IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

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

Respondents.

Supreme Court No. 81704

District Court No.
A-17-763397-B

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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I. NRAP DISCLOSURE

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

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

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

Union No. 519 Pension Trust Fund and City of Sterling Heights Police and Fire Retirement System.

Dated this 25th day of June 2021.

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Plaintiffs-Appellants Plumbers Local Union No. 519 Pension Trust Fund and City of Sterling Heights Police and Fire Retirement System (together, "Plaintiffs"), by and through their counsel, submit this Reply Brief in response to Respondent Special Litigation Committee ("SLC") of Dish Network Corporation's ("Dish" or the "Company") Answering Brief ("Answering Brief" or "AB").

II. INTRODUCTION

Plaintiffs' Opening Brief ("Opening Brief" or "OB") details multiple errors of law and abuses of discretion when the district court granted the SLC's summary-judgment motion and deferred to the SLC's recommendation that Plaintiffs' meritorious claims be dismissed. Those errors include: (a) employing a preponderance of the evidence standard rather than a summary-judgment standard to Respondent-SLC's summary-judgment motion; (b) granting the summary-judgment motion despite finding that Respondent-SLC did not meet the summary judgment standard; (c) granting the summary-judgment motion even though the SLC did not investigate all theories of recovery or the sources of information that bear on the central allegations asserted in Plaintiffs' complaint; and (d) holding that the SLC Report was supported by an independent majority of SLC members when one member was known to be conflicted, the remaining members fundamentally

disagreed on the SLC's procedural approach to the *Krakauer*[1] and *Dish II*[2] findings, and nothing in the structure of the SLC demonstrated how such a fractured SLC could independently investigate the underlying alleged wrongdoing.

Respondent-SLC's Answering Brief fails to directly address Plaintiffs' arguments and instead lobs generalizations and ancillary attacks that have no bearing on the merits of Plaintiffs' arguments. Specifically, when responding to Plaintiffs' arguments that the summary-judgment standard should apply to the SLC's summary-judgment motion, the SLC seeks to invent a new burden of proof applicable to summary-judgment motions where evidence has been submitted in support of or against the motion. However, the standard for the summary-judgment motion Respondent-SLC chose to bring does not change because there was a hearing in support of that motion where the evidence, nearly all of which was attached to the summary-judgment motion and Plaintiffs' opposition motion, was presented in support of such motion.[3]

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[1] *Krakauer v. DISH Network L.L.C.*, No. 1:14-CV-333, 2017 U.S. Dist. LEXIS 77163, at *6 & n.6 (1JA000103) (M.D.N.C. May 22, 2017) ("*Krakauer I*"), *aff'd, Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643 (4th Cir. 2019) ("*Krakauer II*"), *cert. denied*, 140 S. Ct. 676 (2019). The Joint Appendix ("JA") is cited as: [Volume#][JA#]. Throughout this brief, emphasis is added and citations are omitted unless otherwise stated.

[2] *United States v. Dish Network LLC*, 256 F. Supp. 3d 810 (C.D. Ill. 2017) ("*Dish II*"), *aff'd in relevant part*, *United States v. Dish Network L.L.C.*, 954 F.3d 970, 975-76 (7th Cir. 2020) ("*Dish III*"), cert. dismissed, 140 S. Ct. 676 (2021).

[3] As noted in the joint motion requesting the evidentiary hearing, the SLC wanted to present live testimony of the previously deposed SLC members. *See* §III.A at 11,

Similarly, on the merits, Respondent-SLC's Answering Brief repeats blanket denials, citing inapposite authority and insisting that the SLC considered every challenge Plaintiffs made, without addressing the specific points made in the Opening Brief. Respondent-SLC fails to address the simple fact that the SLC did not analyze: (1) the inferences that could be drawn from the facts adjudicated in the *Krakauer* and *Dish II* decisions against DeFranco and the other Defendants for violating the Assurance of Voluntary Compliance ("AVC") and the Telephone Consumer Protection Act ("TCPA") in breach of their fiduciary duties; and (2) the use of offensive collateral estoppel against DeFranco and the other Defendants.

The SLC prematurely concluded that "no evidence" existed to support claims against DeFranco and the other Defendants without thoroughly evaluating or speaking to the inferences available from the *Krakauer* and *Dish II* trial court findings. Indeed, the SLC made that "no evidence" claim nearly 30 times in its Report, *see, e.g.*, 4JA000756(SLC Report:17), but pretending that there is no evidence is not the same thing as evaluating it and the SLC was duty-bound to do the latter. It is telling indeed that while the SLC's Report repeatedly used the "no evidence" formulation, its appellate brief never once tries to explain how that formulation could possibly be consistent with its duty to perform that analysis.

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infra. Thus, the only evidence not attached to the motion for summary judgment and opposition papers was the live testimony of the deponents.

Also glaring is the fact that the SLC Report and the Answering Brief utterly fail to address ***at all*** the use of offensive collateral estoppel. These theories are crucial to Plaintiffs' complaint and must be analyzed by the SLC to render its investigation either "thorough" or in "good faith" as required by *In re DISH Network Derivative Litig.*, 133 Nev. 438, 443 (2017) ("*Dish I*").

Moreover, Respondent-SLC has no meaningful retort to the fact that the SLC was compromised from the beginning when the Board of Directors assigned Defendant Brokaw to the SLC despite knowing he had already been found to lack independence by the district court in *Dish I* and also fails to adequately address the fact that the two other SLC members fundamentally disagreed on the procedural approach taken by the SLC in relation to the *Krakauer* and *Dish II* findings. But "the SLC has the burden of establishing its own independence by a yardstick that must be 'like Caesar's wife' – 'above reproach.'" *Beam v. Stewart*, 845 A.2d 1040, 1055 (Del. 2004); *accord Dish I*, 133 Nev. at 446-47 (maj. op.), 458 (Pickering, J., concurring and dissenting).[4] An SLC with at least one member who is not disinterested and two others who fundamentally disagree on their approaches to the SLC's task cannot meet that demanding standard.

[4] Nevada courts look to Delaware law as persuasive authority. *See Shoen v. SAC Holding Corp.*, 122 Nev. 621, 640-41 (2006), *overruled in part on other grounds*, *Chur v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 136 Nev. 68, 72 (2020). The first step of an SLC review under Delaware law is identical to the analysis required by *Auerbach v. Bennett*, 393 N.E.2d 994 (N.Y. 1979), and adopted by this Court in *Dish I*, 133 Nev. at 443.

III. ARGUMENT

A. The Summary-Judgment Standard Applies

A large chunk of the Respondent-SLC's Answering Brief is devoted to the SLC's contention that the summary-judgment standard does not apply to the SLC's motion for summary-judgment. *See* AB at 29-41. However, the Respondent-SLC cites no authority for the proposition that a different standard applies to a summary-judgment motion just because there is a corresponding evidentiary hearing in support of the motion. *Id.*

First, *Dish I* did not mandate fact-finding under the preponderance standard applied by the district court and instead adopted the holding in *Auerbach*, 393 N.E.2d 994. *Auerbach* makes clear that the summary-judgment standard applies to a motion to defer to an SLC's dismissal recommendations, holding that if the evidence "raise[s] a triable issue of fact as to the good-faith pursuit of [the SLC's] examination," the summary-judgment motion must be denied. *See id*. at 1003. Nor did this Court in *Dish I* state that a summary-judgment motion filed by an SLC is somehow converted into a different motion with a different standard such as a preponderance of the evidence. *See generally Dish I*, 133 Nev. 438. In light of the "'enormous power [vested in an SLC] to seek dismissal of a derivative suit brought against their director-colleagues,'" a mid-litigation change of the burden of proof to a lower standard defeats the purpose of allowing such a procedure by tilting the balance between these competing objectives too far in favor of the SLC. *Id.* at 1095-

97 (Pickering, J., concurring and dissenting) ("To earn this judicial deference, the SLC must demonstrate, usually after allowing the plaintiff discovery into the matter, that no genuine issue of material fact exists respecting the independence and disinterestedness of its members.").[5]

Importantly, the clear "weight of authority [where Courts have followed *Auerbach* is to apply] . . . normal summary judgment rules." *Will v. Engebretson & Co.*, 213 Cal. App. 3d 1033, 1041-42 (1989) (collecting cases). Upon failing to meet the summary-judgment burden, the action should then proceed to a trial on the merits. *Id.* at 1043 (holding that trial on the merits, rather than "limited review" of the good faith and independence of the committee is required).

[5] The Respondent-SLC's retort that Plaintiffs' received all of the discovery they wanted simply because the parties stipulated to the discovery that was produced is flat wrong. AB at 38-39. The discovery Plaintiffs received was simply a function of what the district court ordered produced in *Dish I*. *In re Dish Network Corp. Derivative Litig.*, No. A-13-686775-B, 2015 Nev. Dist. LEXIS 2181, at *40-*41 (D. Nev. Sept. 18, 2015). That discovery consisted of a small portion of the documents and information the SLC and Defendants chose to look at in their investigation and certainly was of limited scope compared to what Plaintiffs would have sought if conducting the same investigation or general discovery. "Special litigation committee members … are usually directors of the corporation and will likely be granted more generous access to corporate documents than a typical derivative plaintiff." *In re Oracle Corp. Derivative Litig.*, No. 2017-0337-SG, 2019 Del. Ch. LEXIS 1381, at *46 (Del. Ch. Dec. 4, 2019). In light of its "preferential access" to information, *see id.*, the SLC's suggestion that the preponderance standard should apply because Plaintiffs here were provided some small portion of the information to which the SLC had access is disingenuous. Because this litigation does not take place on anything even resembling a level playing field, the SLC should be required to satisfy the more-demanding summary-judgment standard, as indeed many courts – including those of Delaware – have required. *See, e.g.*, *Kaplan v. Wyatt*, 484 A.2d 501, 507-08 (Del. Ch. 1984), *aff'd*, 499 A.2d 1184 (Del. 1985); *see also Shoen*, 122 Nev. at 640-41 (this Court looks to Delaware decisions for guidance).

Courts across the country applying *Auerbach* are in accord. *See, e.g.*, *Boland v. Boland*, 31 A.3d 529, 561 (Md. 2011) ("the plaintiff can still avoid summary judgment by presenting a genuine issue of material fact regarding these issues, in which case judicial review should be engaged and thorough"); *TP Orthodontics, Inc. v. Kesling*, 15 N.E.3d 985, 990 (Ind. 2014) (applying summary judgment standard); *Davidowitz v. Edelman*, 583 N.Y.S.2d 340, 344 (N.Y. Sup. Ct. 1992) ("Since questions of law and fact exist . . . summary judgment must be denied."); *Gaines v. Haughton*, 645 F.2d 761, 772 (9th Cir. 1981) (applying summary judgment standard); *Hasan v. CleveTrust Realty Invs.*, 729 F.2d 372, 379-80 (6th Cir. 1984) (same); *Holmstrom v. Coastal Indus., Inc.,* 645 F. Supp. 963, 987 (N.D. Ohio 1984) (same).

Respondent-SLC even misleadingly cites *Day v. Stascavage*, 251 P.3d 1225, 1228-29 (Colo. App. 2010), to avoid admitting that summary-judgment rules apply. AB at 37 n.15. Not only did that court apply a summary-judgment standard, Respondent-SLC's counsel removed the clear reference to that standard from their quote by using a misleading ellipsis. The "burden of persuasion" counsel referenced is defined in the removed excerpt as, "showing that 'there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Id*. at 1229. The *Stascavage* court also quotes a treatise (Fletcher) that states that a "motion seeking dismissal based on [an] SLC report must show 'there is no

genuine issue as to any material fact and that [movant] is entitled to dismiss the complaint as a matter of law.'" *Id.* (second set of brackets in original).

Second, Respondent-SLC's argument is as preposterous as it sounds because parties in the United States legal system do not get to reduce the burden imposed by their chosen motion simply because an evidentiary hearing, as mandated by this Court here, was held in support of their summary-judgment motion. Respondent-SLC made the strategic choice to file a summary-judgment motion rather than another type of plenary motion. "'[W]hen a party makes a deliberate, strategic choice . . . , she cannot be relieved of such a choice merely because her assessment of the consequences was incorrect.'" *McCormick v. City of Chi.*, 230 F.3d 319, 327 (7th Cir. 2000) (quoting *United States v. Bank of New York*, 14 F.3d 756, 759 (2d Cir. 1994)).

The July 6, 2021 evidentiary hearing, required by *Dish I*, was in support of Respondent-SLC's summary-judgment motion and the parties' joint motion requesting the evidentiary hearing acknowledges as much when it states:

> In *In re DISH Network Derivative Litigation*, 133 Nev. Adv. Op. 61, 401 P.3d 1081 (2017), *reh'g denied* (Dec. 8, 2017), 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." 401 P.3d at 1088 (citations omitted). 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. The Motion to Defer is defined in that document as the SLC's motion for summary judgment. *Id.* ("On December 19, 2018, the SLC filed a Motion for Summary-Judgment Deferring to the Special Litigation Committee's Determination that the Claims Should Be Dismissed ('Motion to Defer').")

This Court in *Dish I* required an evidentiary hearing in support of the *Dish I* SLC's motion to defer, without mentioning any change in the summary-judgment standard. *See Dish I*, 133 Nev. at 444 ("[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."). That the parties presented evidence and that the district court had to grapple with that evidence is of no moment because district courts are required to grapple with evidence at every summary-judgment hearing.[6]

[6] Thus, Respondent-SLC's argument that this "Court could not have been clearer in requiring factual findings and rejecting a summary-judgment standard," is simply wrong. *See* AB at 31-32. Respondent-SLC filed a summary-judgment motion and if this Court wanted to adopt a rule in *Dish I* that summary-judgment standards do not apply to summary-judgment motions, it could have plainly so stated. Instead, the *Dish I* court merely held that because evidence was submitted to the Court in support of the motion to defer filed by the *Dish I* SLC, an abuse of discretion standard should apply to the appellate court's review. *See Dish I*, 133 Nev. at 444 n.2. The SLC's reliance on *Edwards Indus., Inc. v. DTE/BTE, Inc.*, 122 Nev. 1025, 1031-36 (1996) is misguided, as that case involved a traditional bench trial on the merits of a contract dispute, not a summary-judgment motion regarding the complex analysis of an SLC investigation as to which only sharply limited discovery was available. *Id.*

Moreover, when it accepted that the deposition transcripts and other evidence presented in the district court were sufficient to qualify the hearing in *Dish I* as an evidentiary hearing, this Court made no mention of changing the standard applicable to a summary-judgment motion. *Dish I*, 133 Nev. at 444-45 ("Here, the district court's hearing on the SLC's motion, which followed Jacksonville's discovery into the SLC's independence and good faith, was sufficient to constitute an evidentiary hearing because the district court and parties relied, at least in part, on deposition testimony."). Indeed, Plaintiffs' counsel was unable to locate another state applying a preponderance of the evidence standard for summary-judgment motions or that lowered the summary-judgment standard because a hearing was held in which evidence is presented in support of such motion.

Third, American jurisprudence is replete with claims that require various burdens of proof and also require evidence to be presented in order to meet those burdens. But none of this jurisprudence arbitrarily changes the burden of proof required for the motion before the court just because evidence was presented in support of the motion. *See, e.g.*, *Gerstein v. Pugh*, 420 U.S. 103 (1975) (evidence presented at probable cause hearings assessed under probable cause standard); *Berry v. State*, 131 Nev. 957, 968 (2015) (evidence presented at hearing on actual innocence assessed under actual innocence review standard of preponderance because the "'court's function is not to make an independent factual determination

about what likely occurred but rather to assess the likely impact of the evidence on reasonable jurors'"); *McNelton v. State*, 115 Nev. 396 (1999) (evidence presented at hearing on demurrer assessed under demurrer standard); *Eli Applebaum IRA v. Arizona Acreage, LLC*, 128 Nev. 894 (2012) (evidence presented at summary-judgment hearing assessed under summary-judgment standard of genuine issue of material fact); *Gillmor v. Thomas*, 490 F.3d 791, 797-98 (10th Cir. 2007) (reviewing district court's grant of summary-judgment following summary-judgment evidentiary hearing *de novo*, under standard of genuine issue of material fact); *Amdocs (Israel) Ltd. v. Openet Telecom, Inc.*, 761 F.3d 1329 (Fed. Cir. 2014) (same); *Univ. of Tex. v. Camenisch*, 451 U.S. 390 (1981) (evidence presented at preliminary-injunction hearing assessed under standard, four-factor preliminary-injunction test enunciated in *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567 (1974)); *Hathaway v. State*, 119 Nev. 248, 252 (2003) (evidence presented at good cause evidentiary hearing assessed under "'substantial reason; one that affords a legal excuse'" good cause standard); *Braunstein v. State*, 118 Nev. 68 (2002) (evidence of prior bad acts during evidentiary hearing assessed under clear and convincing standard as laid out in NRS 48.045(2)); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (evidence presented at evidentiary hearing on a law's "rational relationship" assessed under "rational relationship," not preponderance standard);

City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) (evidence presented at evidentiary hearing assessed under "intermediate scrutiny" standard).

Because the district court held that the SLC did not satisfy the summary-judgment standard, 77JA017614(Order:5 n.3), it was an error of law to grant the SLC's summary-judgment motion. "While review for abuse of discretion is ordinarily deferential, deference is not owed to legal error." *AA Primo Builders, Ltd. Liab. Co. v. Washington*, 126 Nev. 578, 589 (2010) (citing *United States v. Silva*, 140 F.3d 1098, 1101 n.4 (7th Cir. 1998)).[7]

B. The SLC Did Not Analyze the Inferences Available to Prosecute the Claims Asserted in Plaintiffs' Complaint

Plaintiffs' Opening Brief explained that to "conduct a good faith investigation of reasonable scope, [an] SLC must investigate all theories of recovery asserted in the plaintiffs' complaint," *London v. Tyrrell*, No. 3321-CC, 2010 Del. Ch. LEXIS 54, at *54 (Del. Ch. Mar. 12, 2010), and that while "the court should not question the SLC's substantive conclusions, it should examine what issues the SLC actually set out to address." *Boland*, 31 A.3d at 566. Because an "SLC cannot arrive at a reasonable answer if it addresses the wrong issues," it follows that "addressing the

[7] The district court's order, even under an abuse of discretion standard of review, plainly states that the SLC's motion failed to meet its burden of proof under a summary-judgment standard. 77JA017614(Order:5 n.3). The district court's finding that the SLC did not satisfy the summary-judgment standard should be dispositive here given that the SLC chose to file a summary-judgment motion which subjects it to a summary-judgment standard. Given the district court's finding that the SLC failed to meet its burden under the summary judgment standard, a *de novo* review also requires reversal.

wrong issues is an example of unreasonable methodology." *Id*. That the SLC Report here comprised many pages does not cure its deficiencies – "the mere length of the report or volume of items considered will not win the day for the SLC." *Id*. at 569.

Here, the SLC failed to investigate whether Dish's derivative claims could succeed against DeFranco and the other Defendants in light of the adjudicated facts from the *Krakauer* verdict and treble damages order, as well as the decision in *Dish II* – both of which were affirmed on appeal – and the facts that could be inferred from those adjudications. The SLC's failure to even consider the compelling inferences of the Director Defendants' breaches of fiduciary duty that could be drawn in connection with Dish's failure to comply with the AVC and the TCPA, that led to substantial damages for *Dish* in the *Krakauer* and *Dish II* adjudications, is itself a procedural deficiency that reveals the SLC's failure to undertake a good faith analysis of the Director Defendants' "legal liability" as required by *Auerbach*, 393 N.E.2d at 1002.[8]

[8] The damages in *Krakauer* were trebled because of Defendants' failure to cause the Company to comply with the AVC. Judge Eagles specifically held that "[t]he Compliance Agreement did not cause Dish to take the TCPA seriously, so significant damages are appropriate to emphasize the seriousness of such statutory violations and to deter Dish in the future." 2017 U.S. Dist. LEXIS 77163, at *35 (1JA000112). Thus, the SLC's spurious claim that Dish was not damaged by the AVC is simply wrong. AB at 46. Plaintiffs' claims are that Defendants breached their fiduciary duties by failing to cause the Company to comply with the AVC ***and*** the TCPA and that the SLC failed to investigate or even consider the inferences against Defendants that arise from those violations. Thus, the SLC's argument that "no party with standing to seek damages for a breach of the 2009 AVC had brought claims based on the 2009 AVC" is irrelevant. *Id.* Plaintiffs here, as shareholders, plainly have standing to challenge Defendants' breaches of their fiduciary duty to ensure that Dish complied with the AVC.

In response, Respondent-SLC avoids directly addressing the inference argument asserted by Plaintiffs, instead claiming that it investigated a breach of fiduciary duty claim based on violation of the AVC but "determined that the Director Defendants did not know that DISH was violating the 2009 AVC." AB at 46. It further argued that, in any event, breach of the AVC did not matter because it was only violations of National Do-Not-Call ("DNC") laws that damaged Dish. AB at 46-47. However, the SLC's strawman analysis sidesteps the crucial issue: ***assuming the DNC actions did not explicitly hold that the Defendants breached their fiduciary duties, do those cases inferentially support that proposition***.

The SLC repeated a mantra in its Report and at the summary-judgment hearing: "[n]o evidence suggested that [Defendants] believed that DISH was [not] complying with the 2009 AVC." 76JA017363-64(Transcript of Proceedings July 6, 2020("JH1"):146-47); 76JA017367-68(JH1:150-51); 4JA000756(SLC Report:17). But it never analyzed whether the evidence from *Krakauer* and *Dish II* supported an inference that the AVC and TCPA violations were "known, tolerated, and even encouraged," by Defendants. *Krakauer II*, 925 F.3d at 662-63. The *Dish II* court found that that "Dish created a situation [that] unscrupulous [retailers]" could exploit. 256 F. Supp. 3d at 978. And the *Krakauer I* court found that because "even a cursory investigation or monitoring effort" would have uncovered the violations,

"what Dish calls a mistaken belief is actually willful ignorance." 2017 U.S. Dist. LEXIS 77163, at *32 (1JA000110-11).

SLC member Lillis even acknowledged that Dish "easily could have discovered" these violations through minimal monitoring efforts, 76JA017341(JH1:124), and that the SLC "did not determine" that "Mr. Ergen and Mr. DeFranco didn't know anything about [Satellite Services Network ('SSN's') misconduct]," ***and concluded that DeFranco "certainly" knew***. 76JA017344-45(JH1:127-28). In addition to finding DeFranco "certainly knew," the SLC was also required to analyze whether an inference of willful ignorance could be drawn as to Defendants – as was the case in *Krakauer II*, 925 F.3d at 662 – and the SLC's "no-evidence" mantra makes clear it did not undertake ***any*** analysis of the inferences that could be had based on the *Krakauer I* and *Dish II* evidence. Indeed, Lillis's testimony makes clear that not only did the SLC not analyze the courts' findings, they did not accept them either. *See infra* at 28. These procedural errors reveal the SLC investigation to be "*pro forma*" or a "sham." *Dish I*, 133 Nev. at 450.

The SLC's Report is reminiscent of a disappointed diner claiming there is nothing to eat on a restaurant's menu. But that reaction is not a ***factual*** description of the situation. There ***are*** things to eat on the menu – the reluctant diner simply does not want to order them (for whatever reason). The situation here is analogous: there ***is*** evidence in *Krakauer* and *Dish II* from which an inference of director

liability could be drawn and the SLC's repeated assertions that there is "no evidence" are no more accurate than the reluctant diner's claim that there is nothing to eat. The SLC's "no evidence" claim is thus not an accurate factual assertion but rather reflects a failure to consider ***existing evidence*** upon which the complaint is based. Because "[an] SLC must investigate ***all*** theories of recovery asserted in the plaintiffs' complaint," the SLC's investigation is plainly deficient. *London*, 2010 Del. Ch. LEXIS 54, at *54.

Moreover, Respondent-SLC claims that there could not be a breach of fiduciary duty as to the AVC because "directors may knowingly cause a corporation to breach a contract, without becoming liable for the consequences of that breach." AB at 48. This again sidesteps the issue. The AVC was not just a run-of-the-mill contract, it was a promise to 46 state Attorneys General that the Company would take measures to comply with the law, in this case the TCPA. 1JA000014-15(AVC:3-4); 1JA000019(AVC:8). Dish, at Defendants' behest, agreed to comply with applicable telemarketing laws, including honoring DNC lists. 1JA000033(AVC:22). The AVC bound "all executives in DISH, including DeFranco and Ergen," who each received copies of the document. *See* 76JA017304(JH1:87); 76JA017308(JH1:91); *accord* 5JA000951-52(SLC Report:212-13). Thus, to breach the AVC would inherently include a violation of

the TCPA – the same positive law with which Dish agreed to comply when signing the AVC.

Moreover, the significance of the duties imposed by the AVC and Defendants' concomitant fiduciary duty to ensure compliance with it are made manifest by the consequences of non-compliance – under the terms of the AVC, "in certain states, a violation of [the AVC] is punishable by contempt, and, in others, a violation of [the AVC] is *prima facie* evidence of a violation of that State's consumer protection statute." 1JA000043(AVC:32(¶10.1)). It is shocking – and indicative of just how far off the rails the SLC's sham investigation went – that the SLC claims Dish's directors could blithely decide to expose the corporation to contempt sanctions and liability for violations of the consumer-protection statutes of multiple states. AB at 48.

It is ***always*** a breach of fiduciary duty to knowingly cause the Company to operate in violation of the law.[9] "Although directors have wide authority to take lawful action on behalf of the corporation, they have no authority knowingly to cause the corporation to become a rogue, exposing the corporation to penalties from criminal and civil regulators." *Desimone v. Barrows*, 924 A.2d 908, 934-35 (Del.

[9] As the Opening Brief explains, willful ignorance by Defendants is equivalent to knowledge, OB at 57-58 (citing *Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011)), and *Krakauer I* explained that Dish's state of mind was "actually willful ignorance." 2017 U.S. Dist. LEXIS 77163, at *32 (1JA000111); *accord Krakauer II*, 925 F.3d at 662 (holding that the *Krakauer I* court's willfulness finding "was firmly supported by the evidence").

Ch. 2007). "[T]his rather obvious notion; namely, that it is utterly inconsistent with one's duty of fidelity to the corporation to consciously cause the corporation to act unlawfully [has long been clear]. The knowing use of illegal means to pursue profit for the corporation is director misconduct." *Id.*; *see also Guttman v. Jen-Hsun Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003) ("one cannot act loyally as a corporate director by causing the corporation to violate the positive laws it is obliged to obey"). Moreover, even if violation of the AVC was not a violation of law – although by its terms it ***is*** a violation of law, 1JA000043(AVC:32(¶10.1)) – it could still be a breach of fiduciary duty as the failure to comply with the terms of the AVC was central to the *Krakauer* court's decision to treble damages against the Company. *Krakauer I*, 2017 U.S. Dist. LEXIS 77163, at *36 (1JA000112) ("Dish did not take seriously the promises it made to forty-six state attorneys general, repeatedly overlooked TCPA violations by SSN, and allowed SSN to make many thousands of calls on its behalf that violated the TCPA. Trebled damages are therefore appropriate."). Thus, the SLC's failure to consider whether an inference of Defendants' knowledge – or willful ignorance, which is equivalent to knowledge, *see Glob.-Tech Appliances*, 563 U.S. at 766 – associated with Dish's AVC violations is a fatal error to the SLC's methodology under *Auerbach* and *Dish I.*

And as for violations of the DNC laws, Respondent-SLC claims that *Krakauer I* "'did not suggest'" that 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.'" AB at 49. Another artful dodge. Plaintiffs' argument is not whether the *Krakauer I* and *Dish II* courts determined whether anyone at *Dish* knew about the DNC violations or were responsible for retailers' DNC compliance, but rather, ***assuming the DNC actions did not explicitly hold that the Defendants breached their fiduciary duties, do those cases inferentially support that proposition as to Defendants***. As described herein, the SLC failed to conduct this specific and required analysis, instead repeatedly claiming that there was no evidence of director misconduct rather than acknowledging that the *Krakauer* and *Dish II* adjudications supported such an inference ***and explaining why the SLC refused to draw it***.

That the *Krakauer* and *Dish II* courts did not make or "suggest" such a finding is irrelevant.[10] "The SLC cannot arrive at a reasonable answer if [it] addresses the wrong issues." *Boland*, 31 A.3d at 566. By failing to address the inferences that can be taken against the Director Defendants from *Krakauer* and *Dish II*, the SLC "address[ed] the wrong issues," rendering their methodology "unreasonable." *Id.*

[10] Put another way, because the *Krakauer* and *Dish II* courts were not required to find that the directors committed misconduct in order to impose liability on the corporation, it is of no significance whatsoever that those courts supposedly did not "suggest" that the directors were liable. *See Chawla v. Transamerica Occidental Life Ins. Co.*, 440 F.3d 639, 648 (4th Cir. 2006) ("as a general proposition, courts should avoid deciding more than is necessary to resolve a specific case").

Moreover, Respondent-SLC's claim that advice of counsel protects Defendants similarly fails. AB at 50-51. First, the SLC's advice of counsel defense only relates to whether Defendants believed the retailers were Dish's agent – not to Dish's AVC violations. AB at 50. Moreover, as noted in the Opening Brief, Dish could offer evidence at trial supporting an inference not only that the retailers, including SSN, were Dish's agents, ***but also that Defendants knew it***, OB at 62-65, thus satisfying – when taken together with Defendants' knowledge of its retailers' (and SSN's) wrongdoing – Nevada's requirement of a "breach involv[ing] intentional misconduct, fraud or a knowing violation of law." NRS §78.138(7)(b)(2); *Krakauer I*, 2017 U.S. Dist. LEXIS 77163, at *32 (1JA000110-11); *see also* OB at 62-65.

Second, while Respondent-SLC attempts to use purported advice of counsel as a shield to protect Defendants, it never analyzed whether such reliance was reasonable.[11] "[A] director or officer is not entitled to rely on . . . information, opinions, reports, books of account or statements ***if the director or officer has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted***." NRS §78.138(2)(c). As detailed herein and in the Opening Brief, the SLC never analyzed how the evidence it could offer at trial demonstrates

[11] The district court relied upon a "white paper and advice related to the relationship of the Retailers and oversight obligations" that Defendants supposedly received. 77JA017629-30(Order:20-21).

that Defendants ***knew*** facts demonstrating the existence of an agency relationship with its retailers, thus vitiating that purported advice. OB at 62-65. "If the SLC fails to investigate facts or sources of information that cut at the heart of plaintiffs' complaint this will usually give rise to a material question about the . . . good faith of the SLC's investigation." *London*, 2010 Del. Ch. LEXIS 54, at *54-*55. The SLC's investigation thus does not merit deference and the district court committed legal error and abused its discretion by deferring to it.[12]

C. The SLC's Consideration of Collateral Estoppel was Pretextual

The SLC agrees that an investigation is not thorough or in good faith where it was "'so restricted in scope, so shallow in execution, or otherwise so *pro forma* or halfhearted as to constitute a pretext or sham.'" AB at 43. However, just like the SLC Report, the Answering Brief does nothing to address Plaintiffs' argument that the SLC's consideration of offensive collateral estoppel was "shallow in execution."

Without explanation, the SLC claims to have considered and rejected offensive collateral estoppel as a means to hold Defendants accountable for the losses incurred by Dish because the "'Director Defendants were not themselves litigants in the [DNC Actions],'" and thus they "'would be able to take different

[12] Respondent-SLC's carping notwithstanding, AB at 42, Plaintiffs argued throughout their Opening Brief that the district court's deficient analysis – which essentially ignores Plaintiffs' arguments raised in this Court and below – was both legal error and an abuse of discretion regardless of whether the summary-judgment standard applied. *See, e.g.*, OB at 35 & n.12, 40 n.15, 50-51.

positions on issues than those found in the [DNC Actions].'" AB at 51-52. But this conveniently ignores the fact that under *Taylor v. Sturgell*, 553 U.S. 880, 894-95 (2008), nonparty preclusion is justified where there exists a "pre-existing 'substantive legal relationship[]' between the person to be bound and a party to the judgment," where the nonparty was "'adequately represented by someone with the same interests who [wa]s a party' to the suit," or where the nonparty "'assume[d] control' over the litigation in which that judgment was rendered." As the chief architect of *Dish*'s telemarketing practices responsible for creating, directing, and enforcing those practices who testified under oath in *Krakauer I* on Dish's behalf, Defendant DeFranco certainly satisfies all of these elements, making it highly unlikely he would be permitted to re-litigate positions on issues contrary to those that were litigated in *Krakauer* and *Dish II*, as the SLC portends. OB at 59-61. Yet the SLC failed to analyze issue preclusion or the inferences that could be drawn from facts established via collateral estoppel, and even now, at this late stage of the litigation, the SLC cannot offer a tenable – or even untenable – argument explaining how DeFranco could evade being subject to collateral estopped under a straight-forward application of *Taylor*.

Indeed, the Answering Brief is silent as to Plaintiffs' argument that the only form of estoppel actually addressed by the SLC was judicial estoppel. 77JA017480-81(Transcript of Proceedings July 7, 2020 ("JH2"):46:47) (citing 5JA001088-

89(SLC Report:349-50)). The SLC limited its analysis to judicial estoppel in an effort to reach a pre-ordained conclusion because judicial estoppel is "an 'extraordinary remedy'" to be "'cautiously applied only when "a party's inconsistent position [arises] from intentional wrongdoing or an attempt to obtain an unfair advantage."'" *Delgado v. Am. Fam. Ins. Grp.*, 125 Nev. 564, 570 (2009).

"[T]reat[ing] the factual findings in the DNC Actions as if they would be found again in this action," as the SLC claims to have done, does not equate to "effectively assum[ing] that DISH would have the benefit of collateral estoppel when the SLC weighed the merits of DISH's Claims." AB at 52.[13] The SLC did not consider whether the facts established in *Krakauer* and *Dish II* would support inferential knowledge in a trial of Defendants – and particularly DeFranco – under the doctrine of offensive collateral estoppel. In fact, the terms "collateral estoppel" and "issue preclusion" do not even appear in the SLC's 353-page Report and Lillis and Federico testified that they did not even know what collateral estoppel was. 76JA107349-350(JH1:132-33); 77JA017455-57(JH2:21-23). Avoiding the concept of offensive collateral estoppel intentionally removed from the SLC's investigation an analysis of how Dish could prevail in claims against DeFranco and the other Defendants. This procedural deficiency in the SLC's analysis demonstrates that its

[13] Nor did the SLC actually "treat[] the factual findings in the DNC Actions as if they would be found again in this action," AB at 52, as Lillis's testimony made abundantly clear. *See infra* at 28.

investigation was "'so *pro forma* or halfhearted as to constitute a pretext or sham,'" *Dish I*, 133 Nev. at 450, as evidenced by this additional failure to "investigate ***all*** theories of recovery asserted in the plaintiffs' complaint." *London*, 2010 Del. Ch. LEXIS 54, at *54. The SLC thus should have received no deference from the district court, and the latter both committed legal error and abused its discretion by failing to address this issue.

D. The SLC Was Not Independent

The structure of the three-person SLC here is different from the structure of the *Dish I* SLC where SLC member Lillis had veto authority over the other SLC members. This Court affirmed the lower court's independence findings in *Dish I* because of this unique voting structure. *Dish I*, 133 Nev. at 448 (affirming district court's finding that SLC was independent "based on Lillis's independence ***and*** the SLC's voting structure") (emphasis in original). Yet even though SLC member Brokaw maintains the same close personal relationships with Defendant Ergen and Ergen's family that destroyed his independence in *Dish I* and similarly caused the district court to decline to find he was independent here, in stark contrast to *Dish I*, no member of the SLC here has the veto authority granted to Lillis in *Dish I*. *Compare Dish I*, 133 Nev. at 448 *with* 77JA017627(Order:18 n.11). Thus, Respondent-SLC's reliance on Brokaw's assessment as being "the approach least

favorable to the Director Defendants" means nothing because he is still not independent. *See* AB at 56.

Moreover, the remaining two SLC members did not agree on the procedural approach and took diametrically opposing views as to whether or not to accept the facts adjudicated in *Krakauer* and *Dish II*. Although Federico claimed to accept every single word of *Krakauer* (*see* 76JA017390(JH1:173)), Lillis repeatedly admitted rejecting the courts' findings. For instance, he "rejected" the court's finding that Dish's misconduct was "willful[] and knowing[]," 76JA017337-38(JH1:120-21), as well as the courts' findings that SSN was Dish's agent. 76JA017344(JH1:127). There were many more examples of Lillis's refusal to accept courts' findings. *See* 76JA017311-12(JH1:94-95); 76JA017319(JH1:102); 76JA017330(JH1:113); 76JA017332(JH1:115); 76JA017334(JH1:117); 76JA017339(JH1:122); 76JA017347(JH1:130).

Even the citations Respondent-SLC submits in its Answering Brief confirm that Lillis did not accept as true the judicial findings in the *Krakauer* action. AB at 54. For example, when asked if he would take the judicially determined facts as true, Lillis responds: "I would say that's true. We accepted that decision ***as true for her*** . . . ." *See id*. at 55. "True for her" means that Lillis did not accept those facts as true; rather, he accepted that Judge Eagles believed those facts to be true (and implied that she was benighted, relying on facts that were only true for her). Thus,

Respondent-SLC's references to the unanimity of the SLC members are simply misleading.[14]

Moreover, Respondent-SLC's argument that "a difference of opinion . . . over a procedural point serves only to confirm their independence," AB at 55, cannot be true when the entire focus of this Court's inquiry is into the SLC's good faith and whether it can show that it has adopted "'methodologies and procedures best suited to the conduct of an investigation of facts and the determination of legal liability.'" *Dish I*, 133 Nev. at 457 (quoting *Auerbach*, 393 N.E.2d at 1001-03); AB at 55-56. The SLC has not met its burden here.

These conflicts compromise the good faith and independence of the SLC. Without a voting provision similar to *Dish I* and nothing directing the SLC how to proceed if one member is not disinterested or when its two purportedly disinterested members take diametrically opposed approaches, "[t]he composition and conduct" of the SLC cannot "instill confidence in the judiciary and . . . stockholders of the company that the committee can act with integrity and objectivity." *Biondi v. Scrushy*, 820 A.2d 1148, 1166 (Del. 2003). Once again, the district court both committed legal error and abused its discretion by failing to address this issue.

[14] The SLC's reliance on Brokaw's testimony, *see* AB at 54, is irrelevant because Brokaw is not independent due to his familial ties to Defendant Ergen and the district court declined to find him disinterested. 77JA017627(Order:18 & n.10).

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the district court Order be reversed.

V. CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, font size 14-point, Times New Roman. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6,801 words. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on

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

Dated this 25th day of June 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of June 2021, I submitted the foregoing PLAINTIFFS-APPELLANTS' REPLY BRIEF for filing and service via the Court's eFlex electronic filing system.

Judy Estrada, an employee of H1 Law Group