DISH (“DISH Board”).

9 5. On February 26, 2018, Defendants moved to dismiss the Complaint for failure to
10 state a claim. DISH, separately, moved to dismiss for failure to adequately plead demand futility.
11 In the alternative, DISH asked that this action be stayed “pending final resolution” of the DNC
12 Actions.

13
14 6. While the motions to dismiss were pending, the DISH Board, on April 11, 2018,
15 unanimously resolved by written consent (“Unanimous Written Consent”) to form a special
16 litigation committee (“SLC”) of the DISH Board to assume control of the claims of DISH
17 asserted in this action on DISH’s behalf.

18 7. The SLC is composed of Charles Lillis, a non-party and now former director of
19 DISH; George Brokaw, a director of DISH who is named as a Defendant in this action; and
20 Anthony Federico, a director on the board of EchoStar Corporation (“EchoStar”), a non-party
21 affiliate of DISH.

22
23 8. The Unanimous Written Consent fully delegated all rights and powers of the DISH
24 Board with respect to the claims asserted in this action to the SLC. It provided:

25 [T]he Board of Directors hereby delegates to the Special Litigation Committee the power
26 and authority of the Board of Directors to: (1) review, investigate and evaluate the claims
27 asserted in the Derivative Litigation; (2) file any and all pleadings and other papers on
28 behalf of the Corporation that the Special Litigation Committee finds necessary or
advisable in connection therewith; (3) determine whether it is in the best interests of the
Corporation and/or to what extent it is advisable for the Corporation to pursue any or all

JA017638

1 of the claims asserted in the Derivative Litigation, taking into consideration all relevant
2 factors as determined by the Special Litigation Committee; (4) prosecute or dismiss on
3 behalf of the Corporation any claims that were or could have been asserted in the
4 Derivative Litigation; and (5) direct the Corporation to formulate and file any and all
5 pleadings and other papers on behalf of the Corporation and the Special Litigation
6 Committee finds necessary or advisable in connection therewith, including, without
7 limitation, the filing of other litigation and counterclaims or cross-complaints, or motions
8 to dismiss or stay the proceedings if the Special Litigation Committee determines that
9 such action is advisable and in the best interests of the Corporation.

10 9. The Unanimous Written Consent provided the SLC with broad authority to
11 investigate all matters related to this action:

12 (1) the officers of the Corporation are hereby authorized and directed to provide to the
13 Special Litigation Committee, each Committee Member and any of their advisors, agents,
14 counsel and designees, such information and materials, including without limitation, the
15 books and records of the Corporation and any documents, reports or studies pertaining to
16 the Derivative Litigation as may be useful or helpful in the discharge of the Special
17 Litigation Committee's duties or as may be determined by the Special Litigation
18 Committee; (2) the Special Litigation Committee is authorized and empowered to meet
19 with both present and past members of the Board of Directors who are not members of the
20 Special Litigation Committee and/or with both present and past officers of the
21 Corporation to gather information from such directors and/or officers pertaining to the
22 Derivative Litigation as may be useful or helpful in the discharge of the Special Litigation
23 Committee's duties or as may be determined by the Special Litigation Committee, or any
24 member thereof, to be appropriate or advisable in connection with the discharge of the
25 duties of the Special Litigation Committee[.]

26 10. The SLC retained Holland & Hart, LLP and Young Conaway Stargatt & Taylor,
27 LLP as its independent counsel.

28 11. On April 24, 2018, the SLC filed a Motion for Stay Pending Investigation of the
Special Litigation Committee of DISH Network Corporation ("Motion to Stay") to permit it to
conduct an investigation of "the allegations asserted by Plaintiffs Plumbers Local Union No. 519
Pension Trust Fund and City of Sterling Heights Police and Fire Retirement System in their
Complaint in this action."

12. The Court stayed this action for six months to permit the SLC to conduct its
investigation.

JA017639

13. On December 19, 2018, the SLC filed its Motion for Summary Judgment Deferring to the Special Litigation Committee’s Determination That the Claims Should Be Dismissed (“Motion to Defer”). Although the Motion to Defer asserted that there was no genuine issue of material fact, such that this Court should rule in the SLC’s favor based upon the summary judgment standard, this Court does not rule on the Motion to Defer on that basis, but rather on the basis of factual determinations made upon the record presented at the evidentiary hearing under a preponderance of the evidence standard.³

14. From January 14, 2019 through July 31, 2019, Plaintiffs took discovery related to the SLC.

15. On January 10, 2020, the parties filed a Joint Motion for Evidentiary Hearing on the SLC's Motion to Defer, seeking to schedule an evidentiary hearing in accordance with *Dish 1*.

16. On July 6 and 7, 2020, consistent with the Nevada Supreme Court’s direction in *Dish 1*, this Court held the evidentiary hearing on the Motion to Defer.

FINDINGS OF FACT

17. DISH is a Nevada corporation in good standing.

18. Charles Ergen, Cantey Ergen (together the “Ergens”) and James DeFranco founded DISH in 1980. In 1995, DISH became publicly traded on the NASDAQ. The Ergens beneficially hold 48% of DISH’s Class A common stock, 85.8% of DISH’s Class B common stock and 78.4% of its voting power. Report of the Special Litigation Committee of DISH Network Corporation, dated Nov. 7, 2018 (“SLC Report”, admitted Ex.⁴ 102) at Ex. 52 at 9-10. DeFranco holds roughly 2.1% of DISH’s Class A common stock. Ex. 102 at Ex. 44 at 9-10. The

³ If the evidence presented at the evidentiary hearing were evaluated under a summary judgment standard a different result would be reached.

⁴ All "Ex. " references refer to the exhibits admitted during the evidentiary hearing.

1 other Defendants are each stockholders of DISH, each holding less than 1% of DISH's Class A
2 common stock.

3 19. DISH is a company focused on connectivity. Through its subsidiaries, DISH
4 provides television entertainment and technology to customers with its satellite DISH TV and
5 streaming Sling TV services. During the time period addressed by Plaintiffs' Complaint (the
6 "Relevant Time Period"), DISH used a variety of marketing channels, including telemarketing, to
7 market DISH TV and Sling TV services. DISH also authorized third-party businesses, which it
8 referred to as "Retailers," to market and sell DISH's services to businesses and consumers in
9 exchange for commissions. Some of those Retailers used telemarketing.

10 20. Companies that engage in telemarketing are subject to multiple state and federal
11 laws, including the Telephone Consumer Protection Act, 47 U.S.C.A. § 227 ("TCPA") and the
12 Telemarketing Sales Rule, 16 C.F.R. § 310 ("TSR" together with the TCPA, collectively the
13 "DNC Laws"). The TSR is enforceable by the Federal Trade Commission ("FTC"). 15 U.S.C.A.
14 § 6102(a)(1). The TCPA gives both State Attorneys General and individual consumers standing
15 to pursue claims for violations. 47 U.S.C.A. § 227 (b)(3), (c)(5), (g) (2018). Both of these DNC⁵
16 Laws impose per-call fines or damages on companies for telemarketing activities found to be in
17 violation above and beyond specified "safe harbors."

18 21. In 2009, DISH entered into an Assurance of Voluntary Compliance ("2009 AVC")
19 with 46 states' Attorneys General, including Nevada's Attorney General, to resolve disputes
20 between DISH and the 46 states regarding DISH's consumer protection obligations, including
21 with respect to its telemarketing. *See* Ex. 2, at 3-4, 8.

22 22. Under the 2009 AVC, DISH paid \$5,991,000 to the Attorneys General. (Ex. 2 at §
23 6.1.) The 2009 AVC fully resolved, among other things, all DNC Law violations asserted against
24

25
26
27 ⁵ The abbreviation DNC stands for do not call.
28

1 DISH by the 46 states that participated in the 2009 AVC. Through the 2009 AVC, DISH also
2 undertook obligations for specified monitoring and oversight of Retailers who telemarketed
3 DISH's products, but explicitly reserved its position that the Retailers were independent
4 contractors rather than DISH's agents. (*Id.* § 1.14.) No party to the 2009 AVC has alleged that
5 the agreement has been breached in connection with DNC issues.
6

7 23. In 2009, Defendants James DeFranco, Charles W. Ergen, Cantey M. Ergen, Joseph
8 P. Clayton, David K. Moskowitz, Tom A. Ortolf and Carl E. Vogel ("Managing Director
9 Defendants") were briefed on the terms of the 2009 AVC. Ex. 102 at 212-13.

10 24. Between 2007 and 2014, several consumers, the federal government and the four
11 states that declined to join the 2009 AVC brought lawsuits against DISH, seeking to hold DISH
12 liable for violations of the DNC Laws based on calls made by Retailers purporting to sell DISH
13 pay-tv services.
14

15 25. The first two of those lawsuits to reach resolution – *Charvat v. EchoStar Satellite,*
16 *LLC*, 676 F. Supp. 2d 668 (S.D. Ohio 2009) ("*Charvat*") and *Zhu v. DISH Network, LLC*, 808 F.
17 Supp. 2d 815 (E.D. Va. 2011) ("*Zhu*") – were resolved in DISH's favor.

18 26. Although DISH settled with 46 state attorneys general through the 2009 AVC, the
19 other four state Attorneys General and the federal government, through the FTC, continued
20 pursuit of claims that DISH was regularly violating the TCPA. This action was litigated in the
21 U.S. District Court for the Central District of Illinois.
22

23 27. In 2009, the FTC (through the Department of Justice) and the states of California,
24 Illinois, North Carolina and Ohio brought *U.S. v. DISH*, alleging that DISH had violated the
25 TCPA, TSR and state telemarketing laws through telemarketing calls that DISH made directly
26 and that six Retailers made on DISH's behalf from 2003 to 2011. Ex. 102 at Ex. 776. *See also*
27
28

JA017642

1 *U.S. v. DISH*, 256 F. Supp. 3d at 936-37. DISH opposed the claims, arguing that the Retailers
2 were not DISH's agents and that DISH's calls fell within safe harbors of the DNC Laws.

3 28. After a bench trial, the *U.S. v. DISH* court concluded that DISH and telemarketers
4 under its control had placed approximately 7.6 million calls in violation of the DNC Laws. *See*,
5 *e.g.*, *U.S. v. DISH*, 256 F. Supp. 3d at 931-32, 954, 959. The court also found that the Retailers
6 had placed over 90 million calls in violation of the DNC Laws and held that DISH was liable for
7 these calls because the Retailers placed the calls on DISH's behalf. *Id.* at 913, 915, 917-18, 919-
8 20, 930, 943-45, 953-54 (C.D. Ill. 2017). The *U.S. v. DISH* court entered a \$280 million
9 judgment against DISH. *Id.* at 983.

10
11 29. On April 18, 2014, Thomas Krakauer brought a consumer class action lawsuit
12 against DISH for violations of the TCPA and DNC laws because one of DISH's Retailers,
13 Satellite Systems Network ("SSN"), had placed calls to the plaintiff and other class members in a
14 manner that violated the TCPA. SSN placed the calls at issue in *Krakauer* between 2010 and
15 2011. DISH opposed the claims in *Krakauer*, in substantial part by arguing, as it did successfully
16 in prior cases with respect to other Retailers' calls, that SSN was not an agent of DISH and that
17 DISH could not be held liable for calls made by SSN. DeFranco testified on DISH's behalf at
18 trial in *Krakauer*.

19
20 30. On January 19, 2017, the jury in *Krakauer* found DISH liable for violations of the
21 TCPA resulting from, among other violations, over 50,000 calls made between May 2010 and
22 August 2011 in violation of the DNC Laws by SSN, and awarded the plaintiff class \$400 per
23 violation. Ex. 102 at Ex. 88.

24
25 31. The jury found that SSN was DISH's agent and awarded the plaintiff class a total
26 of \$20,447,600 in damages against DISH. Ex. 102 at Ex. 88 and Ex. 102 at 271-73.

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JA017643

1 32. The U.S. District Court considered Krakauer's request for treble damages. The
2 U.S. District Court issued a strongly worded opinion concluding that DISH's conduct met the
3 TCPA's knowing and willful standard. Ex. 1., *Krakauer*, at *10. The Court ordered DISH to pay
4 \$65.1 million in trebled damages. Ex. 1, *Krakauer*, at *37.

5
6 33. DISH appealed the decisions in *Krakauer* and *U.S. v. DISH* on May 4, 2018 and
7 October 6, 2017, respectively.

8 34. On May 30, 2019, the United States Court of Appeals for the Fourth Circuit
9 unanimously affirmed the trial verdict and judgment in *Krakauer*, finding that the *Krakauer*
10 judgment rested on "solid evidence." *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643 (4th Cir.
11 2019). The Fourth Circuit held, in pertinent part:

12
13 The district court also noted the half-hearted way in which Dish responded
14 to consumer complaints, finding that the "evidence shows that Dish cared about
15 stopping complaints, not about achieving TCPA compliance." . . . The court then
16 assessed Dish's arguments to the contrary, finding that its refrain that it knew
17 nothing of SSN's widespread violations was simply not credible: "Given the tens
18 of thousands of violative calls SSN made in a span of just over a year, even a
19 cursory investigation or monitoring effort by Dish would have uncovered the
20 violations. Under these circumstances, what Dish calls a mistaken belief is
21 actually willful ignorance."

22 * * *

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

29 * * *

30 Dish seems to think that so long as it includes certain language in a contract or
31 issues the occasional perfunctory warning to a retailer the court will not look past
32 the formalities and examine the actual control exercised by Dish. Moreover, Dish
33 failed to recognize that repeated expressions of ignorance as to a widespread
34 problem can evince more than simply negligence; they can also be a sign that the

JA017644

1 violations are known, tolerated, and even encouraged. Trebling is never to be
2 done lightly. Given the consequences for a company, a trebled award must rest on
3 solid evidence. Here [it] was.

4 925 F.3d at 661-63.

5 35. On March 26, 2020, the U.S. Court of Appeals for the Seventh Circuit largely
6 affirmed the U.S. District Court's decision in *U.S. v. DISH*, but vacated the U.S. District Court's
7 holding that DISH violated the TSR by substantially assisting one Retailer in making "abandoned
8 calls." 954 F.3d 970, 977-78 (7th Cir. 2020). The Seventh Circuit also vacated the damages
9 award entered in *U.S. v. DISH* and remanded the case to the U.S. District Court to re-calculate
10 damages. *Id.* at 980.

11 36. On October 15, 2019, DISH filed a Petition for a *Writ of Certiorari* of the
12 *Krakauer* opinion with the U.S. Supreme Court, seeking review of a single issue: "The question
13 presented is whether a call placed in violation of the Telephone Consumer Protection Act, without
14 any allegation or showing of injury – or even that Plaintiffs heard the phone ring – suffices to
15 establish concrete injury for purposes of Article III." Ex. 8, at i. On December 16, 2019, the U.S.
16 Supreme Court denied DISH's Petition for a *Writ of Certiorari*. Ex. 9.

17 37. The SLC met for the first time on May 9, 2018. Ex. 108 at 00001-00002. In
18 addition to the twenty-one interviews discussed below the SLC also met in person or
19 telephonically ten times during the course of its investigation. Ex. 108; Ex. 102 at 33. At these
20 meetings, the SLC received advice of counsel concerning the duties of the SLC, the legal
21 standards relevant to the claims under investigation and Nevada law concerning directors'
22 fiduciary duties. Ex. 108 at 00005-00006. The SLC also discussed the information that it had
23 gathered, additional topics of interest, and topics on which it would like legal advice. Plaintiffs
24 have identified no relevant subject on which the SLC was unadvised.
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JA017645

1 38. The SLC began its investigation by assessing its own independence and the
2 independence of its counsel. The SLC concluded that each of its members and the SLC's counsel
3 were independent with respect to the matters to be investigated. Plaintiffs have raised no
4 challenge to the independence or competence of the SLC's counsel.
5

6 39. On June 1, 2018, the SLC sent its First Set of Documents Requested ("First
7 Request") to DISH. Ex. 102 at Ex. 742. After receiving the documents called for in the first
8 Request, the SLC sought and received several additional groups of documents from DISH and
9 DISH's outside legal counsel to further explore topics suggested through the SLC's document
10 review and interviews. The SLC gathered and, through its counsel, reviewed more than 44,000
11 documents related to the SLC's investigation. Ex. 102 at 30. The SLC members themselves
12 reviewed more than 1,500 documents. *Id.*
13

14 40. The SLC began by reviewing the Complaint in this action. The SLC requested and
15 reviewed foundational documents concerning the DNC Actions, such as the decisions in the DNC
16 Actions, including the jury verdict sheet issued in *Krakauer*, the decision trebling damages issued
17 in *Krakauer*, and the Findings of Fact and Conclusions of Law issued in *U.S. v. DISH*, and the
18 trial records for the DNC Actions, including the trial exhibits, the exhibits cited in the decisions
19 and the transcripts of the trial testimony and depositions. The SLC also reviewed the relevant
20 DISH Board-level materials, including Board and Audit Committee meeting minutes and
21 handouts, and communications to the full Board concerning DNC issues whether or not
22 connected to a Board meeting from January 1, 2003 through December 31, 2013. The SLC
23 reviewed internal DISH communications involving the Defendants related to DNC issues,
24 including communications of Mr. Ergen, Mr. DeFranco and Mr. Moskowitz related to DNC
25 issues and the legal advice provided to the DISH Board regarding DNC issues. The SLC also
26 reviewed management-level internal communications and documents regarding telemarketing
27
28

JA017646

1 policies and practices and DNC complaints, including both internal and external communications
2 relating to DISH's entry into the 2009 AVC and subsequent efforts related to the 2009 AVC.

3 41. From DISH's outside regulatory and litigation counsel, the SLC requested and
4 received communications between outside counsel and DISH employees and communications
5 between the outside counsel and relevant third parties, such as the FTC and states' Attorneys
6 General. *See* Ex. 102 at 30-32. Plaintiffs have not identified any documents relevant to the
7 matters at issue in this litigation that the SLC did not gather and consider.

9 42. The SLC identified individuals that the SLC believed likely to have information
10 relevant to the claims in this action. Between July 16, 2018 and September 21, 2018, the SLC
11 conducted twenty-one interviews of this group, including the members of the DISH Board during
12 the Relevant Time Period.⁶ Beyond the DISH Board, the SLC interviewed DISH management,
13 including Blake Van Emst (Vice President of Retail Services) and Amir Ahmed (Senior Vice
14 President of Sales). The SLC also interviewed inside and outside counsel who advised DISH on
15 these issues, including DISH's former General Counsel Stanton Dodge, DISH's Corporate
16 Secretary Brandon Ehrhart, and DISH's other inside counsel responsible for DNC: Jeffrey Blum,
17 Lori Kalani and Brett Kitei. The outside counsel interviewed included Lewis Rose and Alysa
18 Hutnik of Kelley Drye & Warren LLP (regulatory counsel to DISH)⁷ and Helen Mac Murray of
19 Mac Murray & Shuster LLP (DISH's primary counsel for negotiating the 2009 AVC). The SLC
20 interviewed DISH's inside and outside auditors, DISH's Vice President of Internal Audit, Patrick
21 Halbach, and Jason Waldron of KPMG. The SLC interviewed DISH's third-party telemarketing
22
23
24
25

26 ⁶ The only individual affiliated with DISH that the SLC did not interview was Mr. Clayton, a member of the DISH
27 Board, who was suffering from serious health issues during the SLC's investigation and who has since passed.

28 ⁷ The SLC conducted a joint interview of Lewis Rose and Alysa Hutnik.

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1 consultant, Ken Sponsler of PossibleNow, Inc. and a former member of the Retail Sales and
2 Services team responsible for DNC compliance, Reji Musso.⁸

3 43. At the conclusion of its investigation, the SLC met and deliberated with respect to
4 its conclusions. After reaching high-level determinations, the SLC directed its counsel to draft
5 the SLC Report and reviewed multiple drafts of the Report until ultimately approving it in its
6 final form. The SLC Report described the process that the SLC undertook with respect to its
7 investigation as well as the conclusions that the SLC reached based upon its investigation. The
8 SLC Report incorporated 792 exhibits. The SLC filed the SLC Report under seal on November
9 27, 2018.

11 44. The SLC determined that it would not be in DISH's best interest to pursue the
12 claims articulated by Plaintiffs or other claims against the Defendants related to the judgments
13 entered against DISH in the DNC Actions. Ex. 102 at 352-53.

15 45. The SLC determined that, under NRS 78.138(3)-(7), for DISH to recover damages
16 from the Defendants, DISH would need to show that one or more of the Defendants had
17 knowingly caused or permitted DISH to violate the DNC Laws in a manner that caused DISH to
18 suffer the judgments entered in the DNC Actions. Ex. 102 at 299.

19 46. The SLC concluded that Defendants had an objectively reasonable belief that
20 DISH and they were complying with the law. The SLC concluded DISH could not prevail on the
21 claims against each of the Defendants. *See* Ex. 102, at 17, 22-23, 96, 149-50, 201-11, 216-22,
22 293, and 306.

24 47. With respect to the Defendants who were directors of DISH at the time the
25 conduct occurred ("Director Defendants"), the SLC determined that they did not knowingly cause
26

27 ⁸ The SLC sought to interview one or more representatives of Plaintiffs; however, Plaintiffs declined to make a
28 representative available for an interview by the SLC.

1 or permit DISH to violate the DNC Laws. The SLC concluded that – to the extent that they were
2 aware of the situation – the Director Defendants believed that the Retailers were not DISH’s
3 agents and that DISH was not legally responsible for the Retailers’ compliance with the DNC
4 Laws. Ex. 102 at 327-33. The SLC observed that this belief was reached following the receipt of
5 advice of counsel. The SLC stated that it found no evidence that any Director Defendant
6 knowingly caused or permitted DISH to violate the DNC Laws.

8 48. The SLC concluded that telemarketing compliance was not an issue considered
9 sufficiently material during the Relevant Time Period to be brought to the attention of the full
10 DISH Board. The SLC observed that minutes of DISH Board meetings and DISH Board
11 materials did not reflect discussion of DNC compliance until *U.S. v. DISH* was filed on March 25,
12 2009 and that, prior to the judgment entered in the DNC Actions, claims of the types asserted in
13 those actions were generally settled for thousands, not millions, of dollars. The SLC concluded
14 that the Director Defendants who were not executives of DISH could not have knowingly caused
15 or permitted DISH to violate the DNC Laws through Retailers’ telemarketing for the additional
16 reason that the non-executive directors had little, if any, awareness of or role in Retailers’ DNC
17 compliance during the Relevant Time Period. Ex. 102 at 175, 315-17.

19 49. The SLC examined whether the oversight systems in place at DISH suggested that
20 the DISH Board knowingly or willfully permitted DISH to violate the DNC Laws by knowingly
21 failing to monitor serious compliance issues. Ex. 102 at 334-36. The SLC determined that this
22 was not the case. The SLC noted that the DISH Board had regular reports from DISH’s General
23 Counsel, had an audit committee tasked with such oversight and retained both outside and inside
24 auditors to monitor DISH’s regulatory risk, among other precautions. Ex. 102 at 240-42, 246-56.
25 DISH has and then-had a Compliance Department with specific responsibility in respect of TCPA
26 compliance (Compl. ¶ 55), which “had weekly meetings with Dish’s Legal Department”
27
28

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1 concerning “all areas of Order Entry Retailer compliance, including telemarketing,” and imposed
2 “real changes . . . in late 2008 and 2009.” *U.S. v. DISH*, 256 F. Supp. 3d at 852, 987.

3 50. As the SLC found that no Defendant knowingly caused or permitted DISH to
4 violate the DNC Laws, the SLC concluded that NRS 78.138(7)(b)(1)-(2) would bar DISH from
5 recovering damages from the Defendants and that the claims thus lacked merit.
6

7 51. The SLC concluded that it would not be in DISH’s best interest to pursue them:
8 pursuit of non-meritorious claims would not justify the burdens such litigation would impose on
9 DISH, including litigation costs and disruption to DISH’s operations and strategic plans
10 stemming from the distraction attendant upon suing the majority of the current DISH Board and
11 senior executives. *See* Ex. 102 at 348.

12 52. If any findings of fact are properly conclusions of law, they shall be treated as if
13 appropriately identified and designated.
14

15 **CONCLUSIONS OF LAW**

16 53. The question before the Court is whether the Court should defer to the SLC’s
17 recommendation that the claims asserted in this action be dismissed.

18 54. In *Dish I*, the Nevada Supreme Court adopted the *Auerbach* standard, which sets
19 forth the process for judicial deference to a special litigation committee’s recommendation
20

21 55. The SLC, as the moving party, is entitled to no presumption and bears the burden
22 of proof. Only if a special litigation committee meets its burden are its conclusions protected by
23 the business judgment rule.

24 56. The SLC members bear the burden of showing the SLC conducted a good faith
25 and thorough investigation.
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1 57. The SLC must show: (1) “that the areas and subjects to be examined are
2 reasonably complete *and* [(2)] there has been a good-faith pursuit of inquiry into such areas and
3 subjects.” *Dish I*, at 443-444.

4 58. If the SLC fails to meet its burden related to the independence, good faith and/or
5 thoroughness of the special litigation committee and/or its investigative process or work product,
6 then a court cannot defer to a special litigation committee’s business judgment and adopt as its
7 own the findings of that committee.

8 59. The first prong of *Dish I* asks whether the special litigation committee was
9 independent. Under this standard, the Court assesses “whether the [SLC] that would be
10 addressing the demand can impartially consider its merits without being influenced by improper
11 considerations,’ such that it could ‘properly exercise[] its independent and disinterested business
12 judgment[.]’” *Id.* at 446.

13 60. “[T]he independence standard that applies to directors in the demand-futility
14 context is equally applicable” here. *Id.*, at 446. However, a special litigation committee is not
15 presumed to be independent; rather, this Court must make a determination as to the independence
16 of the committee. *Id.* at 446.

17 61. *Dish I* held that a special litigation committee is independent where the committee
18 cannot act without the approval of at least one independent member. *Id.* at 449.

19 62. Mr. Lillis has substantial business experience, including serving, at the
20 appointment of the Governor of Oregon, as the Chair of the Board of Trustees of the University
21 of Oregon, and serving on the boards of Agilera, Inc., Ascent Entertainment Grp., Charter
22 Communications, Inc. and various affiliates, Medco Health Solutions, Inc., On Command
23 Corporation, SUPERVALU Inc., Time Warner Entertainment Company, L.P., Williams
24 Companies, Inc. and Washington Mutual Inc. and affiliated entities.

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1 63. Mr. Lillis joined the DISH Board effective November 5, 2013. He satisfies the
2 independence requirements for a board member of NASDAQ and the SEC rules and regulations.
3 Mr. Lillis has no personal or professional relationship with any Director other than his service on
4 the DISH Board. Mr. Lillis resigned from the DISH Board, effective May 1, 2020.

5
6 64. There is no evidence that any aspect of Mr. Lillis's service on the DISH Board
7 compromised Mr. Lillis's independence. Indeed, Mr. Lillis retired from the DISH Board on May
8 1, 2020. Based upon all evidence presented, including Mr. Lillis's testimony, the Court finds him
9 to be independent of all Defendants.

10 65. Mr. Lillis is not interested in this action and he is clearly independent.⁹

11 66. Mr. Federico has never served on the DISH Board and had no involvement in any
12 of the events at issue.

13
14 67. Mr. Federico joined the board of directors of EchoStar, a DISH affiliate, in May
15 2011 He satisfies the independence requirements for a board member of NASDAQ and the SEC
16 rules and regulations. Federico brings to the EchoStar board and to the SLC years of technical
17 and managerial experience. Federico spent almost fifty years at the Xerox Corporation, during
18 which time he held various product and general management positions, as well as numerous
19 engineering, solutions, information management and process re-engineering positions.

20 68. Mr. Federico is disinterested in the claims under investigation and is independent.

21 69. Mr. Brokaw joined the DISH Board effective October 7, 2013. He satisfies the
22 independence requirements for a board member of NASDAQ and the SEC rules and regulations.
23 Mr. Brokaw is an attorney with years of investment banking and board experience. Mr. Brokaw
24 has served on the boards of directors of multiple companies, including Alico, Inc., Capital
25

26
27 ⁹ In *Dish I*, this Court found Mr. Lillis to be independent. That conclusion remains unchanged after presentation of
the evidence during the evidentiary hearing.

1 Business Credit LLC, Exclusive Resorts, LLC, Ovation LLC, Timberstar Southwest LLC, Value
2 Place Holdings LLC and North American Energy Partners Inc.

3 70. A strong argument can be made that Mr. Brokaw lacks independence with respect
4 to the claims based upon his personal relationship with the Ergens.¹⁰ Mr. Brokaw's "ties with the
5 Ergens represent the type of improper influences that *could* inhibit the proper exercise of
6 independent business judgment." *Id.* at 448.

7
8 71. Even though Mr. Brokaw has social relationships with the Ergens, that does not
9 undermine the independence of the SLC. Under Nevada law, the SLC had to act by the majority
10 approval of its members.¹¹ The SLC could not act without – at minimum – the affirmative
11 approval of either Mr. Lillis or Mr. Federico, each of whom is undeniably independent; thus the
12 unanimous SLC approval here was independent regardless of Mr. Brokaw's independence. There
13 is no evidence that Mr. Brokaw exerted control over the SLC's investigation in a way that might
14 neutralize Mr. Lillis's and Mr. Federico's voting control over the SLC. Thus, the independence
15 of the SLC ultimately does not depend upon Mr. Brokaw's disinterest or independence.

16
17 72. The Court finds the SLC to be independent.
18
19
20

21 ¹⁰ These personal relationships were detailed in *Dish I* and remain the same. Although Mr. Brokaw is clearly a strong
22 personality able to stand his ground, the relationship of Cantey Ergen as godmother to his 12 year old son and the
continuing social relationship between his wife and Cantey Ergen remain of concern.

23 ¹¹ See NRS 78.125(1) ("Unless it is otherwise provided in the articles of incorporation, the board of directors may
24 designate one or more committees which . . . have and may exercise the powers of the board of directors . . ."); NRS
25 78.315(1) ("[T]he act of directors holding a majority of the voting power of the directors, present at a meeting at
26 which a quorum is present, is the act of the board of directors."); Ex. 102 at Ex. 53, Am. and Restated Bylaws of
27 DISH Network Corp. § 4.15 (Mar. 28, 2018) ("Committee Rules. Unless the Board of Directors otherwise provides
28 and subject to Section 4.1 of these Bylaws, a majority of the entire authorized number of members of such committee
shall constitute a quorum for the transaction of business, the vote of a majority of the members present at a meeting at
the time of such vote if a quorum is then present shall be the act of such committee, and in other respects each
committee shall conduct its business in the same manner as the Board of Directors conducts its business pursuant to
this Article IV of these Bylaws."); Ex. 102 at Ex. 20, Am. and Restated Bylaws of EchoStar Communications Corp.
§ 4.15 (May 8, 2007) (same).

1 73. The second prong of the *Dish I* standard – that the special litigation committee
2 conducted a “good faith, thorough investigation” – concerns “the appropriateness and sufficiency
3 of the investigative procedures chosen and pursued by the committee.” *Id.* at 443.

4 74. “In accordance with the business judgment rule, courts can ‘inquir[e] into the
5 procedural indicia of whether the directors resorted in good faith to an informed decision making
6 process.’” *Id.* at 449-50, (quoting *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev.
7 369 (2017)).

8 75. For this analysis, “[c]ourts look to indicia of the SLC’s investigatory
9 thoroughness, such as what documents were reviewed and which witnesses interviewed.” *Id.* at
10 449-50.

11 76. As with any director action protected by the business judgment doctrine, the
12 process employed by the special litigation committee must not be so deficient as to constitute bad
13 faith:
14
15

16 [P]roof[] . . . that the investigation has been so restricted in scope, so
17 shallow in execution, or otherwise so *pro forma* or halfhearted as to
18 constitute a pretext or sham, consistent with the principles underlying the
19 application of the business judgment doctrine, would raise questions of
20 good faith or conceivably fraud which would never be shielded by that
21 doctrine.

22 *Id.* at 450.

23 77. This analysis does not, however, permit inquiry into the substance of the
24 committee’s determinations, into the merit of its analysis, or its conclusions: “The inquiry into
25 whether the SLC made its determination in good faith and on an informed basis ‘focuses on the
26 process used by the SLC, rather than the substantive outcome of the process.’” *Id.* at 449-50. A
27 “court ‘may not under the guise of consideration of such [procedural] factors trespass in the
28 domain of business judgment.’” *Id.* at 443. “[T]he substantive aspects of a decision to terminate
a shareholders’ derivative action against defendant corporate directors made by a committee of

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1 disinterested directors appointed by the corporation's board of directors are beyond judicial
2 inquiry under the business judgment doctrine." *Id.* As codified in NRS 78.138, the business
3 judgment rule in Nevada does not permit inquiry into the reasonableness of the director's
4 decision. *Wynn Resorts*, 133 Nev. at 377.

5
6 78. The evaluation to be made by the Court is whether the SLC's procedures were
7 designed to provide an independent, thorough and good faith analysis of the issues raised in the
8 Complaint. The issues investigated related to the Retailers' violations of the TPCA and the legal
9 responsibility of DISH for supervision or control of those Retailers as well as the efforts to insure
10 compliance with the 2009 AVC.

11 79. For purposes of the SLC's investigation, the members accepted as fact the findings
12 made in the decisions in the DNC Actions. Although damning, these findings do not end the
13 inquiry into whether the Defendants are entitled to protection under the business judgment rule¹²
14 or whether a breach of fiduciary duty occurred by the Defendants.

15
16 80. Board members are entitled to rely upon advice of counsel in exercising their
17 business judgment.¹³ The SLC inquired of the attorneys who during the Relevant Time Period
18

19 ¹² NRS 78.138(3) provides in pertinent part: Except as otherwise provided in subsection 1 of NRS 78.139,
20 directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis
21 and with a view to the interests of the corporation. A director or officer is not individually liable for damages as a
22 result of an act or failure to act in his or her capacity as a director or officer except as described in subsection 7.
23 NRS 78.138(7) provides in pertinent part: Except as otherwise provided in NRS 35.230, 90.660, 91.250, 452.200,
24 452.270, 668.045 and 694A.030, or unless the articles of incorporation or an amendment thereto, in each case filed
25 on or after October 1, 2003, provide for greater individual liability, a director or officer is not individually liable to
26 the corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his or her
27 capacity as a director or officer unless:

- 28 (a) The presumption established by subsection 3 has been rebutted; and
(b) It is proven that:
(1) The director's or officer's act or failure to act constituted a breach of his or her fiduciary duties as a
director or officer; and
(2) Such breach involved intentional misconduct, fraud or a knowing violation of law.

¹³ NRS 78.138(2) provides in pertinent part: In exercising their respective powers, directors and officers may, and
are entitled to, rely on information, opinions, reports, books of account or statements, including financial statements
and other financial data, that are prepared or presented by:

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1 had provided the white paper and advice related to the relationship of the Retailers and oversight
2 obligations as part of its investigation and had the opportunity to test, from its perspective, the
3 appropriateness of reliance upon that advice.¹⁴

4 81. Based upon the evidence presented, including the SLC's Report, the SLC
5 members' testimony, the document requests made, and the minutes of the meetings held by the
6 SLC during the course of its investigation, the SLC approached its investigation without any
7 prejudgment of the outcome.

8 82. The SLC met to plan their investigation, to receive legal advice and to deliberate
9 over the evidence they gathered and their conclusions through ten separate meetings. Some of
10 these meetings were in person; others were telephonic.

11 83. During the SLC's investigation, the SLC, through counsel, reviewed over 44,000
12 documents. Ex. 102 at 30. Each SLC member personally reviewed over 1,500 documents. *Id.* at
13 30. The SLC requested, received and reviewed internal DISH Board materials and
14 communications and the trial court opinions in the DNC Actions, as well as the underlying
15 documents in those actions, such as deposition transcripts, trial testimony and trial exhibits. *See*
16 Ex. 102 at Ex. 742. The SLC members further reviewed hundreds of internal and external DISH
17 communications related to DNC compliance and the 2009 AVC, including legal advice received
18 by DISH from outside counsel related to DNC issues. *See* Ex. 102 at 30-32.

19
20
21
22
23 (b) Counsel, public accountants, financial advisers, valuation advisers, investment bankers or other persons as to
24 matters reasonably believed to be within the preparer's or presenter's professional or expert competence; or
25 ***
26 but a director or officer is not entitled to rely on such information, opinions, reports, books of account or statements if
27 the director or officer has knowledge concerning the matter in question that would cause reliance thereon to be
28 unwarranted.

¹⁴ While prior cases also agreed with the advice apparently given by counsel, it is unclear whether under NRS 78.138(2) the board members are entitled to rely upon those trial court decisions (i.e. *Charvat* and *Zhu*) in exercising their judgment.

1 84. The SLC also interviewed twenty-two individuals, including each current Director
2 Defendant, DISH's inside counsel, DISH's outside counsel in the DNC Actions, and DISH's
3 independent auditor. Ex. 102 at 32, 41-47. Based upon the evidence presented, it is apparent that
4 the SLC challenged the interviewees and tested the honesty and veracity of the answers the
5 interviewees provided to the SLC. The SLC members each testified as to the thoroughness of
6 their investigation.
7

8 85. Although clearly DISH disagrees with the decision in the DNC Actions, the SLC
9 accepted the decisions as fact and reviewed those determinations and considered them in reaching
10 its conclusion. Nineteen pages of the SLC Report directly address those decisions. Ex. 102 at
11 20-23, 265-73, 281-83, 318-24. Under *Dish I*, the test of a special litigation committee's good-
12 faith thoroughness relates to the procedures that the committee followed, its process and the scope
13 of its investigation. The procedure used by the SLC in considering these decisions confirms that
14 there is no issue with respect to the good-faith thoroughness of its investigation in that regard.
15

16 86. The SLC analyzed the decisions in the DNC Actions. The SLC decided that
17 neither decision addressed the questions put before the SLC, which was not whether DISH
18 violated a DNC Law, but whether the Board may be liable for such violation. To assess whether
19 the SLC's determination conflicted with the DNC Actions would necessarily revisit the substance
20 of the SLC's determinations. *Dish I* does not permit that review.
21

22 87. The standard set by the Nevada Supreme Court in *Dish I* governs the SLC's
23 Motion to Defer. Based upon the evidence presented at the evidentiary hearing, this Court
24 concludes that the SLC is independent and has conducted a good-faith, thorough investigation.
25 Therefore, under *Dish I*, this Court defers to the business judgment of the SLC and accepts its
26 determination that it would not be in the best interest of DISH to litigate these claims. Consistent
27
28

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1 with Nevada law, this Court will not review the substantive merits of the SLC's determination.

2 The SLC's Motion to Defer is granted.

3 88. This decision reflects the Court's factual findings based upon weighing the
4 evidence and evaluating witness testimony presented at the evidentiary hearing and through
5 briefing on the Motion to Defer.
6

7 89. If any conclusions of law are properly findings of fact, they shall be treated as if
8 appropriately identified and designated.

9 Based upon the foregoing Findings of Fact and Conclusions of Law:

10 **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that the Motion to Defer
11 is granted.

12 DATED this 17th day of July, 2020.

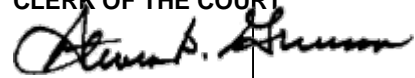
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15 
16 Elizabeth Gonzalez, District Court Judge

17 **Certificate of Service**

18 I hereby certify that on the date filed, a copy of the foregoing Findings of Fact and Conclusions of
19 Law was electronically served, pursuant to N.E.F.C.R. Rule 9, to all registered parties in the Eighth
20 Judicial District Court Electronic Filing Program.

21 
22 Dan Kutinac
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JUDG

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*Attorneys for Special Litigation Committee of
Nominal Defendant DISH Network
Corporation*

**DISTRICT COURT
CLARK COUNTY, 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,

Plaintiffs,

v.

CHARLES W. ERGEN; JAMES
DEFRANCO; CANTEY M. ERGEN;
STEVEN R. GOODBARN; DAVID
MOSKOWITZ; TOM A. ORTOLF; CARL
E. VOGEL; GEORGE R. BROKAW;
JOSEPH P. CLAYTON; and GARY S.
HOWARD,
Defendants,

DISH NETWORK CORPORATION, a
Nevada corporation,
Nominal Defendant

CASE NO.: A-17-763397-B

DEPT. NO.: XI

JUDGMENT

On December 19, 2018, the Special Litigation Committee (the "SLC") of DISH Network Corporation (DISH") filed a Motion for Summary Judgment Deferring to the SLC's

Determination That the Claims Should Be Dismissed (the "Motion to Defer"). On January 19, 2019, Plaintiffs filed a motion pursuant to NRCP 56(f) seeking an order denying or deferring the SLC's motion to allow Plaintiffs to conduct discovery. Pursuant to a Stipulation and Order Regarding Discovery Concerning the SLC and Its Investigation, Plaintiffs sought and obtained certain discovery regarding the SLC and its investigation. On January 10, 2020, the parties filed a Joint Motion for Evidentiary Hearing on the SLC's Motion to Defer pursuant to *In re DISH Network Derivative Litigation*, 133 Nev. 438, 399 P.3d 334 (2017), which the Court granted in an Order dated February 14, 2020. On January 31, 2020, Plaintiffs filed an Opposition to the Motion to Defer, and the SLC filed a Reply in Support of the Motion to Defer on April 14, 2020. The Court, not having ruled on summary judgment, but instead having conducted an evidentiary hearing on July 6 and 7, 2020 pursuant to *In re DISH Network Derivative Litigation*, 133 Nev. 438, 399 P.3d 334 (2017), as jointly requested by the parties in the Joint Motion for Evidentiary Hearing, having entered Findings of Fact and Conclusions of Law filed on July 17, 2020, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that **JUDGMENT** of dismissal with prejudice of Plaintiffs' *Verified Consolidated Shareholder Derivative Complaint for Breach of Fiduciary Duties of Loyalty and Good Faith, Gross Mismanagement, Abuse of Control, Corporate Waste and Unjust Enrichment* is entered in favor of Defendants and the SLC on behalf of nominal defendant DISH, and against Plaintiffs.

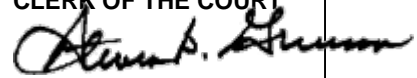
IT IS SO ORDERED this 3rd day of August 2020.


DISTRICT COURT JUDGE

Respectfully submitted by:

/s/ Robert J. Cassity
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1 **NJUD**

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18 *Attorneys for Special Litigation Committee of*
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20 *Corporation*

21 **DISTRICT COURT**

22 **CLARK COUNTY, NEVADA**

23 PLUMBERS LOCAL UNION NO. 519
24 PENSION TRUST FUND and CITY OF
25 STERLING HEIGHTS POLICE AND FIRE
26 RETIREMENT SYSTEM, derivatively on
27 behalf of nominal defendant DISH
28 NETWORK CORPORATION,

Plaintiffs,

v.

CHARLES W. ERGEN; JAMES
DEFRANCO; CANTEY M. ERGEN;
STEVEN R. GOODBARN; DAVID
MOSKOWITZ; TOM A. ORTOLF; CARL
E. VOGEL; GEORGE R. BROKAW;
JOSEPH P. CLAYTON; and GARY S.
HOWARD,

Defendants,

DISH NETWORK CORPORATION, a
Nevada corporation,

Nominal Defendant

CASE NO.: A-17-763397-B
DEPT. NO.: XI

NOTICE OF ENTRY OF JUDGMENT

1 PLEASE TAKE NOTICE that a Judgment was entered on the 3rd day of August,
2 2020. A copy is attached.

3 DATED this 4th day of August 2020.

4
5 By /s/ Robert J. Cassity
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17 *Nominal Defendant DISH Network Corporation*
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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of August 2020, a true and correct copy of the foregoing **NOTICE OF ENTRY OF JUDGMENT** was served by the following method(s):

X Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

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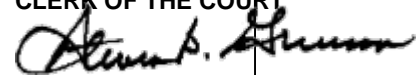
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By: /s/ Valerie Larsen
An Employee of Holland & Hart, LLP

15163124_v1



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*Attorneys for Special Litigation Committee of
Nominal Defendant DISH Network
Corporation*

**DISTRICT COURT
CLARK COUNTY, 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,

Plaintiffs,

v.

CHARLES W. ERGEN; JAMES
DEFRANCO; CANTEY M. ERGEN;
STEVEN R. GOODBARN; DAVID
MOSKOWITZ; TOM A. ORTOLF; CARL
E. VOGEL; GEORGE R. BROKAW;
JOSEPH P. CLAYTON; and GARY S.
HOWARD,
Defendants,

DISH NETWORK CORPORATION, a
Nevada corporation,
Nominal Defendant

CASE NO.: A-17-763397-B

DEPT. NO.: XI

JUDGMENT

On December 19, 2018, the Special Litigation Committee (the "SLC") of DISH Network Corporation (DISH") filed a Motion for Summary Judgment Deferring to the SLC's

Determination That the Claims Should Be Dismissed (the "Motion to Defer"). On January 19, 2019, Plaintiffs filed a motion pursuant to NRCP 56(f) seeking an order denying or deferring the SLC's motion to allow Plaintiffs to conduct discovery. Pursuant to a Stipulation and Order Regarding Discovery Concerning the SLC and Its Investigation, Plaintiffs sought and obtained certain discovery regarding the SLC and its investigation. On January 10, 2020, the parties filed a Joint Motion for Evidentiary Hearing on the SLC's Motion to Defer pursuant to *In re DISH Network Derivative Litigation*, 133 Nev. 438, 399 P.3d 334 (2017), which the Court granted in an Order dated February 14, 2020. On January 31, 2020, Plaintiffs filed an Opposition to the Motion to Defer, and the SLC filed a Reply in Support of the Motion to Defer on April 14, 2020. The Court, not having ruled on summary judgment, but instead having conducted an evidentiary hearing on July 6 and 7, 2020 pursuant to *In re DISH Network Derivative Litigation*, 133 Nev. 438, 399 P.3d 334 (2017), as jointly requested by the parties in the Joint Motion for Evidentiary Hearing, having entered Findings of Fact and Conclusions of Law filed on July 17, 2020, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that **JUDGMENT** of dismissal with prejudice of Plaintiffs' *Verified Consolidated Shareholder Derivative Complaint for Breach of Fiduciary Duties of Loyalty and Good Faith, Gross Mismanagement, Abuse of Control, Corporate Waste and Unjust Enrichment* is entered in favor of Defendants and the SLC on behalf of nominal defendant DISH, and against Plaintiffs.

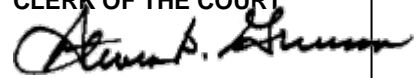
IT IS SO ORDERED this 3rd day of August 2020.


DISTRICT COURT JUDGE

Respectfully submitted by:

/s/ Robert J. Cassity
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7 *of Nominal Defendant DISH Network Corporation*
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Lead Counsel for Plaintiffs

[Additional counsel appear on signature page.]

IN THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

PLUMBERS LOCAL UNION NO. 519
PENSION TRUST FUND, Derivatively on
Behalf of DISH NETWORK
CORPORATION,

Plaintiff,

vs.

CHARLES W. ERGEN, et al.,

Defendants,

– and –

DISH NETWORK CORPORATION, a
Nevada corporation,

Nominal Defendant.

Lead Case No. A-17-763397-B
(Consolidated)
Dept. No. XI

NOTICE OF APPEAL

JA017668

1 NOTICE IS HEREBY GIVEN that Plaintiffs, Plumbers Local Union No. 519 Pension
2 Trust Fund and City of Sterling Heights Police and Fire Retirement System, by and through their
3 counsel, David C. O'Mara, Esq., of the O'Mara Law Firm, P.C., appeal to the Supreme Court of
4 Nevada from the following orders:

- 5 1. Findings of Fact and Conclusions of Law entered in this action on the 17th day of
6 July, 2020, with the Notice of Entry filed on July 31, 2020.
7 2. Judgment entered in this action on the 3rd day of August, 2020, with the Notice of
8 Entry of Judgement filed on August 4, 2020.

9 DATED: August 25, 2020.

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11 /s/ David O'Mara
12 DAVID C. O'MARA

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Lead Counsel for Plaintiffs

JA017669

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Additional Counsel for Plaintiffs

JA017670

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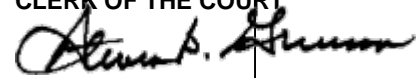
CERTIFICATE OF SERVICE

I hereby certify that I am an employee of The O’Mara Law Firm, P.C., 311 E. Liberty Street, Reno, Nevada 89501, and on this date I served a true and correct copy of the foregoing document on all parties to this action through the Court’s electronic filing system.

DATED: August 25 2020

/s/ Bryan Snyder
BRYAN SNYDER

JA017671



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*Attorneys for Special Litigation Committee of
Nominal Defendant DISH Network
Corporation*

**DISTRICT COURT
CLARK COUNTY, 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,

Plaintiffs,

v.

CHARLES W. ERGEN; JAMES
DEFRANCO; CANTEY M. ERGEN;
STEVEN R. GOODBARN; DAVID
MOSKOWITZ; TOM A. ORTOLF; CARL
E. VOGEL; GEORGE R. BROKAW;
JOSEPH P. CLAYTON; and GARY S.
HOWARD,
Defendants,

DISH NETWORK CORPORATION, a
Nevada corporation,
Nominal Defendant

CASE NO.: A-17-763397-B

DEPT. NO.: XI

AMENDED JUDGMENT

The Court having entered Findings of Fact and Conclusions of Law filed on July 17,
2020, having entered a Judgment filed on August 3, 2020, having entered an Order Granting in

1 Part and Denying in Part Motion to Retax and Settle Costs filed on October 5, 2020, and good
2 cause appearing,

3 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that **JUDGMENT** of
4 dismissal with prejudice of Plaintiffs' *Verified Consolidated Shareholder Derivative Complaint*
5 *for Breach of Fiduciary Duties of Loyalty and Good Faith, Gross Mismanagement, Abuse of*
6 *Control, Corporate Waste and Unjust Enrichment* is entered in favor of Defendants and the
7 SLC on behalf of nominal defendant DISH Network Corporation, and against Plaintiffs;

8 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that **JUDGMENT** is
9 entered in favor of the SLC on behalf of nominal defendant DISH Network Corporation, and
10 against Plaintiffs for costs in the amount of \$37,268.95, as of August 10, 2020. Prejudgment
11 and post-judgment interest shall accrue in accordance with Nevada law.

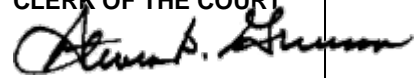
12 **IT IS SO ORDERED** this 2nd day of November 2020.

13 
14 _____
15 DISTRICT COURT JUDGE

16 Respectfully submitted by:

17 /s/ Robert J. Cassity
18 J. Stephen Peek, Esq. (1758)
19 Robert J. Cassity, Esq. (9779)
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18 *Attorneys for Special Litigation Committee of*
19 *Nominal Defendant DISH Network*
20 *Corporation*

21 **DISTRICT COURT**

22 **CLARK COUNTY, NEVADA**

23 PLUMBERS LOCAL UNION NO. 519
24 PENSION TRUST FUND and CITY OF
25 STERLING HEIGHTS POLICE AND FIRE
26 RETIREMENT SYSTEM, derivatively on
27 behalf of nominal defendant DISH
28 NETWORK CORPORATION,

Plaintiffs,

v.

CHARLES W. ERGEN; JAMES
DEFRANCO; CANTEY M. ERGEN;
STEVEN R. GOODBARN; DAVID
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HOWARD,

Defendants,

DISH NETWORK CORPORATION, a
Nevada corporation,

Nominal Defendant

CASE NO.: A-17-763397-B
DEPT. NO.: XI

**NOTICE OF ENTRY OF AMENDED
JUDGMENT**

1 PLEASE TAKE NOTICE that an Amended Judgment was entered on the 2nd day of
2 November 2020. A copy is attached.

3 DATED this 2nd day of November 2020.
4

5 By /s/ Robert J. Cassity
6 J. Stephen Peek, Esq. (1758)
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17 *Nominal Defendant DISH Network Corporation*
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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of November 2020, a true and correct copy of the foregoing **NOTICE OF ENTRY OF AMENDED JUDGMENT** was served by the following method(s):

☒ **Electronic:** by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

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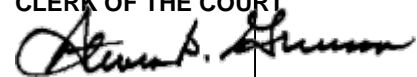
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*Attorneys for Plaintiff Plumbers Local Union
No. 519 Pension Trust Fund*

Attorneys for Defendants

By: /s/ Valerie Larsen
An Employee of Holland & Hart, LLP

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Nominal Defendant DISH Network
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

PLUMBERS LOCAL UNION NO. 519
PENSION TRUST FUND and CITY OF
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Defendants,

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Nevada corporation,
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CASE NO.: A-17-763397-B

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1 Part and Denying in Part Motion to Retax and Settle Costs filed on October 5, 2020, and good
2 cause appearing,

3 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that **JUDGMENT** of
4 dismissal with prejudice of Plaintiffs' *Verified Consolidated Shareholder Derivative Complaint*
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6 *Control, Corporate Waste and Unjust Enrichment* is entered in favor of Defendants and the
7 SLC on behalf of nominal defendant DISH Network Corporation, and against Plaintiffs;

8 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that **JUDGMENT** is
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11 and post-judgment interest shall accrue in accordance with Nevada law.

12 **IT IS SO ORDERED** this 2nd day of November 2020.

13 
14 _____
15 DISTRICT COURT JUDGE

16 Respectfully submitted by:

17 /s/ Robert J. Cassity
18 J. Stephen Peek, Esq. (1758)
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JA017678