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,

V.

CHARLES W. ERGEN; JAMES DEFRANCO; CANTY 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.

Supreme Court No.: 81704

District Court Case No.: A-17-763397-B

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

RESPONDENT SPECIAL LITIGATION COMMITTEE OF DISH NETWORK CORPORATION'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

The SPECIAL LITIGATION COMMITTEE OF DISH NETWORK CORPORATION (the "SLC") consists of individuals, not corporations, and as such, there is no stock to be held and there is no parent corporation or publicly held company that owns 10% or more of its stock. DISH NETWORK CORPORATION ("DISH") is a Nevada corporation, publicly traded on the NASDAQ stock exchange under the ticker symbol "DISH." DISH has no parent corporation. Based solely on a review of Form 13D and Form 13G filings with the Securities Exchange Commission, no entity owns more than 10% of DISH other than Dodge & Cox.

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INTRODUCTION

In this appeal, Appellants Plumbers Local Union No. 519 Pension Trust Fund and City of Sterling Heights Police and Fire Retirement System ("Plaintiffs") challenge the District Court's straightforward application of the legal standard for a special litigation committee's request to dismiss derivative claims, established by this Court in *In re DISH Network Derivative Litigation*, 133 Nev. 438, 443, 401 P.3d 1081, 1087-88 (2017) ("*Jacksonville*"). In *Jacksonville*, this Court held: A "shareholder must not be permitted to proceed with derivative litigation after an SLC requests dismissal, unless and until the district court determines at an evidentiary hearing that the SLC lacked independence or failed to conduct a thorough investigation in good faith." The District Court adhered scrupulously to this holding.

Following a good-faith, thorough investigation, the special litigation committee in this case (the "SLC") requested dismissal of the claims asserted by Plaintiffs (the "Claims"), on the ground that their pursuit would not be in the best interest of DISH Network Corporation ("DISH"). As *Jacksonville* directed, the District Court held the required evidentiary hearing—for two full days, live, with testimony from all three members of the SLC. And it made the required factual findings on independence and good faith, thoroughness. Finding that the SLC was independent and conducted a good-faith, thorough investigation, the District Court held that the precondition to permitting Plaintiffs to proceed with their Claims was

not satisfied and dismissed the Claims. Under *Jacksonville*, the District Court's independence and good faith, thoroughness findings are now subject to review only for abuse of discretion, and there was none.

Plaintiffs attempt to avoid abuse of discretion review, arguing that the District Court committed legal error in applying *Jacksonville*, but there was no error. According to Plaintiffs, *Jacksonville* did not permit the District Court to make factual findings. But in *Jacksonville*, this Court did not merely *authorize* factual findings, but *mandated* such findings. Plaintiffs say that *Jacksonville* required the District Court to apply a summary judgment standard, determining merely whether a genuine issue had been raised concerning the SLC's independence and good faith, thoroughness. If such an issue were raised, Plaintiffs contend, the District Court was required to permit Plaintiffs to proceed with their Claims, without ever resolving the issue. But Plaintiffs merely rehash an argument made and squarely rejected in *Jacksonville*. In *Jacksonville*, this Court could not have been clearer in requiring factual findings and rejecting the summary judgment standard.

Plaintiffs presumably seek to overrule *Jacksonville* because their alternative argument—that the District Court's factual findings were an abuse of discretion—lacks merit. In challenging the finding that the SLC conducted a good-faith, thorough investigation, Plaintiffs say that the SLC failed to consider certain points that the SLC unmistakably considered. Plaintiffs' argument is particularly

remarkable because the SLC specifically documented in the SLC's report (the "Report") its consideration of the points now raised by Plaintiffs. For example, as documented in the Report, the SLC investigated the Claim by Plaintiffs that the director defendants ("Director Defendants") breached their fiduciary duties in connection with the 2009 Assurance of Voluntary Compliance (the "2009 AVC"), and concluded upon all of the evidence that they did not breach their duties. The SLC also addressed in the Report whether it could infer, from the decisions in the two underlying do-not-call ("DNC") litigations, *Krakauer* and *U.S. v. DISH* (together, the "DNC Actions"),[1] that the Director Defendants knew that DISH was violating the DNC laws, concluding that no such inference could be drawn on the record facts. The SLC even addressed whether offensive collateral estoppel could be used against the Director Defendants to establish the facts found in the DNC Actions, concluding that it could not.

Moreover, Plaintiffs concede that under *Jacksonville*, to obtain reversal of the District Court's good faith, thoroughness finding, they would have to show that the SLC's investigation was so incomplete that it was clear error for the District Court

[1] *Krakauer v. DISH Network LLC*, 2017 WL 2242952 (M.D.N.C. May 22, 2017) ("*Krakauer*"); *U.S. v. DISH Network LLC*, 256 F. Supp. 3d 810 (C.D. Ill. 2017) ("*U.S. v. DISH*").

not to have found it a "sham." Plaintiffs have not shown that it was incomplete in *any* respect, much less a sham.

Finally, on independence, Plaintiffs do not dispute that *Jacksonville* requires that a majority of the members of the SLC be independent. They also do not dispute that a majority of the members of the SLC were independent. They nonetheless make an attenuated argument that the District Court abused its discretion in finding the SLC independent. According to Plaintiffs, it was an abuse of discretion to find the SLC independent because the two members of the SLC whom the District Court found clearly independent (it made no finding as to the third) supposedly disagreed on a "procedural" issue preceding the SLC's unanimous decision that pursuit of the Claims would not be in DISH's best interest. Plaintiffs are wrong.

First, there was no disagreement upon which to predicate Plaintiffs' argument. The District Court found that all three SLC members agreed on the issue, and its finding was based upon substantial evidence, including the SLC Report and clear testimony from all three members of the SLC. Plaintiffs ignore Mr. Lillis's clear testimony on the subject, in favor of misinterpreting other testimony from him as contradicting his clear testimony. If there were any ambiguity in his testimony, the District Court was well positioned to resolve it.

Second, even if there had been disagreement on a "procedural" issue between two clearly independent members of the SLC (and there was not), Plaintiffs have not

explained how that might support their independence challenge. The supposedly contrasting views would confirm, rather than undermine, the independence of the SLC's ultimate, unanimous dismissal decision. The decision reached on the "procedural" issue, whether unanimously or by a majority of the SLC members, was adverse to the Director Defendants. That decision was to treat the findings of fact from the DNC Actions as correct, a first step that could lead to finding the Director Defendants liable. Because doing so was adverse to the persons from whom the SLC needed to be independent, there could be no argument that the decision reflected a lack of independence, much less that it deprived the ultimate dismissal decision of independence.

The District Court correctly applied the *Jacksonville* standard, and there was no abuse of discretion in its factual findings. The District Court's decision should be affirmed.

STATEMENT OF ISSUES

1. Did the District Court properly hold an evidentiary hearing under *Jacksonville* to weigh evidence presented and make findings of fact on the SLC's independence and the good faith, thoroughness of the SLC's investigation?

2. Did the District Court abuse its discretion in finding that the SLC conducted a good-faith, thorough investigation based on the evidence presented,

including the SLC's 353-page Report and its nearly 800 exhibits and testimony by each of the SLC members?

3. Did the District Court abuse its discretion in finding the SLC independent where Plaintiffs concede that two of the three members are independent?

STATEMENT OF THE CASE

Plaintiffs sought to assert derivatively Claims belonging to DISH against certain members of the DISH board of directors. The Claims sought to hold the Director Defendants personally liable, jointly and severally, for over $340 million in losses, the damages DISH was ordered to pay in *Krakauer* and *U.S. v. DISH*. (4JA000701-02 ¶¶ 49-51 (Complaint).)[2]

DISH's liability in the DNC Actions arose from violations, between 2004 and 2011, of the Telephone Consumer Protection Act (the "TCPA"), the Telemarketing Sales Rule (the "TSR") and certain state telemarketing laws (together with the TCPA and the TSR, the "DNC Laws"). (*See* 4JA000768 (Report).) The DNC Laws prohibit the placement of telemarketing robocalls and calls to persons on certain DNC lists.

[2] The Joint Appendix ("JA") and Respondent's Appendix ("RA") are cited as: [Volume#][JA/RA#].

The DNC Actions found violations of the DNC Laws based primarily on telemarketing calls placed not by DISH or its telemarketing vendors, but by a small subset of third-party retailers who sold DISH's pay-TV service pursuant to third-party sales contracts with DISH (the "Retailers"). The DNC Actions held DISH liable for violations by the Retailers under broad agency principles. None of the Director Defendants were parties in the DNC Actions.

Under NRS 78.138(7)(b)(2), directors of a Nevada corporation are not liable for damages paid by the corporation for violations of law unless the directors knowingly caused or permitted the corporation to violate the law. To meet this requirement, Plaintiffs allege that the Director Defendants, "with knowledge," caused DISH to commit the legal violations that gave rise to the losses in the DNC Actions. (4JA000691 ¶ 30 (Complaint); *see also id.* at JA000704 ¶ 59.)

Plaintiffs do not allege that any Director Defendant had a conflict of interest in the conduct that gave rise to the losses or in the DNC Actions. Indeed, some of the Director Defendants, as DISH's largest stockholders, shared in the losses alongside DISH's other stockholders. Their interests were aligned with other stockholders in avoiding the violations that gave rise to the losses.

Plaintiffs also allege that the Director Defendants knowingly caused DISH to violate the 2009 AVC, a contract between DISH and 46 states' attorneys general, concerning multiple consumer issues, including DNC issues. As part of a post-trial

remedy decision, the *Krakauer* court found that DISH breached the 2009 AVC's DNC provisions, but there had been no claim in that case for its breach, no party in *Krakauer* had standing to bring a claim based on the 2009 AVC, and no damages were assessed for its breach.

Plaintiffs filed their operative complaint (the "Complaint") on January 12, 2018. (77JA017637 ¶ 3 (Findings of Fact and Conclusions of Law ("FFCL")).) The Director Defendants and DISH moved to dismiss the Complaint on various grounds, including that Plaintiffs had neither made a demand on the DISH board that the Claims be brought nor adequately alleged demand futility. (77JA017638 ¶ 5.) Before the District Court decided those motions, the DISH board established the SLC, with plenary powers to investigate the Claims, decide whether they should be pursued and generally act for DISH in this case. On May 15, 2018, the District Court stayed the proceedings for six months to provide time for the SLC to investigate the Claims and issue its Report. (*See* 77JA017639 ¶ 12.)

On November 27, 2018, after an exhaustive investigation, the SLC issued a 353-page Report. The SLC Report described the SLC's investigation, its factual findings, its analysis of the issues raised by the Claims and its resulting conclusion that it would not be in DISH's best interest to pursue the Claims. For purposes of its determinations, although the Director Defendants had not been parties in the DNC Actions, the SLC accepted as true the findings of fact made in the DNC Actions.

But the SLC found that, even accepting as true these factual findings, they were insufficient to establish the Director Defendants' liability to DISH. This was so because the findings did not address whether any Director Defendant had knowingly caused or permitted DISH to violate the DNC Laws. They also did not address whether any Director Defendant had knowingly caused or permitted DISH to violate the 2009 AVC. The findings did not state (or even suggest) that any Director Defendant had knowingly caused or permitted such violations. To address the Director Defendants' knowledge, the SLC was required to review and consider voluminous materials, including internal and external emails and other correspondence and advice of counsel given to the Director Defendants during the relevant time period.

Based upon the totality of this information, as thoroughly detailed in its Report, the SLC found that the Director Defendants did not know DISH was violating the DNC Laws or the 2009 AVC. To the contrary, they believed DISH had been complying with both, and they believed DISH was not legally responsible for violations by the Retailers. Their belief concerning DISH's lack of legal responsibility for the Retailers was consistent with external positions taken by DISH and the only final court decision during the relevant time period. The SLC found that DISH was unlikely to prevail on the Claims against the Director Defendants and that their pursuit would not be in DISH's best interest. The SLC found that, after

the relevant time period, the Director Defendants were surprised by the decisions in *Krakauer* and *U.S. v. DISH* holding, in a departure from prior cases, that DISH was liable for the Retailers' DNC violations.

The SLC also found that the Director Defendants were surprised that, in *Krakauer*, the U.S. District Court for the Middle District of North Carolina decided to treble the damages awarded. In trebling damages, the *Krakauer* court did not find that anybody at DISH believed that DISH had been violating the DNC Laws; the court interpreted the TCPA's "knowing and willful" requirement for trebling damages as not requiring that DISH have acted in bad faith. Rather, under broad agency principles, the court attributed the willfulness of the Retailer in that case to DISH. The court also found that DISH had acted willfully in the sense that it had known the *Retailer* was violating the DNC Laws and did not do enough to stop it.

With regard to the 2009 AVC, the SLC found that the losses for which the Complaint sought damages had arisen from violations of the DNC Laws, not of the 2009 AVC. To recover money damages from the Director Defendants, DISH would need to prove that the Director Defendants knew DISH was violating the DNC Laws, regardless of whether it proved that they knew DISH was violating the 2009 AVC.

Nonetheless, the SLC considered the 2009 AVC, finding that, after receiving advice of counsel, the Director Defendants believed DISH had been complying with it, including its provisions concerning monitoring, investigating and disciplining

retailers. The SLC found that those tasked with implementing the 2009 AVC at DISH believed DISH had conformed its business practices to such provisions before it entered the 2009 AVC, such that further changes were not needed thereafter. The *Krakauer* court had interpreted the 2009 AVC's requirements differently than DISH had interpreted them.

After filing its Report, on December 19, 2018, the SLC moved for summary judgment deferring to the SLC's business judgment that dismissal of the Claims would be in DISH's best interest. The SLC argued that there was no genuine issue of material fact concerning the independence of the SLC and the good faith, thoroughness of its investigation.

Plaintiffs thereafter requested, and by stipulation obtained, voluminous discovery concerning the SLC's independence and the good faith, thoroughness of its investigation, including over 27,000 pages of documents and depositions of each member of the SLC. Plaintiffs did not file a single motion with the District Court contending that this scope of discovery was insufficient.

On August 9, 2019, before the District Court had ruled on the SLC's motion for summary judgment, the SLC elected to proceed directly to the evidentiary hearing required by *Jacksonville*, and Plaintiffs agreed to this approach. Plaintiffs and the SLC therefore advised the District Court by joint status report on August 9, 2019, that they "would like to discuss with the Court, during the August 12, 2019

status conference, rescheduling the November 4, 2019 hearing to a date on which the Court will have time to conduct an evidentiary hearing that includes live testimony from the members of the SLC in accordance with [*Jacksonville*]."[3] (IRA015 (Joint Status Report).)

Subsequently, on January 10, 2020, the parties *jointly* moved the District Court for the evidentiary hearing. The parties first set forth the portion of *Jacksonville* requiring factual findings and then requested the hearing to satisfy this requirement:

> In [*Jacksonville*], the Nevada Supreme Court held that "a shareholder must not be permitted to proceed with derivative litigation after an SLC requests dismissal, unless and until the district court determines at an evidentiary hearing that the SLC lacked independence or failed to conduct a thorough investigation in good faith." Although a hearing on the SLC's Motion to Defer is currently scheduled for April 13, 2020, the parties jointly move the Court to schedule an evidentiary hearing at which the SLC may call live witnesses in support of its Motion to Defer.

(74JA017057 (Joint Mot. for Evidentiary Hr'g) (citation omitted).) The District Court granted the joint motion for the evidentiary hearing. Briefing on the motion to defer was completed two months later. The District Court held the live evidentiary

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[3] Because Plaintiffs agreed to convert the SLC's motion for summary judgment into a *Jacksonville* evidentiary hearing, their assertions that the District Court applied a preponderance-of-the-evidence standard to a summary judgment motion, (*see, e.g.*, Appellants' Opening Br. ("OB") 29), are incorrect and misleading.

hearing on July 6 and 7, 2020. It made its factual findings in Findings of Fact and Conclusions of Law (the FFCL) dated July 17, 2020.

It is surprising that Plaintiffs would fault the District Court for making factual findings, when Plaintiffs themselves had initially requested the factual findings and never abandoned the request for the evidentiary hearing. Plaintiffs did not depart from their view that the District Court should make factual findings at the evidentiary hearing until just before the hearing, in their ironically entitled Proposed Findings of Fact and Conclusions of Law. In that July 2, 2020 submission, presumably in anticipation of their incorrect appellate argument here, Plaintiffs argued for the first time that *Jacksonville* adopted a summary judgment standard. (IRA030-31 (Pls.' Submission).)

STATEMENT OF FACTS

I. Background

DISH provides television entertainment and technology through its satellite DISH TV and streaming Sling TV services. (77JA017615 ¶ 19 (FFCL).) DISH marketed its services directly and also authorized third-party retailers to sell its services. Among other means of marketing, DISH and some retailers used telemarketing. (*Id.*)

A. The DNC Laws

The TCPA and the TSR regulate telemarketing. (*Id.* ¶ 20.) State attorneys general and individual consumers have standing under the TCPA to bring claims for

violations. (*Id.* (citing 47 U.S.C.A. § 227 (b)(3), (c)(5), (g) (2018)).) The TSR is enforceable by the Federal Trade Commission ("FTC"). (*Id.* (citing 15 U.S.C.A. § 6102(a)(l)).)

B. The 2009 AVC

In 2009, DISH entered into an Assurance of Voluntary Compliance with 46 states' attorneys general to resolve disputes regarding various consumer issues, including telemarketing. (*Id.* ¶ 21.) In the 2009 AVC, the attorneys general stated their position that retailers were DISH's agents (1JA000013 § 1.7 (2009 AVC)); DISH preserved its position that retailers were not its agents, but independent contractors (77JA017615-16 ¶ 22 (FFCL); 1JA000014-15 § 1.14 (2009 AVC)). The 2009 AVC did not resolve that dispute. Instead, DISH agreed to undertake measures related to the monitoring and oversight of retailers' telemarketing of DISH's services. (77JA017615-16 ¶ 22 (FFCL); *see also* 77JA000014-15 § 1.14 (2009 AVC); 5JA000954-60 (Report).) DISH paid $5,991,000 in total to resolve all issues addressed in the 2009 AVC. (77JA017615-16 ¶ 22 (FFCL); 1JA000040 § 6.1 (2009 AVC).)

This 2009 AVC is not law; it is a settlement agreement. None of the attorneys general who are signatories to the 2009 AVC, including Nevada's attorney general, have brought claims asserting that DISH has breached the 2009 AVC; none of the damages at issue in this action arose under the 2009 AVC.

C. *Charvat* and *Zhu*

While DISH was negotiating the 2009 AVC, DISH consumer Philip Charvat filed an action in the U.S. District Court for the Southern District of Ohio, attempting to hold DISH liable for TCPA violations by retailers. *See Charvat v. EchoStar Satellite LLC*, 676 F. Supp. 2d 668, 671 (S.D. Ohio 2009). In a summary judgment decision, the court ruled against Charvat, holding that DISH was not liable for calls made by retailers in violation of the TCPA.[4] *Id.* at 676.[5] Two years later, in *Zhu v. DISH Network, LLC*, the U.S. District Court for the Eastern District of Virginia similarly held that DISH was not liable for calls made by retailers in violation of the Virginia Telephone Privacy Protection Act. 808 F. Supp. 2d 815, 819-20 (E.D. Va. 2011).

II. The DNC Actions

A. *U.S. v. DISH*

In 2009, the FTC and the four state attorneys general who had not joined in the 2009 AVC brought suit against DISH in the U.S. District Court for the Central

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[4] A month prior, on a motion to dismiss, the court in *U.S. v. DISH* declined to dismiss claims seeking to hold DISH liable for violations of DNC Laws by the Retailers. The *Charvat* court did not find that decision persuasive. *Charvat* explained that the court in *U.S. v. DISH* "simply decided that the allegations contained in the Complaint, 'if true, could plausibly establish that the Dealers acted on behalf of Dish Network.'" 676 F. Supp. 2d at 677. In contrast, the court in *Charvat* made its decision on the merits based on the evidence presented.

[5] The *Charvat* decision was vacated based on subsequent FCC rulings after the time period relevant to this action.

District of Illinois (the "Illinois Court") alleging violations of the DNC Laws and state telemarketing laws (*U.S. v. DISH*). (77JA017616-17 ¶ 27 (FFCL).) Some of the calls at issue in *U.S. v. DISH* were made by DISH directly, but most were made by six Retailers between 2003 and 2011. (*Id.*; 5JA001012, 1016-19 (Report).)

DISH vigorously litigated *U.S. v. DISH*, arguing that it had no liability for violations by the Retailers. The Director Defendants shared that view sufficiently to approve DISH's rejection of offers to settle *U.S. v. DISH* for $12 million. (5JA000961 (Report).) After trial, and well after the relevant time period addressed by the SLC, the Illinois Court disagreed, finding on June 5, 2017, that the Retailers acted as DISH's agents when placing the 90 million calls at issue in the litigation. (77JA017671 ¶ 28 (FFCL)); *U.S. v. DISH*, 256 F. Supp. 3d at 913, 915, 917-18, 919-20, 930, 943-45, 953-54. The Illinois Court awarded damages of $280 million against DISH, of which $22.5 million was attributable to calls made by DISH itself. (77JA017617 ¶ 28 (FFCL); 5JA001012-13 (Report)); *U.S. v. DISH*, 256 F. Supp. 3d at 983.

DISH appealed. On March 26, 2020, the U.S. Court of Appeals for the Seventh Circuit largely affirmed the decision.[6] (77JA017619 ¶ 35 (FFCL)); *U.S. v.*

[6] At the end of 2020, DISH settled *U.S. v. DISH* for $210 million. (Stipulated Order for Monetary Judgment, *U.S. v. DISH*, Case No. 3:09-cv-03073-SEM-TSH, ECF No. 868 § II (N.D. Ill. Dec. 4, 2020).)

DISH Network, LLC, 954 F.3d 970, 977-78, 980 (7th Cir. 2020).

B. *Krakauer v. DISH Network L.L.C.*

In 2014, Thomas Krakauer brought a consumer class action lawsuit against DISH in the U.S. District Court for the Middle District of North Carolina (the "North Carolina Court") for violations of the TCPA by one of DISH's Retailers, Satellite Systems Network ("SSN"), from May 2010 through August 2011. (77JA017617 ¶ 29 (FFCL).)

DISH vigorously litigated *Krakauer*, arguing that SSN was not its agent and that DISH was not liable for SSN's DNC violations. On January 19, 2017, the *Krakauer* jury found that SSN was DISH's agent and that DISH therefore was liable for SSN's violations of the TCPA. The *Krakauer* jury awarded damages against DISH in the amount of $400 per call. (*Id.* ¶ 30; 1JA000098 (Verdict Sheet).)

The plaintiff in *Krakauer* then requested that the North Carolina Court treble damages against DISH on the basis that DISH acted "knowingly and willfully" when causing violations of the TCPA. (77JA017618 ¶ 32 (FFCL)); *Krakauer*, 2017 WL 2242952, at *9. The North Carolina Court interpreted the knowing and willful requirement of the TCPA as not requiring that DISH have acted in bad faith. *Id.* at *9. The court found that, because the jury had determined that SSN was DISH's agent, the willfulness of SSN's conduct could be attributed to DISH. *Id.* at *10. It also found that DISH's conduct was knowing and willful in the sense that DISH

"knew or should have known that its agent, SSN, was violating the TCPA." *Id.* The court thus found DISH liable for SSN's willful acts. (77JA017617-18 ¶¶ 30-32 (FFCL)); *Krakauer*, 2017 WL 2242952, at *10. The North Carolina Court trebled the damages, awarding $61,342,800 against DISH for violations of the TCPA. (77JA017618 ¶ 32 (FFCL); 5JA001012 (Report)); *Krakauer*, 2017 WL 2242952, at *9, *13.

DISH appealed the North Carolina Court's decision to the U.S. Court of Appeals for the Fourth Circuit, which affirmed the lower court's decision. *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643 (4th Cir. 2019). On October 15, 2019, DISH filed a Petition for a Writ of Certiorari with the U.S. Supreme Court, seeking review of the definition of concrete injury under the TCPA. On December 16, 2019, the U.S. Supreme Court denied DISH's petition. (77JA017619 ¶ 36 (FFCL).)

III. The Complaint in This Action

The primary claim that Plaintiffs seek to assert on behalf of DISH is that the Director Defendants breached their fiduciary duties under NRS 78.138(3)-(7). If the SLC were to pursue this claim on behalf of DISH, DISH would need to prove that the Director Defendants *knowingly* caused *DISH* to violate the DNC Laws. (*See* 4JA000706 ¶¶ 64-68 (Complaint); 77JA017622 ¶ 45 (FFCL).) Thus, DISH would need to show that, during the relevant time period, before the decisions in the DNC

Actions, the Director Defendants *knew* that DISH was violating the DNC Laws.[7] *See Chur v. Eighth Jud. Dist. Ct. in & For Cty. of Clark*, 136 Nev. 68, 75, 458 P.3d 336, 342 (2020) ("[T]he claimant must establish that the director or officer had knowledge that the alleged conduct was wrongful in order to show a 'knowing violation' or 'intentional misconduct' pursuant to NRS 78.138(7)(b).").

IV. The Special Litigation Committee

On April 11, 2018, the DISH board unanimously resolved by written consent to form the SLC to investigate the Claims asserted in the Complaint and determine whether their pursuit would be in DISH's best interest. (77JA017612 ¶ 6 (FFCL).)

The SLC had three members, none of whom were members of the DISH board during the years for which DISH was assessed damages in the DNC Actions: Charles Lillis, a non-party and now former director of DISH; George Brokaw, a director of DISH; and Anthony Federico, a director on the board of EchoStar Corporation, a non-party affiliate of DISH. (*Id.* ¶ 7.) George Brokaw, while a named

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[7] Corporate misconduct and liability do not inexorably lead to director liability, even where a corporation is found liable for egregious misconduct and required to pay exemplary damages. *See, e.g.*, *Cottrell v. Duke*, 829 F.3d 983, 986-87 (8th Cir. 2016) (dismissing claims against directors where "[t]here is reasonable suspicion to believe that Mexican and USA [sic] laws have been violated" through "an extensive and systematic practice of bribing Mexican officials" "orchestrated by top executives," including the subsidiary's CEO and general counsel); *Okla. Firefighters Pension & Ret. Sys. v. Corbat*, 2017 WL 6452240, at *9 (Del. Ch. Dec. 18, 2017) (dismissing claims against directors where the corporation "paid $2.2 billion in fines as a result of [foreign exchange rate manipulation] and . . . pleaded guilty to conspiracy to violate federal antitrust laws").

defendant in this action, did not join the DISH board until 2013, years after the telemarketing calls for which DISH was found liable in the DNC Actions. (*Id.* at JA017626-27 ¶ 69.)

The DISH board "fully delegated all rights and powers of the DISH Board with respect to the claims asserted in this action to the SLC." (*Id.* at JA017612 ¶ 8.) The SLC retained independent counsel: Holland & Hart, LLP and Young Conaway Stargatt & Taylor, LLP. (*Id.* at JA017613 ¶ 10).

A. The SLC's Investigation and Report

Over six months, the SLC investigated the Claims asserted in the Complaint and related issues. The SLC investigated the time period from 2003—when the earliest DNC violations asserted in the DNC Actions occurred—through 2013—the end of the time period addressed in the Complaint. (4JA000754 (Report).)

The SLC's independent counsel advised the members of the SLC on the legal standards applicable to the Claims, including the fiduciary duties owed by directors to Nevada corporations. (77JA017619 ¶ 37 (FFCL).)

The SLC, through counsel, issued document requests to DISH and third parties and reviewed over 44,000 documents, with the SLC members personally reviewing more than 1,500 documents. (*Id.* at JA017630 ¶¶ 82-83.) The documents included relevant court filings, deposition transcripts, hearing transcripts, trial transcripts, trial exhibits and opinions from the DNC Actions. The documents

further included documents internal and external to DISH that might shed light on the Director Defendants' knowledge, during the relevant time period, as to whether DISH was legally responsible under the DNC Laws for retailer violations, including advice on the issue from DISH's inside and outside counsel, the *Charvat* and *Zhu* decisions described above and DISH's efforts before the FTC and others to preserve its position that it was not legally responsible for the Retailers' conduct. (*Id.* at JA017620-21 ¶ 40.)

The SLC met formally on ten occasions (in person and telephonically). (*Id.* at JA017630 ¶¶ 82-83.) It interviewed twenty-two relevant individuals. (*Id.* at JA017631 ¶¶ 83-84.) Plaintiffs have not identified any relevant document or person that the SLC failed to review or interview. (*See id.* at JA017621-22 ¶¶ 41-42.)

After receiving advice from counsel, reviewing documents and conducting interviews, the SLC provided its determinations and the reasons for those determinations to counsel, and directed counsel to prepare a report consistent with the SLC's determinations. Counsel prepared and the SLC reviewed and commented on multiple drafts of the SLC Report. The SLC approved the final text of the Report and authorized counsel to file it on November 27, 2018. (*Id.* at JA017622 ¶ 43.) The 353-page Report contained an exhaustive discussion of the Claims, the applicable law, the investigation, the extent to which the decisions in the DNC

Actions had addressed matters relevant to the investigation, the relevant evidence and the SLC's findings and conclusions.

B. The Motion to Defer

After submitting its Report, 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"). (74JA016876 (Mot. to Defer).) During the briefing of the Motion to Defer, Plaintiffs requested and obtained voluminous discovery,[8] and the parties thereafter jointly requested that the District Court proceed directly to an evidentiary hearing and the factual findings required by *Jacksonville*. *See supra.* pp. 11-12.

On July 6 and 7, 2020, the District Court held an in-person evidentiary hearing consistent with this Court's direction in *Jacksonville*. Both the SLC and Plaintiffs presented opening and closing arguments. Over two days, all three SLC members testified regarding their independence and investigative process. The District Court received the testimony live, in person; 49 exhibits (18,592 pages), including the SLC Report and its numerous exhibits, were submitted into evidence over the course of

[8] The parties agreed upon the scope of discovery. (74JA017045-51 (Discovery Stipulation & Order).) Pursuant to that agreement, between January 14 and July 31, 2019, the SLC made voluminous document productions, and Plaintiffs deposed each SLC member. (77JA017614 ¶ 14 (FFCL); IRA001-12 (Deposition Notices).)

the evidentiary hearing. The District Court asked multiple questions of the witnesses and counsel.

During the evidentiary hearing, Plaintiffs questioned the SLC members extensively about the SLC's consideration of the various issues raised by the Complaint. (76JA017293-97, 17304, 17310, 17322-25, 17329-33, 17335, 17338, 17340-41, 17345-50, 17352, 17355, 17366-68 (07/06/2020 Hr'g—Lillis); 76JA017419, 17421-23, 17426-29 (07/06/2020 Hr'g—Federico); 77JA017439, 17441-44, 17446-47, 17449, 17451-52, 17454-57, 17459-62, 17484-87 (07/07/2020 Hr'g—Federico continued).)[9]

V. The District Court's Decision

On July 17, 2020, as required by *Jacksonville*, based upon the evidence presented at the evidentiary hearing, the District Court applied the *Auerbach* legal standard and made factual findings in a thorough written decision. The District Court held that, based on the preponderance of the evidence presented at the evidentiary hearing, the SLC was independent and had conducted a good-faith, thorough investigation. (77JA017614 ¶ 13, 17631 ¶ 87 (FFCL).)

The District Court found as follows on the issue of the SLC's independence:

> Under Nevada law, the SLC had to act by the majority approval of its members. The SLC could not act without – at minimum – the affirmative approval of either Mr. Lillis or Mr. Federico, each of whom

[9] The Plaintiffs waived their cross-examination of Mr. Brokaw. (77JA017562 (07/07/2020 Hr'g).)

> is undeniably independent; thus the unanimous SLC approval here was independent regardless of Mr. Brokaw's independence. . . . The Court finds the SLC to be independent.

(*Id.* at JA017627 ¶ 71 (footnote omitted).)[10]

The District Court found as follows on the issue of the SLC's good faith, thoroughness:

> The evaluation to be made by the Court is whether the SLC's procedures were designed to provide an independent, thorough and good faith analysis of the issues raised in the Complaint. The issues investigated related to the Retailers' violations of the TCPA and the legal responsibility of DISH for supervision or control of those Retailers as well as the efforts to ensure compliance with the 2009 AVC.
>
> For purposes of the SLC's investigation, the members accepted as fact the findings made in the decisions in the DNC Actions. Although damning, these findings do not end the inquiry into whether the Defendants are entitled to protection under the business judgment rule or whether a breach of fiduciary duty occurred by the Defendants.
>
> Board members are entitled to rely upon advice of counsel in exercising their business judgment. The SLC inquired of the attorneys who during the Relevant Time Period had provided the white paper and advice related to the relationship of the Retailers and oversight obligations as part of its investigation and had the opportunity to test, from its perspective, the appropriateness of reliance upon that advice.

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[10] Although the District Court did not make an independence finding as to Mr. Brokaw, the District Court noted that he is "clearly a strong personality able to stand his ground." (77JA017627 n.10 (FFCL).) This observation followed the District Court's receipt of evidence that, in a different, but remarkably similar setting, Mr. Brokaw had recently stood his ground, in litigation, on behalf of stockholders, against another godparent of one of his children. (77JA017523-26 (07/07/2020 Hr'g—Brokaw).)

> Based upon the evidence presented, including the SLC's Report, the SLC members' testimony, the document requests made, and the minutes of the meetings held by the SLC during its investigation, the SLC approached its investigation without any prejudgment of the outcome. . . .
>
> Although clearly DISH disagrees with the decision in the DNC Actions, the SLC accepted the decisions as fact and reviewed those determinations and considered them in reaching its conclusion. Nineteen pages of the SLC Report directly address those decisions. Ex. 102 at 20-23, 265-73, 281-83, 318-24. Under [*Jacksonville*], the test of a special litigation committee's good-faith thoroughness relates to the procedures that the committee followed, its process and the scope of its investigation. The procedure used by the SLC in considering [the decisions in the DNC Actions] confirms that there is no issue with respect to the good-faith thoroughness of its investigation in that regard. . . .
>
> Based upon the evidence presented at the evidentiary hearing, this Court concludes that the SLC . . . has conducted a good-faith, thorough investigation.

(77JA017629-31 ¶¶ 78-81, 85, 87 (FFCL) (footnotes omitted).)

In addition to considering whether *U.S. v. DISH* or *Krakauer* could be used to prove liability as Plaintiffs urged, the District Court found that the SLC also considered other evidence. Among other things, the District Court observed that the SLC investigated DISH's compliance efforts in connection with the 2009 AVC, including the Director Defendants' knowledge and involvement with those efforts. (*Id.* at JA017620-21 ¶ 40, 17629-30 ¶¶ 78, 83.) The SLC considered DISH's oversight systems, including whether the board knowingly failed to monitor serious compliance issues. (*Id.* at JA01762 ¶¶ 48-49 (citing 5JA000979-81, 985-95, 1073-

75 (Report)).) The SLC gathered and evaluated evidence of the Director Defendants' intent with respect to DISH's compliance with DNC Laws, including the legal advice given to the Director Defendants on the topic. (*Id.* at JA017622-23 ¶ 47 (citing 5JA001066-72 (Report)); *id.* at JA017630 ¶ 83 (citing 4JA000769-71 (Report)).) The SLC considered the individual Director Defendants' knowledge of DNC Laws and reliance on legal advice given to the board regarding DISH's responsibilities under DNC Laws. (*Id.* at JA017620-23 ¶¶ 40, 47 (citing 5JA001066-72 (Report)); *id.* at JA017629-30 ¶ 80.) The District Court found that the SLC concluded that the Director Defendants had a reasonable belief that they and DISH were compliant with DNC Laws. (*Id.* at JA017622 ¶ 46.)

Following this Court's direction in *Jacksonville*, upon concluding that the SLC was independent and had conducted a good-faith, thorough investigation, the District Court deferred to the business judgment of the SLC, accepting its conclusion that pursuit of the Claims would not be in the best interests of DISH.

SUMMARY OF ARGUMENT

After the evidentiary hearing, the District Court correctly made findings of fact concerning the SLC's independence and the good faith, thoroughness of the SLC's investigation. Plaintiffs are wrong to say that *Jacksonville* precluded findings of fact in favor of a summary judgment standard; it plainly required findings of fact and rejected the summary judgment standard. Plaintiffs further suggest that

Auerbach v. Bennett, 393 N.E.2d 994 (N.Y. 1979), the case on which *Jacksonville* relied, precluded factual findings in favor of a summary judgment standard. It did not and, even if it did, it would not matter here, because *Jacksonville* provides the governing Nevada legal standard. There is no good reason for this Court to reconsider the *Jacksonville* standard. It is consistent with *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (2006), *In re AMERCO Derivative Litigation*, 127 Nev. 196, 252 P.3d 681 (2011) and, more generally, Nevada's statutory business judgment rule. It also reflects the rule applicable in a majority of U.S. jurisdictions.

The District Court did not abuse its discretion in finding that the SLC had conducted a good-faith, thorough investigation. The finding was supported by substantial evidence, including the extensive SLC Report and testimony from each of the members of the SLC. Plaintiffs nevertheless argue that the SLC's investigation was inadequate, pointing to supposed deficiencies in the SLC's investigation without regard to the actual evidentiary record. As Plaintiffs themselves recognize, for the District Court to have found that the SLC did not conduct a good-faith, thorough investigation, the SLC's investigation would had to have been so incomplete as to constitute a sham. Plaintiffs do not come close to showing that the SLC's investigation was a sham. Plaintiffs have not identified any manner at all in which the investigation was incomplete. The SLC considered all

the points that Plaintiffs say it should have considered and documented those considerations in the SLC's Report.

The District Court did not abuse its discretion in finding that the SLC was independent. Plaintiffs do not dispute that a special litigation committee is independent if a majority of its members are independent, nor do they deny that a majority of the SLC members were independent. Plaintiffs' contention that the SLC nonetheless lacked independence because the judgments of two concededly independent members diverged on a "procedural" issue is wrong. The District Court found no such disagreement, and its finding was not an abuse of discretion but amply supported by the SLC Report itself and the testimony of all three members of the SLC. Moreover, even if there were such disagreement between independent members, it would serve only to confirm their independence and did not affect the independence of the SLC's ultimate unanimous decision that pursuit of the Claims is not in DISH's best interest.

ARGUMENT

I. Standard of Review

As established in *Jacksonville*, and as Plaintiffs agree, the Supreme Court reviews the District Court's decision to defer to the business judgment of a special litigation committee for an abuse of discretion. 133 Nev. at 443-44, 401 P.3d at 1088 ("[T]he application of this standard is a matter left to the sound discretion of

the district court, and absent an abuse of that discretion, the district court's rulings will not be disturbed on appeal.") (citations omitted).

Under this standard of review, the Supreme Court will not reverse the District Court's findings of fact "unless they are clearly erroneous or not supported by substantial evidence." *NOLM, LLC v. Cty. of Clark*, 120 Nev. 736, 739, 100 P.3d 658, 661 (2004) (internal quotation marks omitted). Where "the trial court, sitting without a jury, makes a determination predicated upon conflicting evidence, that determination will not be disturbed on appeal where supported by substantial evidence." *Edwards Indus., Inc. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1031, 923 P.2d 569, 573 (1996) (internal quotation marks omitted); *see also Savini Const. Co. v. A & K Earthmovers, Inc.*, 88 Nev. 5, 7, 492 P.2d 125, 126 (1972) (same).

II. After Conducting the Evidentiary Hearing That Plaintiffs Requested, the District Court Correctly Made Factual Findings.

The District Court correctly made factual findings, as required by *Jacksonville*. Plaintiffs concede that, before a stockholder may proceed with derivative claims, *Jacksonville* requires an evidentiary hearing. (OB 36.) Plaintiffs nonetheless oddly contend that, under *Jacksonville*, no factual findings should be made with respect to the evidence presented at the evidentiary hearing. (OB 38-39.) Plaintiffs argue that *Jacksonville* required the District Court to hold an evidentiary hearing, not to weigh the evidence presented, but to resolve the motion through a summary judgment standard. Plaintiffs offer no explanation as to why this Court

would require an evidentiary hearing devoid of credibility determinations or the weighing of any evidence.[11]

Under Plaintiffs' interpretation of *Jacksonville*, the evidentiary hearing is nothing more than an elaborate summary judgment hearing, and if any genuine issue of material fact is raised concerning the independence of the SLC or the good-faith, thoroughness of its investigation, the District Court should ignore the evidence actually presented at the evidentiary hearing, and should not resolve the issue. Instead, Plaintiffs interpret *Jacksonville* to mean that a stockholder should be given control of the corporation's legal claims at that point, even if a preponderance of the evidence shows that the SLC was independent and conducted a good-faith, thorough investigation. According to Plaintiffs, *Jacksonville* "did not mandate fact finding" based upon the evidence presented at the evidentiary hearing; it required a "summary

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[11] Having requested that the District Court hold an evidentiary hearing and having submitted proposed factual findings, Plaintiffs cannot now claim that it was error for the District Court to have done as they requested. *See, e.g.*, *Hemingway v. State*, 471 P.3d 754, 2020 WL 5634151, at *1 (Nev. Sept. 18, 2020) (Table) ("A party who participates in an alleged error is estopped from raising any objection on appeal.") (quoting *Carter v. State*, 121 Nev. 759, 769, 121 P.3d 592, 599 (2005)). In all events, the pendency of a motion for summary judgment never prevents a court from proceeding directly to try the issues raised by the motion. *See, e.g.*, *Zupancic v. Sierra Vista Recreation, Inc.*, 97 Nev. 187, 189, 192, 625 P.2d 1177, 1178, 1180 (1981) (recognizing that "[h]earing and trial procedures, such as consolidation and the scheduling of hearings, so long as within the parameters of the governing rules, are matters vested in the sound discretion of the trial court"). A party opposing summary judgment has no right to require that the other party's motion be heard before factual findings are made.

judgment standard." (*See, e.g.*, OB 31, 36.) Plaintiffs' reading of *Jacksonville* is wrong.

A. *Jacksonville* Required Factual Findings.

In *Jacksonville*, this Court *wrote in plain language* that it was requiring factual findings and rejecting a summary judgment standard. First, the Court explained, as quoted above, that a plaintiff may not proceed with derivative claims, after a special litigation committee requests dismissal of the claims, unless and until the District Court "determines," after the evidentiary hearing, "that the SLC *lacked* independence or *failed* to conduct a thorough investigation in good faith." *Jacksonville*, 133 Nev. at 444, 401 P.3d at 1088 (emphasis added). The District Court is required to make these determinations—not merely to identify the existence of a genuine issue of material fact on these points.

Moreover, when holding that it would review the District Court's findings for abuse of discretion, this Court explained:

> Jacksonville and our dissenting colleague argue that de novo review is required, analogizing to the standards of review applicable to summary judgment motions under NRCP 56 and motions to dismiss under NRCP 12(b)(6). Unlike a motion for summary judgment or to dismiss, however, the district court's review of an SLC's motion under *Auerbach* does not concern the adequacy of the pleadings or the merits of the derivative suit. Rather, the standard we adopt from *Auerbach* involves **assessing the weight and credibility of the evidence**, and reaching conclusions that depend greatly on **factual determinations**.

Id. at 444 n.2, 401 P.3d at 1088 n.2 (emphasis added). As the Court also explained,

> Such fact-intensive legal standards are appropriately reviewed deferentially . . . . Therefore, we **disagree** with the parties' and our dissenting colleague's arguments **regarding standards applicable to summary judgment proceedings**.

Id. (emphasis added). The Court could not have been clearer in requiring factual findings and rejecting a summary judgment standard.

The Court further wrote that its decision was consistent with *Shoen* and *AMERCO*, both of which require that *factual findings* be made after an evidentiary hearing, before a plaintiff may proceed with its derivative claims. *Jacksonville*, 133 Nev. at 444, 401 P.3d at 1088; *see also AMERCO*, 127 Nev. at 206, 252 P.3d at 690 ("We conclude that appellants adequately pleaded demand futility, but the district court must now conduct a proper evidentiary hearing regarding whether the evidence supports appellants' allegations[.]"); *id.* at 222, 252 P.3d at 700 ("[T]his matter should be scheduled for an evidentiary hearing to determine whether demand was, in fact, futile."); *Shoen*, 122 Nev. at 645, 137 P.3d at 1187 ("If the district court should find the pleadings provide sufficient particularized facts to show demand futility, it must later conduct an evidentiary hearing to determine, as a matter of law, whether the demand requirement nevertheless deprives the shareholder of his or her standing to sue."), *abrogated on other grounds by Chur*, 136 Nev. 68, 458 P.3d 336 and *Guzman v. Johnson*, 137 Nev. Adv. Op. 13, 483 P.3d 531 (2021).

Finally, to make the point absolutely clear, in *Jacksonville*, the Court affirmed the District Court's *findings of fact* concerning the independence and good faith,

thoroughness of the SLC in that case, a result that would have been impossible if the Court had concluded that such findings of fact were impermissible. *Jacksonville*, 133 Nev. at 439, 452, 401 P.3d at 1085, 1094.

In this case, the SLC requested dismissal of the Claims in its Motion to Defer. After the evidentiary hearing, the District Court correctly made findings of fact on independence and good faith, thoroughness because *Jacksonville* required it to do so.

B. *Auerbach* Did Not Adopt the Summary Judgment Standard Sought by Plaintiffs.

Plaintiffs argue that, despite its clear language, *Jacksonville* must have *precluded* the District Court from making factual findings after the evidentiary hearing and adopted the summary judgment standard because *Jacksonville* adopted the *Auerbach* standard. And, according to Plaintiffs, *Auerbach* rejected factual findings in favor of the summary judgment standard. (OB 36.) This argument is wrong for two reasons.

First, irrespective of the procedures employed in *Auerbach*, Nevada law mandates factual findings because this Court in *Jacksonville* rejected the summary judgment standard, as detailed above. *Jacksonville* is the controlling Nevada authority.

Second, Plaintiffs misinterpret *Auerbach*; the New York Court of Appeals in *Auerbach* did not permit a plaintiff to proceed with its claims merely upon a special

litigation committee's failure to satisfy a summary judgment standard. The court applied a summary judgment standard because it was granting a special litigation committee's summary judgment motion. 393 N.E.2d 994, 998, 1003-04 (N.Y. 1979). It made clear that, had summary judgment not been granted to the committee, factual findings would have been *required* before the stockholder could proceed. *Id.* at 1003. The court explained that the "disposition of the present appeal" turns on whether the appellant has "shown facts sufficient to *require a trial* of any material issue of fact as to the adequacy or appropriateness of the Modus operandi of that committee . . . ." *Id.* (emphasis added). Had the appellant shown such facts, there presumably would have been a trial on the committee's independence and process.[12]

The difference between *Jacksonville* and this case, on one hand, and *Auerbach*, on the other, results from a procedural choice by the parties. In *Jacksonville* and here, the parties decided to proceed directly to an evidentiary hearing, necessitating factual findings; while in *Auerbach*, the SLC sought first to resolve the case in its favor through a summary judgment motion. No evidentiary hearing was held in *Auerbach* because the summary judgment motion was granted.

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[12] This reading of *Auerbach* was confirmed in *Rosen v. Bernard*, 108 A.D.2d 906 (N.Y. App. Div. 1985). Determining that "the issues of independence of the special litigation committee and the methods of its investigation are potentially dispositive of the lawsuit," an intermediate New York appellate court directed that "a hearing of these issues should be held." 108 A.D.2d at 907.

This Court has adopted a similar bifurcated approach in the analogous situation of addressing demand futility under NRCP 23.1. A court may address the sufficiency of a complaint's allegations at the pleading stage, and, if the allegations are sufficient, it must proceed to conduct an evidentiary hearing and decide the independence of the directors based on evidence. *See* pp. 38-41, *infra.*

C. There Is No Good Reason to Overrule *Jacksonville.*

There is no merit to Plaintiffs' veiled argument that *Jacksonville* should be overruled. As discussed above, Plaintiffs now refuse to acknowledge that *Jacksonville* required factual findings; so they cannot overtly argue for its reconsideration. But they nonetheless do so implicitly, by arguing that *Jacksonville* "makes a great deal of sense" in supposedly adopting a summary judgment standard that it did not adopt. (OB 38.)

Contrary to Plaintiffs' suggestion (OB 37), *Jacksonville* is not somehow out of step with other jurisdictions in requiring an evidentiary hearing and factual findings. *Jacksonville* adopted the majority rule. Nearly all United States jurisdictions that have addressed the issue, including all those that have adopted the Model Business Corporation Act ("MBCA"),[13] require factual findings adverse to a

[13] Section 7.44 of the MBCA provides that on a motion to terminate derivative litigation, the movant "shall have the burden of ***proving***" that "a majority vote of a committee consisting of two or more qualified directors" has "determined in good faith, after conducting a reasonable inquiry upon which its conclusions are based, that the maintenance of the derivative proceeding is not in the best interests of the

special litigation committee before a derivative plaintiff may proceed with the corporation's claims.[14] Only three states have adopted the rule that Plaintiffs

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corporation." 2 *Model Business Corporation Act Annotated* § 7.44 (5th ed. 2020) (emphasis added).

[14] At least 23 states and the District of Columbia have adopted versions of the MBCA's statute on terminating derivative litigation. Ariz. Rev. Stat. Ann. § 10-744; Conn. Gen. Stat. Ann. § 33-724; D.C. Code Ann. § 29-305.54; Fla. Stat. Ann. § 607.0744; Ga. Code Ann. § 14-2-744; Haw. Rev. Stat. § 414-175; Idaho Code Ann. § 30-29-744; Iowa Code Ann. § 490.744; La. Rev. Stat. Ann. § 12:1-744; Me. Rev. Stat. Ann. tit. 13-C § 755; Mich. Comp. Laws Ann. § 450.1495; Miss. Code Ann. § 79-4-7.44 (similar to MBCA); Mont. Code Ann. § 35-14-744; Neb. Rev. Stat. § 21-279(d); N.H. Rev. Stat. Ann. § 293-A:7.44; N.J. Stat. Ann. § 14A:3-6.5(c)(4); N.C. Gen. Stat. § 55-7-44; R.I. Gen. Laws § 7-1.2-711(e); S.D. Codified Laws §§ 47-1A-744 through 47-1A-744.5; Tex. Bus. Org. Code Ann. §§ 21.554, 21.558; Utah Code Ann. § 16-10a-740(4); Va. Code Ann. § 13.1-672.4; Wis. Stat. § 180.0744; Wyo. Stat. § 17-16-744.

At least seven states have adopted other statutes or established common law that similarly require factual findings on independence and good faith before a plaintiff can take control of derivative litigation from a special litigation committee. Alaska Stat. Ann. § 10.06.435(f) (committee "shall have the burden of establishing to the satisfaction of the court their disinterest, independence . . . , and the informed basis on which they have exercised their asserted business judgment"); *Day v. Stascavage*, 251 P.3d 1225, 1228-29 (Colo. App. 2010) ("Consistent with the majority view, we will impose the burden of persuasion on those seeking dismissal based on an SLC's report. . . . Any factual disputes must be resolved by a court after an evidentiary hearing."); Ind. Code § 23-1-32-4:c; *In re Guidant S'holders Derivative Litig.*, 841 N.E.2d 571, 575 (Ind. 2006) (committee determination "presumed conclusive" unless stockholder "proves" committee not disinterested or investigation not in good faith); *Boland v. Boland*, 31 A.3d 529, 556 (Md. 2011) (court proceeds to trial on issues of special litigation committee's independence and good faith after a denial of committee's motion for summary judgment); *Auerbach*, 393 N.E.2d 994, 1003 (N.Y. 1979) (calling for factual findings where genuine issues exist as to a special litigation committee's independence and process); 15 Pa.C.S.A. § 1783 ("If the court finds that the committee met the qualifications required under subsection (c)(1) and (2) [regarding independence] and that the committee acted in good faith, independently and with reasonable care, the court shall enforce the

advocate.[15] In *Jacksonville*, the Court was well aware of the minority standard and rejected it in favor of the majority rule set forth in *Auerbach*. *Jacksonville*, 133 Nev. at 442-443, 401 P.3d at 1087-88.

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determination of the committee."); *Cuker v. Mikalauskas*, 692 A.2d 1042, 1048 n.2 (Pa. 1997) ("Until factual determinations are made in regard to these disputed issues [on independence and adequacy of investigation], a trial court cannot conclude whether or not the business judgment rule requires dismissal of the action[.]"); *House v. Est. of Edmondson*, 245 S.W.3d 372, 376 (Tenn. 2008) (affirming lower court ruling: "Following multiple hearings in which the plaintiff, [special litigation committee], and others testified, the trial court, on January 16, 2004, approved [special litigation committee's] report recommending that the case be settled by [majority stockholder] paying [corporation] $552,501. The trial court found that [special litigation committee's] findings and recommendations were in the corporation's best interests and that, once a settlement was reached, the derivative suit would be dismissed.").

[15] *See London v. Tyrrell*, 2010 WL 877528, at *12 (Del. Ch. Mar. 11, 2010); *Niesar v. Zantaz, Inc.*, 2007 WL 2330789, at *8 (Cal. Ct. App. Aug. 16, 2007); *Abrano v. Abrano*, 2016 WL 7735781, at *3 (Mass. Super. Nov. 30, 2016).

Plaintiffs submit a misleading string cite to suggest that more than three states have adopted a summary judgment standard. (OB 37). Several of Plaintiffs' cited cases require factual findings before allowing a plaintiff to proceed with its derivative claims. *Boland v. Boland*, 31 A.3d 529, 556 (Md. 2011) ("If the plaintiff survives summary judgment, at trial, the burden is on the directors to prove that the SLC was independent, acted in good faith, and made a reasonable investigation and principled, factually supported conclusions.") (citations omitted); *Day v. Stascavage*, 251 P.3d 1225, 1228-29 (Colo. App. 2010) (following *Auerbach* and holding: "Consistent with the majority view, we will impose the burden of persuasion on those seeking dismissal based on an SLC's report. . . . Any factual disputes must be resolved by a court after an evidentiary hearing."). And in another case, a Minnesota court acknowledged that some states (unlike Nevada and many others) allow plaintiffs to proceed merely upon determining that there is uncertainty about the independence of the committee, but the court did not decide which approach it preferred as it found that the committee investigation at issue clearly lacked independence and good faith. *Janssen v. Best & Flanagan*, 662 N.W.2d 876, 889 (Minn. 2003). Each of the remaining cases cited by Plaintiffs applied the law

Plaintiffs also argue that public policy supports their reinterpretation of *Jacksonville*, but they do so only by ignoring Nevada law and policies. They say that this Court's adoption of the preponderance standard "undercut[s] the integrity of the process and defeats the purpose of requiring the SLC to bear its burden." (OB 39.) Yet, well before *Jacksonville*, Nevada had already decided that factual findings concerning the full board's independence is the better course in determining whether a stockholder may proceed with derivative litigation on the ground that demand is excused under NRCP 23.1. *See AMERCO*, 127 Nev. at 206, 252 P.3d at 700 (requiring "evidentiary hearing to determine whether demand was, in fact, futile"); *Shoen*, 122 Nev. at 645, 137 P.3d at 1187 (similar). There is no reason that the District Court's determinations of good faith and independence would be less reliable or garner less confidence when applied to a special litigation committee's determination.

Plaintiffs' argument with respect to information imbalance (OB 39) also rings hollow. A plaintiff resisting a special litigation committee's conclusion is entitled to pre-hearing discovery of relevant evidence from the committee or anyone else

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of one of the three states that have adopted Plaintiffs' proposed standard. (*See* OB 37 (citing *Will v. Engebretson & Co.*, 261 Cal. Rptr. 868 (Cal. App. 1989) (applying California law); *Booth Family Tr. v. Jeffries*, 640 F.3d 134 (6th Cir. 2011) (applying Delaware law); *Kaplan v. Wyatt*, 484 A.2d 501 (Del. Ch. 1984) (same); *Hasan v. CleveTrust Realty Inv's.*, 729 F.2d 372, 374 (6th Cir. 1984) (applying Massachusetts law).)

concerning the committee's independence and its good faith, thoroughness. Plaintiffs here got all of the discovery they sought on those topics. Indeed, Plaintiffs stipulated to the scope of discovery. (74JA017045-51 (Discovery Stipulation & Order).) The process is well designed to ferret out potential abuse.

Public policy actually undermines Plaintiffs' position. Nevada's public policy concerning the authority of corporate boards is reflected in Nevada's statutory business judgment rule. As the Court correctly observed in *Jacksonville*, the minority standard adopted in some other states would conflict with Nevada's business judgment rule. *Jacksonville*, 133 Nev. at 443, 401 P.3d at 1087 ("Because Nevada's business judgment rule prevents courts from substitut[ing] [their] own notions of what is or is not sound business judgment, we conclude that *Auerbach* is the better approach.") (internal citations and quotations omitted). This case makes the point clear: If Plaintiffs' standard were adopted, such that factual findings could never be made, the District Court would be required to disregard the SLC's business judgment, due to the existence of a mere dispute of an issue of fact (even if the evidence as a whole heavily weighs in favor of the SLC). It would not matter that the District Court had already found, as a matter of fact on a full record, that the SLC was independent and conducted a good-faith, thorough investigation. This would be a clear intrusion on the business judgment rule and a waste of judicial resources.

Finally, Plaintiffs incorrectly contend that Nevada's demand futility case law supports the adoption of a summary judgment standard. Plaintiffs liken demand futility review to special litigation committee review, concluding that the standards for each should be similar, and argue that the "reasonable doubt" standard for demand futility is similar to the summary judgment standard they advocate for special litigation committee review. (OB 39-40.) Plaintiffs' analogy to the demand futility context may have merit, but not in support of their argument.

Plaintiffs apparently forget that, in the demand futility setting, the "reasonable doubt" standard is a *pleading* standard. If that standard is satisfied, as a next step, the derivative plaintiff "must" then *prove*, at an evidentiary hearing, that demand would have been futile. *AMERCO*, 127 Nev. at 222, 252 P.3d at 700 ("In *Shoen*, we noted that '[i]f the district court should find the pleadings provide sufficient particularized facts to show demand futility, it must later conduct an evidentiary hearing to determine, as a matter of law, whether the demand requirement nevertheless deprives the shareholder of his or her standing to sue.' Thus, on remand, this matter should be scheduled for an evidentiary hearing to determine whether demand was, in fact, futile.") (citations omitted). Nothing in *Shoen* requires the District Court to rule on the pleading standard before conducting the required evidentiary hearing and finding facts as to independence and demand futility. Even if it did, a similar two-step process here would mean only that, if a derivative plaintiff

establishes a genuine issue of material fact, the District Court would turn to a similar second step and hold a mandatory evidentiary hearing at which it would defer to the special litigation committee unless it finds that the committee lacked independence or failed to conduct a good-faith, thorough investigation. Plaintiffs' comparison to demand futility case law supports *Jacksonville*'s conclusion that a plaintiff may not proceed absent an evidentiary hearing and findings of fact adverse to the SLC. *See Jacksonville*, 133 Nev. at 444-46, 401 P.3d at 1088-90 (citing *Shoen*, 122 Nev. at 645, 137 P.3d at 1187 and *AMERCO*, 127 Nev. at 222, 252 P.3d at 700).

III. The District Court Did Not Abuse Its Discretion by Finding That the SLC Conducted a Good-Faith, Thorough Investigation.

The District Court did not abuse its discretion in finding that the SLC conducted a good-faith, thorough investigation. Its finding was well supported by the record evidence. At the evidentiary hearing, the parties moved into evidence the SLC's 353-page Report, the nearly 800 exhibits to the Report, the SLC's meeting minutes, the 2009 AVC and the *Krakauer* and *U.S. v. DISH* decisions. (*See* 77JA017645-48 ¶¶ 37, 39-41, 43, 17656 ¶¶ 81-83 (FFCL).) At the hearing, the District Court heard live testimony from each member of the SLC about their investigation, and Plaintiffs had an opportunity to cross-examine the SLC

members.[16] The record reflected that the SLC had been advised by independent counsel, thoroughly reviewed the Complaint and the decisions in the DNC Actions, requested and reviewed voluminous documents, interviewed 22 individuals, addressed the issues raised by the Complaint and thoroughly documented its findings and conclusions in an exhaustive Report. (*See id.* at JA017620-22 ¶¶ 40-43, 17630-31 ¶¶ 81-84.) There was ample evidence that the SLC's investigation was a good-faith effort to thoroughly understand the Claims and to evaluate whether litigating them would be in DISH's best interest.

Plaintiffs hardly argue that there was an abuse of discretion. They do so only indirectly and in the alternative, through a footnote. (*See* OB 40 n.15 ("The following arguments mandate reversal regardless of whether the summary judgment standard applies.").) Instead, building on their incorrect assertion that *Jacksonville* mandated a summary judgment standard, Plaintiffs primarily argue only that there were "genuine issues" concerning the good faith, thoroughness of the SLC's investigation. (*See, e.g.*, OB 42-43.) The argument is irrelevant because, as explained above, *Jacksonville* rejected a summary judgment standard.

Plaintiffs' footnote argument fails because there plainly was no abuse of discretion. Plaintiffs acknowledge that the yardstick by which the good faith,

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[16] *See* 76JA017247-429 (07/06/2020 Hr'g); 77JA017437-562 (07/07/2020 Hr'g).

thoroughness of an SLC's investigation is measured is whether the investigation was "so restricted in scope, so shallow in execution, or otherwise so *pro forma* or halfhearted as to constitute a pretext or sham." (OB 42.) But Plaintiffs do not even attempt to establish that the SLC's investigation was so incomplete that it was clear error for the District Court not to have found it a sham. Plaintiffs have not established that it was incomplete even in the smallest respect.

Plaintiffs primarily contend that that the SLC failed to consider "whether [the Claims] could succeed against DeFranco and the other Defendants in light of the adjudicated facts from the *Krakauer* verdict and treble damages order[.]" (OB 44; *see also* OB 62 (The SLC "failed to address the effects of the prior adjudications [in the DNC Actions] on the viability of Dish's TCPA breach-of-fiduciary-duty claims against Defendants.").) It is perplexing that Plaintiffs would make this assertion. The SLC clearly considered the issue. The District Court expressly found that it did: The "SLC analyzed the decisions in the DNC Actions" and "decided that neither decision addressed the questions put before the SLC[.]" (77JA0017631 ¶ 86 (FFCL).) And this finding was well supported by the record evidence: The SLC Report shows that the SLC carefully reviewed, across numerous pages of its Report, the *Krakauer* and *U.S. v. DISH* decisions and considered what impact the factual findings made in those decisions would have on the prosecution of the Claims. (*See, e.g.*, 5JA001058 (Report) (determining that the findings in *Krakauer* "did not

implicate the Director Defendants, much less suggest that they knowingly caused DISH to violate the DNC Laws"); *id.* at JA001057 ("The SLC determined that, contrary to the allegations of the Complaint, the Trebling Decision does not demonstrate that any Director Defendant knowingly caused DISH to violate the DNC Laws or otherwise acted in bad faith . . . ."); *id.* at JA001053 ("Neither *U.S. v. DISH* nor *Krakauer* addressed who within DISH was aware of the Subject Retailers' DNC violations, let alone specified that the Director Defendants were aware of the violations.").) Plaintiffs cross-examined Mr. Lillis and Mr. Federico on the topic at length at the evidentiary hearing. (76JA017292-361, 17365-68, 17371 (07/06/2020 Hr'g—Lillis); *id.* at JA017418-29 (07/06/2020 Hr'g—Federico); 77JA017437-69, 17482-89 (07/07/2020 Hr'g—Federico).) They waived their opportunity to question Mr. Brokaw. (77JA017562 (07/07/2020 Hr'g).) The record is replete with evidence that the SLC considered whether the decisions in the DNC Actions could be used to establish liability on the part of the Director Defendants.

Plaintiffs otherwise contend that the SLC failed to consider certain specific means by which the decisions in the DNC Actions might be used to establish liability on the part of the Director Defendants, and even there they are wrong. As detailed below, the SLC fully considered each of the means Plaintiffs describe.

A. The SLC Considered the Viability of the Claim Against the Director Defendants Based upon DISH's Breach of the 2009 AVC.

Plaintiffs argue that the SLC failed to address the Claim that the Director Defendants breached their fiduciary duty based upon the breach of the 2009 AVC found in *Krakauer*.[17] (*See* OB 32 ("Dish's non-compliance with the AVC . . . was established in *Krakauer*[.]"); OB 44-45 ("The SLC's disregard of the facts adjudicated in *Krakauer* . . . in particular Defendants' failure to cause Dish to comply with its 'promise[]' to 'forty-six state attorneys general in 2009 . . . raises genuine issues of material fact[.]"); OB 33 ("[T]he AVC claim was not 'the subject of [the SLC's] investigation[.]'").)

But the SLC considered the Claim and documented its consideration in its Report. The SLC first identified the Claim. (5JA001033 (Report) ("The primary Claim that Plaintiffs would have DISH assert is that the Director Defendants breached their fiduciary duties of good faith and loyalty by knowingly 'participat[ing] in, approv[ing] and/or permit[ting] violations by DISH of the TCPA

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[17] Plaintiffs selectively quote testimony of Mr. Lillis to assert that he believed the Complaint did not include a claim against the Director Defendants for breach of fiduciary duty for causing violations of the 2009 AVC. (*See* OB 53.) Due to the much greater importance of the DNC Laws, for which DISH might actually recover, if there had been a knowing violation by a Director Defendant, it is not surprising that Mr. Lillis, nearly two years after completing the investigation, did not recall that aspect of the Complaint. Regardless, the SLC's Report clearly shows that the SLC did investigate the possibility of claims based on the 2009 AVC. (5JA001059-63 (Report); *id.* at JA001070-71.)

and *2009 AVC*.") (emphasis added).) It then determined that no party with standing to seek damages for a breach of the 2009 AVC had brought claims based on the 2009 AVC. (*Id.* at JA001062, 1070-71.) DISH had not suffered any damages for any breach of the 2009 AVC; a breach of the 2009 AVC was not the basis of the judgments in the DNC Actions. (*Id.* at JA00948-49.) Therefore, the SLC reasoned that, even if DISH proved that the Director Defendants breached their fiduciary duties with respect to the 2009 AVC, DISH would still need to show that they did so also with respect to the DNC Laws to recover damages from the Director Defendants. (*Id.* at JA001034, 1060-61.)

In all events, the SLC squarely concluded that the Director Defendants did not breach their fiduciary duties based upon DISH's breach of the 2009 AVC. (*Id.* at JA001076 (The "Director Defendants did not breach their fiduciary duties to DISH, either by knowingly participating in, approving, or permitting violations by DISH of the . . . 2009 AVC[.]").) In reaching that conclusion, the SLC investigated the Director Defendants' knowledge of DISH's violations of the 2009 AVC and determined that the Director Defendants did not know that DISH was violating the 2009 AVC. (*Id.* at JA001061 ("Based upon its thorough investigation, the SLC has

determined that the Board and Management, including DeFranco, believed in good faith that DISH was complying with the 2009 AVC.").)[18]

To the extent Plaintiffs instead argue that the SLC did not consider a claim that the Director Defendants might be liable for innocent or negligent breaches of the 2009 AVC found in *Krakauer*,[19] Plaintiffs are also wrong.[20] The SLC considered and rejected as legally unsound the possibility that DISH could obtain damages from

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[18] Plaintiffs argue that the SLC "did not analyze whether sending consumers a letter disavowing responsibility for SSN's conduct would violate the AVC." (OB 56.) But, in the testimony from Mr. Federico that Plaintiffs cite for the proposition, he testified precisely to the contrary: that the SLC did analyze the issue. (77JA017461 (07/07/2020 Hr'g—Federico) ("So I'd say, yes, we did the analysis.").) The SLC Report references the letters and some of the *Krakauer* court's criticism of the letters. (5JA000927-28, 941 (Report).) In all events, the SLC accepted as true, for purposes of its investigation, the factual findings in the DNC Actions, which included the courts' criticisms of the letter as inconsistent with the 2009 AVC. Of course, what mattered was not whether the AVC was breached, and not even whether the Director Defendants knowingly caused or permitted the breach, which the SLC found was not the case, but whether they knowingly caused DISH to violate the DNC Laws.

[19] *See* OB 43 ("The Decisions Condemning Dish's Conduct Support a Strong Inference that Defendants Breached Their Fiduciary Duty *to Require* Dish to Honor the AVC, but the SLC Never Analyzed That Issue.") (emphasis added); OB 50 ("Plaintiffs' Complaint alleges Defendants breached their fiduciary duty by *failing to cause* Dish to comply with the AVC.") (emphasis added).

[20] Plaintiffs' Complaint itself does not attempt to articulate a Claim premised on strict liability for any breach of the 2009 AVC. (*See* 4JA000704 ¶ 59 (Complaint) (alleging that the Director Defendants breached their fiduciary duties by "participat[ing] in, approv[ing] and/or permit[ting]" the wrongs); *id.* at JA000691 ¶ 30 ("[E]ach defendant acted with knowledge of the primary wrongdoing, substantially assisted the accomplishment of that wrongdoing, and was aware of his or her overall contribution to and furtherance of the wrongdoing.").)

its directors on a "strict liability" basis for any claim. (*See* 5JA001034-38 (Report) (Any claim for breach of fiduciary duty would require DISH to establish a "knowing" violation of law.).) Having determined that Nevada law never imposed strict liability on directors—but, instead, NRS 78.138(7) "provides the sole method for holding individual directors liable for corporate decisions," *Guzman*, 137 Nev. Adv. Op. 13, 483 P.3d at 535, the SLC had no reason to individually discuss the possibility of strict liability related to a breach of the 2009 AVC.

Further, this entire argument is a diversion. While a director may breach his or her fiduciary duties by knowingly causing the company to violate "positive law," the same is not true in respect of an allegation that the director caused the company to breach a contract, absent unusual circumstances. Directors may knowingly cause a corporation to breach a contract, without becoming liable for the consequences of that breach. *See, e.g.*, NRS 78.747(1) ("Except as otherwise specifically provided by statute or agreement, no person other than a corporation is individually liable for a debt or liability of the corporation unless the person acts as the alter ego of the corporation."); *PWP Xerion Holdings III LLC v. Red Leaf Res., Inc.*, 2019 WL 5424778, at *15 (Del. Ch. Oct. 23, 2019) ("A board can readily comply with its fiduciary duties while making a decision that breaches a contract, just as a board could opt to comply with a contract under circumstances where its fiduciary duties would call for engaging in efficient breach."); *Murtha v. Yonkers*, 45 N.Y.2d 913,

915 (1978) ("A 'director of a corporation is not personally liable to one who has contracted with the corporation on the theory of inducing a breach of contract, merely due to the fact that, while acting for the corporation, he has made decisions and taken steps that resulted in the corporation's promise being broken.'").

B. The SLC Considered Whether to Infer from the Findings of Fact in the DNC Actions That the Director Defendants Knew That DISH Was Violating the DNC Laws.

Plaintiffs contend that the SLC failed to "examine[] whether Defendants' knowledge of Dish's misconduct could be ***inferred*** from the factual findings in *Krakauer* (or in [*U.S. v. DISH*])[.]"[21] (OB 54.) But the SLC examined this issue too. As stated in its Report, the SLC determined that *Krakauer* "did not ***suggest*** that during the Claims Period the Director Defendants or anyone at DISH believed that DISH was legally responsible for Retailers' DNC compliance or knew that DISH was violating DNC Laws if it failed to enforce DNC compliance by all Retailers."

[21] Supposedly in support of this contention, Plaintiffs repeatedly quote the decisions in the DNC Actions for the proposition that *DISH* knew that the *Retailers* were violating the DNC Laws (and did not respond appropriately). (*See* OB 31-34, 49, 54, 56-57.) Plaintiffs suggest that this is tantamount to DISH knowing that *DISH* was violating the DNC Laws or the 2009 AVC. (*See* OB 52-54, 56-57.) But the SLC found that the propositions were entirely different. Because DISH did not believe that it was legally responsible for the Retailers, either under the DNC Laws or the 2009 AVC, DISH could know that the *Retailers* were violating DNC Laws, without knowing that *DISH* was violating the DNC Laws or the 2009 AVC. (5JA001048-53 (Report).)

(5JA001058-59 (Report) (emphasis added).)[22] That the SLC used the word "suggest" instead of "infer" is meaningless hair-splitting and cannot render the SLC's investigation so inadequate as to constitute a sham. The issue was addressed explicitly.

Plaintiffs also contend that the SLC failed to consider whether, *if it could be inferred* that the Director Defendants had known that the Retailers were DISH's agents, the Director Defendants could not have relied upon advice of counsel that might have been to the contrary. (OB 64-65.) The argument makes no sense because it is premised upon a counter-factual assumption.

The SLC found that the inference could not be made and that the Director Defendants in fact did not know that the Retailers were DISH's agents. (4JA000835 (Report) ("Based upon the SLC's Investigation, everyone within DISH, including the Director Defendants, genuinely believed in good faith, with the benefit of legal advice, that Retailers were independent contractors, not DISH's agents.").) The SLC also found that the Director Defendants did not believe that DISH was legally responsible for the Retailers' DNC compliance. (5JA001049 (Report) ("[T]he belief that DISH was not legally responsible for the Retailers' DNC compliance was

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[22] *See also id.* at JA001058 (The "court's primary basis for trebling damages"—SSN's "knowledge and willfulness" which could be attributed to DISH—"did not implicate the Director Defendants, much less suggest that they knowingly caused DISH to violate the DNC Laws.").

consistent with DISH's experience in *Charvat* and *Zhu*, the only cases during or prior to the Claims Period in which DISH had litigated this issue.").) That the SLC did not specifically analyze a counter-factual hypothetical does not render its investigation a sham.

C. The SLC Considered Collateral Estoppel.

Plaintiffs finally raise two arguments related to collateral estoppel. They contend that the SLC failed to analyze whether the doctrine of offensive collateral estoppel would preclude re-litigation in this action of the factual findings made in the DNC Actions. (*See* OB 58 (The SLC "fail[ed] to analyze the applicability of offensive collateral estoppel and the inferences that could be drawn if issue preclusion applied to the *Krakauer and Dish II* findings."); *see also* OB 52.) They further contend that the SLC failed to consider whether DISH could utilize the doctrine of collateral estoppel specifically to "seek issue preclusion on the findings made in *Krakauer* and [*U.S. v. DISH*]" that "Dish's retailers were – as a factual matter – Dish's agents[.]" (OB 62-63.) In each case, Plaintiffs' contention is contradicted by the clear record.

The SLC expressly considered offensive collateral estoppel, but rejected it, determining that, because the "Director Defendants were not themselves litigants in the [DNC Actions]," they "would be able to take different positions on issues than

those found in the [DNC Actions]." (5JA001088-89 (Report).) This issue was considered by the SLC and discussed in its Report; there was no deficiency.

Moreover, the SLC treated the factual findings in the DNC Actions as if they would be found again in this action. As the District Court found, "the SLC accepted the decisions as fact and reviewed those determinations and considered them in reaching its conclusion." (77JA017657 ¶ 85 (FFCL).) Thus, despite concluding that collateral estoppel would likely not apply, the SLC effectively assumed that DISH would have the benefit of collateral estoppel when the SLC weighed the merits of DISH's Claims, even though doing so was likely contrary to governing federal preclusion law, *Taylor v. Sturgell*, 553 U.S. 880, 899-900 (2008).

Fundamentally, Plaintiffs' criticisms identify several ways that they would like to use the decisions in the DNC Actions to plead the Claims against the Director Defendants. They quote pages upon pages from the decisions to drive home their point that DISH was found to have engaged in misconduct. The SLC considered those pages and possibilities. But the SLC did so in the course of investigating whether the decisions in the DNC Actions, paired with the evidence reviewed in its investigation, would allow DISH to prove the Claims against the Director Defendants. The SLC determined that they would not. Plaintiffs have no colorable argument that the SLC's process was deficient, much less so deficient as to render the whole investigation a sham, and certainly not so deficient as to render the whole

investigation so resoundingly a sham that the District Court abused its discretion by not reaching Plaintiffs' desired conclusion.

IV. The District Court Did Not Abuse Its Discretion in Finding the SLC Independent.

There are no grounds to reverse the District Court's finding that the SLC was independent. Plaintiffs do not dispute the basic proposition, confirmed in *Jacksonville*, that a special litigation committee is independent if a majority of its members are independent. (*See* OB 34.) Nor do Plaintiffs dispute the District Court's finding that a majority of this SLC was clearly independent. For this reason, the District Court's decision that the SLC was independent must be affirmed.

Plaintiffs nonetheless grasp at straws, arguing that the District Court abused its discretion in making the independence finding. According to Plaintiffs, the SLC lacked independence because the two SLC members that the District Court found to be clearly independent, Messrs. Federico and Lillis, supposedly disagreed on a procedural issue during the course of the SLC's investigation. (OB 66.) The argument is meritless for at least three reasons.

First, there was no disagreement. Plaintiffs say that Messrs. Federico and Lillis disagreed as to whether, for purposes of its investigation, the SLC should accept as true the factual findings already made in the DNC Actions. (OB 66-67.) But, the District Court found no disagreement, finding instead that the "members [of

the SLC] accepted as fact the findings made in the decisions in the DNC Actions."[23] (77JA017629 ¶ 79 (FFCL).) The District Court had ample evidence supporting this determination. (*See, e.g.*, 76JA017297 (07/06/2020 Hr'g) (Lillis: "We accepted [Judge Eagle's] decision as true for her – from her trial and we didn't challenge that. We accepted it."); *id.* at JA017353 (Lillis: "We accepted the [*U.S. v. DISH*] judge's ruling[.]"); *id.* at JA017390-91 (Federico: "We accept *Krakauer*, what Judge Eagle said, we accept every single word of it, and we went off and looked at what are the director defendants doing in this period, what was going on."); 77JA017479 (Federico: SLC based its conclusions on assuming the DNC Actions' opinions were correct); *id.* at JA017539 (Brokaw: "We accept it as fact, the findings both of the jury and of Judge Eagles trebling opinion."); 4JA000805 n.167 (Report) ("[T]he SLC has proceeded as though the rulings made in the Underlying DNC Actions will stand and were well reasoned based upon the evidence presented and legal standards applied. The SLC's determinations do not depend upon the outcome of DISH's appeals in the Underlying DNC Actions.").)

For the proposition that there was disagreement, Plaintiffs refer only to potentially ambiguous testimony from Mr. Lillis that the District Court was best

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[23] Plaintiffs acknowledge this finding. (OB 67 ("The district court, erroneously disregarding Lillis's testimony, found 'the [SLC] members accepted as fact the findings made in the DNC actions.'").)

positioned to interpret. (*See* OB 21-22, 66-67.) They wholly ignore Mr. Lillis's crystal clear and repeated testimony that the SLC, even if it disagreed with certain findings, accepted them as true, for purposes of making its determination:

> Q Now, in your investigation of the facts, did you take the approach or the SLC take the approach that if a judge -- for example, if Judge Catherine Eagles made findings of fact in her treble damages opinion, you would accept those facts a[s] being absolute; those are facts that are judicially determined and you're going to take them as true?
> A **I would say that's true.** We accepted her decision as true for her -- from her trial and we didn't challenge that. We accepted it.
> Q You were not out there seeking to rebut her or the jury's findings of facts; correct?
> A I was not, no. . . .
>
> Q . . . So in the judicial system, you know, we have things that are called allegations and, you know, ideas and information, but once a judge or a jury makes a finding of fact, then it becomes the fact. Did you operate in the Special Litigation Committee based on that concept?
> A **Yes.** . . .
>
> Q And then with point two, you just disagreed with what the jury found? . . .
> A. We found something different, but I didn't -- **I accepted what the jury found. We investigated a different issue.**

(76JA017297-98, 17322-23 (07/06/2020 Hr'g—Lillis) (emphasis added).) There was no disagreement upon which to predicate Plaintiffs' argument for lack of independence.

Moreover, as a logical matter, a difference of opinion between two clearly independent members over a procedural point serves only to confirm their independence. It does not render the ultimate, unanimous, business judgment of

those members somehow non-independent. Even if Mr. Lillis had rejected the factual findings made in the DNC Actions for purposes of the SLC's investigation, Plaintiffs have not explained how it would have undermined the independence of the SLC or its business judgment.

The approach that the SLC took, based (at a minimum) on the approval of Mr. Federico and Mr. Brokaw, was the approach least favorable to the Director Defendants. It assumed that this action would reach the same conclusions as the DNC Actions had with respect to DISH's conduct. Thus, the SLC's decision could not have been impaired by any lack of independence from the Director Defendants, even under Plaintiffs' version of events.

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CONCLUSION

For the foregoing reasons, the SLC respectfully requests that this Court affirm the District Court's decision.

DATED this 26th day of May, 2021

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, font size 14-point, Times New Roman.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 13,990 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that the brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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

DATED this 26th day of May, 2021

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b), I hereby certify that on the 26th day of May, 2021, I served a true and correct copy of the foregoing **RESPONDENT SPECIAL LITIGATION COMMITTEE OF DISH NETWORK CORPORATION'S ANSWERING BRIEF** by electronic transmission to the parties on electronic file and/or depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below :

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