

1 LAS VEGAS, NEVADA, THURSDAY, SEPTEMBER 19, 2013, 9:35 A.M.

2 (Court was called to order)

3 THE COURT: You can sit down. All right. For those
4 of you who don't know, Mr. Fetaz was most recently my law
5 clerk after a two-year stint. I'm now training a new law
6 clerk. But he never worked on any of this case, because it
7 didn't exist when he was still here, and we had blocked him
8 from Brownstein Hyatt cases from the time he got an offer.

9 (Pause in the proceedings)

10 THE COURT: I was going to start with them and grill
11 them first.

12 MR. RUGG: I just wanted to give the Court one piece
13 of information. I shared this with all counsel last night,
14 and I think's material for Your Honor to know.

15 At a board meeting, a Dish board meeting last night
16 the board voted to put together a special litigation committee
17 to consider the allegations made in the first amended
18 complaint. And I think it's likely to and that we should
19 anticipate that the special litigation committee will make an
20 appropriate motion to stay this case while it does its
21 investigation.

22 THE COURT: Okay.

23 MR. RUGG: I called counsel about that last night so
24 they wouldn't be surprised.

25 THE COURT: Aren't you glad you knew that ahead of

1 time? I would have liked to know that.

2 MR. REISMAN: Your Honor, also just kind of a
3 housekeeping measure. Charles Ergen has his motion to
4 associate counsel pending today, and it's unopposed.

5 MR. BOSCHÉE: We have no opposition to it, Your
6 Honor.

7 THE COURT: Granted. Anything else?

8 MR. REISMAN: And I have an order for the Judge.
9 Should I submit it after --

10 THE COURT: You can.

11 Anything else before I grill you?

12 MR. BOSCHÉE: Before I let my co-counsel --

13 THE COURT: Because I've been on a roll grilling
14 people today.

15 MR. BOSCHÉE: And I appreciate that, Your Honor.
16 Before I let you grill my co-counsel, primarily, who is going
17 to directly and specifically answer all your questions this
18 week, I did want to say we did hear Your Honor's concern.
19 That's why we amended the complaint. I think -- and I
20 actually did a lunch training. I think we complied with terms
21 of 227 in terms of our appendix and everything that we
22 submitted with our order, but you're probably --

23 THE COURT: Your motion is too long. It's only
24 allowed to be 30 pages.

25 MR. BOSCHÉE: How long was the motion we submitted?

1 THE COURT: Thirty-seven. My kids asked me that
2 last night when I said, I wonder if I should just stop reading
3 at the page limit they're required to use.

4 MR. BOSCHÉE: I was going to say I thought the
5 authority was only 30 pages. I thought the extras was what
6 put it over, the appendix and whatnot. But that was a
7 clerical error on my part. I'm sorry. I thought that --
8 because we do have like a three-and-a-half or four-page
9 appendix.

10 THE COURT: In CityCenter I actually struck one that
11 was -- but it was like 44 pages.

12 MR. BOSCHÉE: Well, the idea --

13 THE COURT: Maybe it was 66.

14 MR. BOSCHÉE: The idea was to submit, obviously, a
15 30-page motion with obviously the long appendix and the
16 properly numbered documentation.

17 I did want to address before I let co-counsel
18 apparently get grilled by Your Honor, with respect to the
19 special litigation committee we did have -- and I appreciate
20 Counsel sending an email last night. The committee apparently
21 was formed approximately, giving Jeff the benefit of the doubt
22 that he let us know immediately after he knew, was formed at
23 about 11:00 o'clock Eastern Time last night, our concern being
24 why was a special litigation committee formed last night at
25 11:00 o'clock, on the eve of this hearing, as opposed to when

1 the Bankruptcy Court had presented issues, when we had filed
2 our complaint, when we initially come before Your Honor. I
3 mean, it seems a little odd to us.

4 THE COURT: Probably because you filed a new amended
5 complaint and it's something they should look at.

6 MR. BOSCHÉE: But then why didn't the committee form
7 -- wasn't it formed at that point? That's our concern.

8 THE COURT: I don't know.

9 MR. BOSCHÉE: And we also --

10 THE COURT: It doesn't really matter.

11 MR. BOSCHÉE: Well, we also don't know anything
12 about the committee was the other primary concern. We don't
13 know who's on it, we don't know what charge it has.

14 THE COURT: Who's on the committee, Mr. Rugg?

15 MR. RUGG: We require 48 hours' notice before a
16 meeting, so we couldn't do it right away. So --

17 THE COURT: Who's all on the committee?

18 MR. RUGG: The committee is made up of Mr. Tom
19 Ortolfo, who's a board member, and actually the day before the
20 meeting a new board member was elected to the board. There's
21 an AK on that. I'm happy to give it to you. His name is Mr.
22 George Brokaw. He is appointed to the committee. Though he's
23 not starting as a director until October 7th, he will be
24 serving on the committee immediately, which is allowed under
25 Nevada law. As long as there's one director you can have non

1 directors on it. So that's the membership of the committee.

2 THE COURT: So it's a two-member special litigation
3 committee?

4 MR. RUGG: It's a two-member special litigation
5 committee.

6 THE COURT: It's okay.

7 MR. BOSCHÉE: Charged with what doing what precisely
8 and under what timeline is the other concern we had. Because
9 that was something that wasn't addressed in the email. Those
10 are just concerns we have. At this late date we don't think
11 that should, absent a motion, interfere with anything that
12 we're going to talk about today. It's good to know, but --

13 THE COURT: Let me ask Mr. Rugg a question. Is the
14 special litigation committee going to only be concerned with
15 this litigation, or are they also going to look at the other
16 litigation that is identified in these pleadings?

17 MR. RUGG: My understanding is they're charged with
18 investigating the complaints made by this plaintiff.

19 THE COURT: Okay. That's fine. Anything else?

20 MR. BOSCHÉE: Is the a time -- well, yes. I mean,
21 under what timeline? Because obviously one of our concerns is
22 there's --

23 THE COURT: I'm going to grill you now, not your
24 co-counsel.

25 MR. BOSCHÉE: Okay.

1 THE COURT: One of the things that I sent you away
2 to do after our last discussion on whether I was going to
3 allow expedited discovery at this point in time was I need a
4 preliminary injunction motion. I now have that. And I'm
5 going to give you a break to answer this question.

6 MR. BOSCHÉE: Okay.

7 THE COURT: What are you really seeking to enjoin?
8 Because I've read your motion, and it's long and it's over the
9 page limit, but I still can't figure out, other than you want
10 to "enjoin Ergen and his loyalists on the board from
11 influencing or interfering with Dish's efforts to buy
12 LightSquared asset." Figure out what you're trying to do.

13 So how about I take a break for -- very short break.
14 As soon as you're done caucusing with your co-counsel I need
15 you to tell me what you are seeking by way of the preliminary
16 injunction so I can then make a determination if it is
17 appropriate, especially given the special litigation
18 committee, to allow expedited discovery before I have an
19 evidentiary hearing on the preliminary injunction. But I need
20 clarification.

21 MR. BOSCHÉE: More clarification, more specificity.
22 We will have that for you, Your Honor.

23 (Court recessed at 9:41 a.m., until 9:50 a.m.)

24 THE COURT: Sit down, please.

25 All right. Team Plaintiff, what's the answer?

1 MR. BOSCHÉE: We want to enjoin -- the short answer,
2 we want to enjoin the people currently controlling the bid
3 process from controlling going forward. We believe that given
4 the conflict situation and really Corporations 101, the people
5 controlling the process in a conflict situation, the
6 disinterested, the non-conflicted directors should be the ones
7 that are actually controlling the process. And the fact that
8 that isn't happening is creating an ongoing and, you know,
9 potentially even greater harm to Dish getting this
10 LightSquared bid. And truthfully, again, since the last time
11 we were here the Wall Street Journal article came out, and we
12 now know that's exactly what the special committee wanted to
13 happen, was for the disinterested directors to control this
14 process. And then Mr. Ergen just disbanded that committee.

15 So we believe at this point that's -- at the end --
16 I mean, I could expound on it, if Your Honor wants, but really
17 at the end of the day that's what we're looking for in terms
18 of an injunction, is for the people that are with Ergen, loyal
19 to Ergen, that Ergen clearly is controlling not be the ones
20 directing this process, that the disinterested directors --
21 and it sounds like we have at least two of them, because
22 they're on the special litigation committee -- would be the
23 ones controlling this process.

24 Also, Your Honor, one thing that Mr. --

25 THE COURT: And by "this process" you mean --

1 MR. BOSCHÉE: The bidding process.

2 THE COURT: -- the bid process at the live auction
3 the Bankruptcy Court is going to conduct in New York.

4 MR. BOSCHÉE: That's correct. And everything
5 leading up to that. Everything leading up to that, yes.

6 THE COURT: Okay.

7 MR. BOSCHÉE: And also, Your Honor, I did note one
8 thing that Mr. Rugg said that I think is probably important
9 for consideration of the preliminary injunction. I don't
10 think the new director starts until October 8th, is what he
11 said --

12 MR. RUGG: 7th.

13 MR. BOSCHÉE: 7th. Okay.

14 THE COURT: He's going to start on the committee
15 ahead of time because he's allowed to under Nevada law as long
16 as there's one director on the committee.

17 MR. BOSCHÉE: I understood that. My question was
18 going to be is he actually going to do that before he takes --
19 starts as a director on October 7th.

20 THE COURT: I thought that was what Mr. Rugg said.

21 MR. RUGG: That's my understanding.

22 MR. BOSCHÉE: Okay. And --

23 THE COURT: And everybody in the back row is saying
24 yes.

25 MR. BOSCHÉE: I didn't -- that wasn't clear to me.

1 THE COURT: Thank you, gentlemen, for that.

2 MR. BOSCHEE: And with that I will --

3 THE COURT: Okay. Let me tell what I have so --
4 because, as you can see, I have a large pile, so that if
5 someone thinks you submitted something that I don't have that
6 you can tell me.

7 I have the amended complaint that I reviewed with
8 interest last night, I have the motion for preliminary
9 injunction, I have Ergen's opposition, I have Dish Network's
10 supplemental opposition, I have Goodbarn's response, I have a
11 really fine appendix that makes other appendixes pale in
12 comparison, and I have two motions to associate counsel.

13 Mr. Ferrario, do you want me to grant Mr. Markel's
14 request?

15 MR. FERRARIO: Yes, Your Honor. And I have an order
16 here --

17 THE COURT: Okay. You can approach.

18 MR. FERRARIO: -- that I can submit after the
19 hearing.

20 THE COURT: And I think that's all I have. Does
21 someone think I have something more that's not in here? This
22 is from our prior hearing, this part of the pile.

23 MR. MARKEL: Your Honor, Gregory Markel. I'm not
24 sure if you want to include it, because I'm not sure it's
25 relevant to today, but there also was a motion to dismiss by a

1 couple of the parties, as well.

2 THE COURT: I don't have those on today.

3 MR. MARKEL: No, they're not on today. I didn't
4 know whether you wanted to --

5 THE COURT: I'm not going to do them, because
6 they're not on today.

7 All right. It's plaintiff's motion.

8 MR. LEBOVITCH: Your Honor, would you prefer to
9 grill me while I'm standing here, or at the lectern?

10 THE COURT: It doesn't matter to me as long as you
11 keep voice up. As I think I said -- I don't know if you were
12 in the room when I said this last time you were here. We use
13 a digital audio-video recording system, and it triggers by
14 who's talking. So sometimes it's really important that if
15 more than one of you talk at a time that we wait and be polite
16 and let others talk, because my record gets screwed up if too
17 many people try and talk at once. It will pick you up at
18 either the table or the lectern, but it is important that you
19 keep your voice up. And the recorder will give you a high
20 sign or something if she's having trouble hearing you. And if
21 it's really bad, the marshal will come hit you on the
22 shoulder.

23 MR. LEBOVITCH: I will speak slowly, which is my
24 normal problem. Volume has never been --

25 THE COURT: Never been your issue, huh?

1 MR. LEBOVITCH: -- never been a problem for me.

2 THE COURT: I look forward to that.

3 MR. LEBOVITCH: Most people complain about me being
4 too loud.

5 Well, thank you, Your Honor. And, as Mr. Boschee
6 said, we took to heart Your Honor's comments. We realized
7 that it made sense, and it really was an opportunity to update
8 our complaint to take into account the many new facts that had
9 arisen since we filed the initial complaint. Also to organize
10 it. The defendants had said that they weren't sure which
11 counts were implicated by our request for injunctive relief,
12 and so that's really the change that was made, is having Count
13 1 articulate our basis for injunction. And, of course, there
14 was a Wall Street Journal article. And our complaint really
15 tried -- our amended complaint tried to crystallize the
16 problem that Dish faces, Your Honor. Put simply, if not for
17 the baggage from Charles Ergen's prior and ongoing breaches of
18 duty, Dish would participate in a strategically critical
19 bidding process just like any other third-party bidder.
20 That's all Dish and its shareholders would ask for here.

21 And what we see now is that Harbinger and
22 LightSquared, which is the debtor and its lead shareholder,
23 they had pitted Ergen and Dish against each other, and they've
24 done so through a series of filings challenging -- they seek
25 to disallow Ergen's debt claims. That's a billion-dollar

1 personal investment by Charles Ergen that LightSquared and
2 Harbinger are seeking to disallow. They're also seeking to
3 disallow his vote, so he would lose voting rights.

4 They put Dish and Ergen together because Dish and
5 Ergen are acting in unison, and they say Dish is not a good-
6 faith bidder and therefore it should not get the benefits of
7 its stalking horse status. That's extremely valuable in an
8 auction, to get the bankruptcy law benefits of a stalking
9 horse. If Your Honor wants any clarification of what those
10 benefits are, I could talk about them, but --

11 THE COURT: No. I understand what they are.

12 MR. LEBOVITCH: They're very significant. Okay.
13 And Harbinger is proposing -- so you have LightSquared
14 proposing a bidding process that does not give Dish stalking
15 horse status. That's a bidding advantage. Harbinger is
16 proposing a reorganization plan that, as I said, attacks
17 Ergen's position and also would keep the spectrum in the first
18 place. So you have very -- numerous competing interests among
19 Dish and Ergen.

20 The Wall Street Journal article that came out the
21 day of hearing, I guess later that night, we did feel -- we
22 recognized that in our initial complaint we were making some
23 inferences. We said, this is very unusual to have Mr. Howard
24 resign in the time that he did. We understood that we didn't
25 know exactly why we were asking the Court to make an

1 inference. The Wall Street Journal article confirms that he
2 resigned in protest. It confirmed something we didn't know,
3 which is that the committee was actually disbanded before Dish
4 even made its initial bid. It confirmed that the board only
5 put two members on. That was in our initial complaint, but it
6 was an inference. The board essentially conceded there's only
7 two people that could be on the independent committee, Mr.
8 Howard and Mr. Goodbarn.

9 Now, why did the committee get disbanded? Because
10 it tried to act independently. It wanted to control the
11 bidding process going forward, and it wanted the ability to
12 have Mr. Ergen disgorge some of his profits on the debt that
13 he had purchased.

14 Now, why did the special committee have these
15 conditions? We talk about the DBSD litigation, which was a
16 prior negative event.

17 THE COURT: And that's before the bankruptcy judge?

18 MR. LEBOVITCH: It's before the same Bankruptcy
19 Court. I can't represent that it's the same judge, Your
20 Honor.

21 THE COURT: Okay.

22 MR. LEBOVITCH: I could look -- I could look that
23 up, but I don't know offhand.

24 THE COURT: If you don't know the answer, don't
25 guess.

1 MR. LEBOVITCH: I will not. But the special
2 committee and the board, having just lived through this, of
3 course they're aware of the prior debacle that Dish had to
4 suffer, and so it makes sense for them to say, we need to
5 control the process here because what you're doing is
6 upsetting LightSquared and Harbinger and we want to make
7 friends with them. And, of course, they say, we're not going
8 to let you make a bid if it means you get to keep all the
9 profits. We think there is a question about why you made
10 those -- about why you made those debt purchases and whether,
11 irrespective of what any charter says, you used confidential
12 corporate information --

13 THE COURT: And some of those purchases were made
14 prior to the bankruptcy filings.

15 MR. LEBOVITCH: Some of those were prior to the
16 bankruptcy filing. There was some small -- I mean, well,
17 hundreds of millions of dollars, but we're talking about I
18 think a billion dollars of debt was purchased at discounts, I
19 believe it was like somewhere between seven or \$800 million
20 out of pocket for Mr. Ergen. But we know when the committee
21 said, here's our conditions, he disbanded the committee, makes
22 the offer for LightSquared afterwards.

23 Now, all we're asking for today, Your Honor, is
24 discovery. We can talk about it, but we obviously think it's
25 very narrowly tailored, and it's -- we want to show the

1 predicate breach and the harm. Those are the elements of an
2 -- the key elements of an injunction that you prove through
3 discovery. We want to show that Mr. Ergen's handling of the
4 special committee was itself a predicate breach, his
5 insistence on controlling the process right now is an ongoing
6 breach, and that those breaches create the ongoing risk of
7 irreparable harm. That's what we're focused on.

8 Now, I want to on for now some of the defendants'
9 arguments that we saw in last night's briefs. So I tried to
10 prepare some responses very quickly. Start really with Mr.
11 Goodbarn's motion and perhaps highlight what it doesn't say.

12 Mr. Goodbarn's focus -- he never says -- he's one of
13 the two members, of course. He never says you shouldn't grant
14 the injunction, he never says it wouldn't help the company if
15 independent directors were in control of the process, he never
16 says there's no harm. What he basically says is, I don't want
17 to be deposed, I don't want to have to produce my own
18 documents. Of course, a lot of our requests, as I'll explain,
19 really go to the company anyway, but there are requests that
20 would go to the committee's files and to Mr. Goodbarn.

21 The fact is, Your Honor, these cases -- these cases
22 of breach of fiduciary duty that turn on bad on faith, they're
23 very sensitive to the evidence. We cited to leading cases
24 that I'll talk about, the Hollinger case and the T. Rowe Price
25 case, and, you know, what I can say with personal experience

1 on T. Rowe Price, because I was the clerk for Vice Chancellor
2 Lamb when he wrote that opinion, the end product, that opinion
3 was nowhere to be found when the complaint was filed, nowhere
4 to be found. And in fact the defendants in that case, as I
5 know the defendants in the Hollinger case also, started out
6 saying, demand is not excused and business judgment rule
7 applies and there's nothing to see here, please move on, Your
8 Honor. And on the discovery it was a close call, because
9 there were strong arguments of why you might apply the
10 business judgment rule in the T. Rowe Price fact pattern.
11 They went all out on that. And the court made a decision,
12 which, you know, I think the court said --

13 THE COURT: You know our statute's a little bit
14 different than the Delaware statute; right?

15 MR. LEBOVITCH: For good cause? I guess which
16 statute are we talking, Your Honor?

17 THE COURT: When there is an acquisition our statute
18 is slightly different on what we're supposed to consider.

19 MR. LEBOVITCH: Your Honor, the differences I don't
20 think would make a difference here, because we still look at
21 the conflicts and the fairness. In other words, there's still
22 a duty of loyalty, and here we're not talking about a duty to
23 maybe maximize value or something like that. We're talking
24 about a conflict transaction, okay, a bid by the company
25 that's being controlled by Mr. Ergen. And you still need

1 good- faith loyalty and independent -- an independent process.
2 And so I understand that there's differences, but I don't
3 think those differences would change an outcome here, Your
4 Honor.

5 THE COURT: Under the Nevada analysis you think that
6 there is the same analysis for disinterestedness as there is
7 in Delaware?

8 MR. LEBOVITCH: I think under the Amerco case, which
9 for demand futility --

10 THE COURT: Some of us call it Schoen II.

11 MR. LEBOVITCH: Schoen II. Okay.

12 THE COURT: Not the Supreme Court, but those of us
13 who've lived through all these --

14 MR. LEBOVITCH: Every time I come here, Your Honor,
15 I'll learn more of the local tendencies.

16 THE COURT: You'll learn something new, yes.

17 MR. LEBOVITCH: I will.

18 So under, you know, Schoen I and then Schoen II the
19 Nevada courts will look to Delaware. Obviously there could be
20 places where there's differences. I think on the facts here,
21 and we could talk about the independence of the board, it's --
22 I'm not aware of any state in the country that would actually
23 look and conclude that half or a majority of this board is
24 independent. And we can get to that. But, again, we say we
25 need to show the predicate breach. And, again, in the

1 Hollinger case and T. Rowe Price they're a close call till you
2 get the records. And even the records -- in T. Rowe Price I
3 can tell you, and it's in the opinion, the minutes are
4 sanitized. The key fact in the T. Rowe Price case was the
5 special committee members' handwritten notes. And I remember
6 because I found them, Your Honor. Those notes during meetings
7 that they took and kept said, how can this be fair, what are
8 we supposed to do when he's forcing it on us no matter what we
9 do. And that shows itself in the opinion, Your Honor. That's
10 what these cases are made of.

11 Now, the defendants say that we're seeking relief,
12 you know, based on future facts and that's prospective. In a
13 certain respect that's obviously true. That's what injunctive
14 relief is for. You have to show a predicate breach and
15 ongoing prospective harm that you're trying to stop, enjoin,
16 avoid. And so in the end that discovery that we're seeking
17 goes to the heart of what the Court would need to essentially
18 even consider the elements of an injunction and also to
19 consider how to fashion the relief in an appropriate way.
20 This is a unique fact pattern, although, again, I think the
21 legal principles of loyalty and good faith are -- should be
22 clear, and I think the evidence will make even clearer.

23 One last point about Mr. Goodbarn before I move on
24 is he says -- kind of says he shouldn't be deposed and that
25 his counsel should not be deposed. As to him we put in a

1 sentence in our brief at the end that it may be -- and we
2 wanted to flag it, Your Honor -- it may be that we take one of
3 committee members and one of the other directors. We said
4 that. And, again, you know, if we had had a chance to discuss
5 it with Mr. Goodbarn's counsel, that may have been something
6 we would do, because we may not need both special committee
7 members. Clearly we think we need one.

8 As far as counsel goes, we're not trying to get
9 someone's privileged advice unless it's going to be waived.
10 But in a corporate transactional context lawyers are -- the
11 corporate lawyers, not Mr. Markel, but he's going to have a
12 corporate partner who is advising the committee just like a
13 banker. They negotiate with the other side, with Ergen.
14 They're adversarial, and it is very typical that lawyers there
15 would be deposed. Again, in the T. Rowe Price case my
16 recollection is that that happened. I don't remember if the
17 opinion identifies that. And the Hollinger case was very
18 heavily lawyered. Some of the lawyers in this room or at
19 least their firms were involved, and lawyers were being
20 deposed, because I remember I was on the defense side for one
21 of the parties at that time.

22 The relief we're seeking is really not radical. The
23 defendants like to say we've changed our whole complaint,
24 abandoned our whole complaint. I think we dealt with that.
25 We simply reorganized it, because it was true with all these

1 new facts we have to clarify for the Court and for everyone
2 what is the relief we're seeking, but the relief we're seeking
3 is not this mandatory injunction. In fact, part of the relief
4 that was granted in the Hollinger case is very similar. In
5 the Hollinger case Mr. Black, when he decided that the special
6 committee, the independent directors were being too
7 independent, posed a threat to him, he disbanded it. Now, he
8 did it through bylaws, but he disbanded that committee. There
9 that committee kept fighting. And what the court said on the
10 record that was before the court is, this disbanding is of no
11 use, it's not a valid act, it's a breach of fiduciary duty
12 because it was disloyal and not taken in good faith. That was
13 then Vice Chancellor Strine's -- now he's a chancellor -- but
14 that was based on a very full record. And so this is not --
15 it may be unusual because the situation doesn't come up, but
16 there's precedent for saying, I'm not going to let you take
17 away from independent directors something that you had granted
18 to them for good reason and in part because that's creating an
19 ongoing harm.

20 The assertion that we're supporting Harbinger or
21 supplanting the Bankruptcy Court doesn't really fly. Just the
22 opposite. Any independent board facing this situation, Your
23 Honor -- and I don't know -- we'll try to present evidence if
24 that's helpful to the Court -- any independent board here
25 would say, we need an independent process, because of the

1 ongoing lawsuits we need independent process, and so all we're
2 trying to do is make it harder for the Bankruptcy Court to
3 hurt Dish here by getting a ruling here, absent any agreement
4 with the defendants, to send the message to the Bankruptcy
5 Court Dish is acting independently, you shouldn't punish Dish
6 even if you're not happy with what Mr. Ergen did. That's we
7 believe Corporate Governance 101, and that's really what --
8 we're just trying to bring the parties back to that situation.

9 Now, again, there's an ongoing problem. It's not
10 hypotheticals, who you see a lot in our papers it's
11 hypotheticals of what may or could happen, it's the nature of
12 injunctions, but our facts that will support the injunction
13 are based on ongoing breaches, which is, we allege, buying the
14 debt without telling the board, knowing that it's going to put
15 Dish in a precarious position when it tries to pursue a
16 strategic objective that Mr. Ergen himself has said is
17 essential, and also disbanding the committee to ensure that he
18 controls what Dish does, rather than face the chance that the
19 committee actually goes against his wishes.

20 And, again, there's ongoing harm. And I want to
21 talk about the conflict, because there's a fair amount of
22 discussion that there's really not a conflict. If you assume
23 the only question is will Ergen be paid and you assume the
24 bidding has already cleared his price, well, that's what the
25 defendants want to focus on, that's he'll be paid as long as

1 the bidding goes there. But they're just ignoring the key
2 facts that we put in the complaint, put in the brief.
3 Harbinger and LightSquared are attacking his position.
4 They're seeking to invalidate it, they're seeking to disallow
5 his economic claims. A billion-dollar personal investment
6 that he that has is under attack is under attack. Dish has a
7 very significant strategic objective that it's trying to
8 pursue. And the only reason why it faces a risk from the
9 Bankruptcy Court -- I mean, in other words, it's always going
10 to face a risk of losing in the bidding, but the only risk it
11 faces of losing its stalking horse status or other equitable
12 relief the Bankruptcy Court can provide is because Ergen's not
13 letting go.

14 So we have a very real conflict, because there's a
15 real lawsuit, they're real claims, and really, you know,
16 again, had Ergen not bought the debt and not disbanded the
17 committee, these risks either would not exist or would be
18 significantly mitigated. And what we're asking the Court to
19 do is take a look at a real-world problem and provide a real-
20 world solution to it.

21 Now, the DBSD case, there's an argument that the
22 defendants make that, you know, the facts of DBSD are
23 different. We don't dispute that. The facts are different.
24 The point is that to show the broad equitable powers that the
25 Bankruptcy Court has and, more importantly, show that the

1 board knows that Dish itself has already gotten into trouble
2 in the past in being found to have acted in bad faith. That
3 just supports why any board acting in good faith, acting
4 independently of Ergen would kick him out of the room. It's
5 just what happens. You say, Mr. Ergen, you've got a conflict,
6 get out of the room. And I think we -- I don't remember if it
7 was in our brief or not, Your Honor, but picture a slightly
8 alternative scenario. Picture a board that doesn't have a
9 controlling shareholder, picture a board that has some
10 activist, a Carl Icahn or a Bill Ackman or, you know, you name
11 it, someone who gets himself on the board and the company's
12 looking to buy a bankrupt entity, and then Carl Icahn, who's
13 not in control of the board, says, oh, by the way, I bought a
14 billion dollars of the target's debt. There should be no
15 doubt in anybody's mind that that board would say, Carl,
16 you're out of the room, you're not part of this process at
17 all, we're not going to debate it, we're not going to justify
18 it, you're out. And I don't think Mr. Icahn would have any
19 problem with that, because he'd understand he has to be
20 isolated.

21 Demand. I think that -- I believe it was the Dish
22 brief -- and, again, we got them late last night, but I
23 believe it was the Dish brief that talks about demand. And
24 it's interesting, they cite a lot of law that you have to
25 establish demand. They don't actually give any facts that

1 show that the board is independent. And that's because they
2 can't, Your Honor. All they say is there's no conflict.
3 They'd have to show that a majority of the board could
4 consider a demand. There's an eight-member board at the time
5 this complaint was filed. Mr. Ergen, Mrs. Ergen, his best
6 friend and business partner for 40 years, and the CEO, that's
7 half the board right there. And I am -- again, you know, I
8 don't think there's any basis in Nevada law or the law of
9 essentially any state that looks at independence to say that
10 ties like that, I mean, family relations, a CEO with a
11 controlling shareholder or a best friend and business partner
12 for 40 years would not be disqualified for demand purposes.
13 And then obviously we also talk about the other three
14 directors who were question because of their longstanding ties
15 with Ergen and being current or former executives.

16 But in the end it's about the conflict, Your Honor.
17 They say there's no conflict, therefore you don't have to
18 consider demand because there's no reason to look at
19 independence. If Your Honor sees that there's no conflict
20 here, then that position is going to be ripe. But if Your
21 Honor sees the potential for conflict that warrants discovery
22 and a possible hearing, which we think should be eminently
23 reasonable, if not very much a given, then demand is going to
24 be excused for these purposes.

25 Irreparable harm. Again, we think the defendants

1 try to change the story. They say, well, we're going to have
2 a bidding process for the spectrum so we know what it's worth.
3 That's really not the issue from a Dish perspective. The
4 question is what is the benefit to Dish of getting the
5 spectrum and what is the harm from Ergen's breaches. And our
6 point, Your Honor, is there may be scenarios where with
7 hindsight we could say, well, you know, Ergen cost the company
8 an extra \$200 million or \$400 million, and we could award
9 money damages. But there's a lot of very obvious scenarios
10 where it would be very difficult to quantify that in court.
11 If they could have gotten the company at 2 billion and now
12 they have to bid 2.4, how much of that extra cost will be
13 attributable to the problems Dish has because of what I'll
14 call the Ergen baggage? If they lose the bidding -- if
15 there's no sale of the spectrum -- you know, that's what
16 Harbinger's proposing; they're also attacking Ergen's debt, so
17 is it possible that the spectrum would be sold if you didn't
18 have all this distraction with Ergen's debt purchases and
19 controlling Dish? That's entirely possible, Your Honor. And
20 so while anyone can talk about what, you know, scenarios can
21 result in money damages, and we recognize that there were
22 scenarios that can result in money damages, there's a high
23 likelihood that Ergen's breaches are currently impairing Dish,
24 and if there's going to be any harm, it may well be
25 irreparable harm. So that's really what we're trying to do.

1 And, again, Dish just wants to be treated like a
2 third-party bidder. They just want to top anyone else that's
3 out there, win the bidding. Ergen's involvement is impeding
4 that, and that's what the special committee told Your Honor.

5 Pretty much at the end, and then I'll turn to the
6 discovery requests, if Your Honor would like. But the
7 balancing of harms and the public policy, we see an argument
8 from I guess it was Dish or Ergen that the board has done a
9 good job for the company, that was kind of the argument. We
10 don't dispute that. When there's no conflict of interest
11 between Ergen and the shareholder -- and the other
12 shareholders, they do a good job of running the business.
13 That's not uncommon with a controlled company. The whole
14 question is what happens when there's a conflict between the
15 controller and the shareholders. That's the point. And so
16 the fact that they're good at other times doesn't mean you
17 shouldn't have an independent process when there's a conflict.

18 Again, with the Bankruptcy Court, Your Honor would
19 not be supplanting the Bankruptcy Court's findings at all.
20 All Your Honor would be doing, if we can convince Your Honor
21 on the evidence, is saying, Dish is going to act
22 independently, that can only send a positive message to the
23 court -- the Bankruptcy Court to say, there's no reason to
24 hurt Dish here.

25 And then really, on the discovery, I can go -- I

1 don't know if Your Honor wants me to go through the requests,
2 but they are very focused --

3 THE COURT: I don't want you to go through the
4 requests. I read them. I understand them. I know what they
5 say.

6 MR. LEBOVITCH: Okay. They're very focused on the
7 special committee's actions and what's happening now. And if
8 there's --

9 THE COURT: Talk to me about the impact of the
10 special litigation committee.

11 MR. LEBOVITCH: Okay. Okay. There's -- the special
12 litigation committee is not taking over the process right now.
13 As far as I could tell and as far as any special litigation
14 committee I've seen, particularly one that I guess may or may
15 not be getting off the ground before October 7th, they're not
16 going to reach a conclusion and take action by the end of
17 October, early November, which is when we believe injunctive
18 relief is warranted. They might look into the debt purchases,
19 but we're not even seeking to expedite that. That's a long-
20 term process. So we don't know their charge, we don't know
21 their timing. We have a history, obviously, with Mr. Ergen
22 disbanding the last special committee. All we got is an
23 11:00 p.m. email saying, a committee's been created. No
24 information about what it does.

25 Now, what would -- and I understand Nevada can

1 approach these things differently, but we did find some
2 precedent in Delaware where the Delaware courts have said, I'm
3 not going to slow things down because of a special litigation
4 committee. And particularly because the board member's not
5 officially joined until October 7th and we don't know what
6 role will be had or what timing is being imposed on the
7 committee, so it's very possible that the irreparable harm
8 will come and pass long before the committee gets off the
9 ground, much less takes action. And I say that because, from
10 experience, these committees do investigations -- when they're
11 thorough and not just a whitewash it takes time. They hire
12 their own lawyers, it takes time.

13 But in the Kaufman versus Computer Associates I
14 believe it was Vice Chancellor Lamb who said that, "A sham SLC
15 that is established merely as a device for delaying litigation
16 will receive little respect from the court." And I do note,
17 Your Honor, that Dish has already said they're going to be
18 moving to dismiss. We were surprised to hear that Mr.
19 Goodbarn is not on the special litigation committee, that it's
20 a different director whose independence has been challenged
21 here, he's a former executive. And what you have, though, is
22 in the Kaufman case Vice Chancellor Lamb actually explains,
23 you know, these people, they're not only named as defendants
24 that comprise now this newly created special litigation
25 committee, they move to dismiss, they move to dismiss. And he

1 says, "Rather than taking steps to investigate at the time the
2 allegations were brought, they filed a motion to dismiss. How
3 can I ignore that?" And, again, Your Honor, the cite -- the
4 cite for it is 2005 WL 3470589, (Del.Ch. December 21st, 2005).

5 So we think that the special litigation committee,
6 maybe it's going to do a great job down the road, maybe it's
7 going to find that the charter provision, notwithstanding what
8 Mr. Ergen and Dish have said, you know, is an absurd argument,
9 maybe they'll find it's a good argument. We know the old
10 special committee thought it was good enough that they wanted
11 the ability to disgorge. But that's not going to solve the
12 immediate problem, and we don't think that getting the limited
13 discovery we seek in any way impairs the special committee's
14 efforts. We think if there's confidentiality concerns, it is
15 standard, as all the lawyers here sign all time, we could do
16 attorneys' eyes only confidentiality agreements to preserve
17 the confidentiality of anything that's sensitive. And again,
18 if the special litigation committee looks at our complaint and
19 finds it meritorious, in our experience they'd talk to us and
20 work with us. That's almost universally what happens if
21 they're actually finding merit in the cases. And so the fact
22 that we get some discovery now over the next few weeks, before
23 the committee even gets off the ground, is frankly completely
24 relevant. And, again, I think it would be very prejudicial to
25 assume the independence of the committee right now knowing

1 that one of the members, his independence is already being
2 questioned in this litigation and also the timing of the
3 committee's creation and the lack of clarity about what
4 they're doing, coupled with the near impossibility that this
5 special litigation is actually going to have the time or
6 ability to take over the process to save Dish now while we're
7 seeking injunctive relief. Does that satisfy Your Honor, or
8 at least answer your question?

9 THE COURT: Thank you. I'll let you have a chance
10 to stand up again if you want.

11 MR. LEBOVITCH: Thank you, Your Honor.

12 THE COURT: Mr. Rugg.

13 MR. RUGG: Thank you, Your Honor.

14 This case is really not complex. The complex
15 machinations of plaintiff set aside, the issues presented to
16 the Court are pretty straightforward. Number one, is there a
17 conflict that needs to be enjoined? Plaintiff can't point to
18 a conflict. They keep looking backwards, they keep saying
19 that the debt creates a conflict. We've presented and the
20 facts support that Mr. Ergen's affiliates' ownership of the
21 debt is not creating an ongoing conflict at this point.
22 Everybody's interests are in line in seeing Dish succeed in
23 the bidding process. What plaintiffs want is the extreme
24 remedy of taking out the duly elected board, setting them
25 aside, and leaving -- I'm still not exactly sure -- I think

1 one board member, Mr. Goodbarn. But they sued him, too, so
2 I'm not even sure that he qualifies under their independence
3 rules, to make very important decisions on a multibillion-
4 dollar transaction going forward. That is an extreme remedy
5 and is not something that you can point to precedent that's
6 been allowed by anything. Nevada in Schoen and its statutes
7 say that a board controls the business of the company. Nevada
8 also has a statute, as Your Honor has pointed out, 78.140,
9 that deals with transactions that might involve a conflicted
10 director. It doesn't mean that you have to take out the
11 conflicted director. There are several ways that a board can
12 act within it's fiduciary duties and conduct a transaction
13 where there's an interested director.

14 So we think that either way, even if there was a
15 conflict here -- and we don't think there's a conflict going
16 forward at this point. But even if there was a conflict here,
17 it can be resolved by the Court by looking and being advised
18 on 78.140 and actng in compliance with it. If down the line
19 plaintiff still contends that that transaction is then --
20 wasn't appropriately handled, that's a case plaintiff can
21 bring at that time. But there's no need to enjoin the duly
22 elected directors from doing their job.

23 And coming back to the conflict, all they point to
24 is the debt. Now, they talked to Harbinger, as well. Now,
25 Harbinger is a --

1 THE COURT: Under the items in the Nevada statute
2 that doesn't seem to be a conflict, the debt.

3 MR. RUGG: Yeah. Harbinger --

4 THE COURT: I mean, there's certainly issues, but --

5 MR. RUGG: Right. Because in some ways by arguing
6 Harbinger they're saying that whenever a corporation is sued
7 its board must have breached its fiduciary duties. And we
8 know that's not the case. Harbinger, by the way, is suing
9 everybody in the industry to try to stop them from getting the
10 debt. I mean, they've started -- I understand from my New
11 York colleagues they've started actually a RICO case against
12 pretty much everybody in the GPS industry to try to keep them
13 away from their spectrum. Harbinger is desperate to go
14 through bankruptcy, get rid of its debt, but keep its asset.
15 I'm not going to comment here on the bankruptcy process. I've
16 had my own experiences over there in Bankruptcy Court that
17 color it to some extent, but that's a question for the
18 Bankruptcy Court. And let the Bankruptcy Court deal with it.
19 It's not something for this Court, and it doesn't -- just the
20 fact that Harbinger has sued Dish doesn't mean that Dish has
21 done anything wrong or that its board has breached its
22 fiduciary duties or that there's an existing conflict going
23 forward. Otherwise, as we've said, once a company is sued
24 they'd have to appoint non directors to figure out how to
25 handle even a lawsuit against the company.

1 Now, just to be clear about the facts that I think
2 motivated the amended complaint. They want to point to a Wall
3 Street Journal article. The Wall Street Journal article,
4 bunch of unnamed sources. And if we're going to go by the
5 Wall Street Journal article, we've provided a different Wall
6 Street Journal article to Your Honor that says the Dish board
7 is actually doing pretty well by its spectrum and it's
8 increased it by --

9 THE COURT: And I try not to worry about what the
10 media says.

11 MR. RUGG: And I think that's fair. So we set aside
12 the Wall Street Journal article. We've already talked about
13 the Harbinger complaint. Let's talk about the other facts
14 that caused plaintiff to amend its complaint.

15 The other facts were facts that they should have
16 known, the articles of Dish. The articles of Dish deal with
17 the situation. They accuse Mr. Ergen of having stolen a
18 compare opportunity. The articles dealt with it, it's proper
19 under Nevada law, 78.080. The articles say -- and this is a
20 place where plaintiffs kind of pervert what the articles say.
21 The articles say that amongst the three items that are part of
22 the test is that the opportunity must have been presented to
23 the board member solely in his role, or her role, as a board
24 member. They pervert that to he learned of it. That's not
25 what the articles say, and you don't get to go there.

1 Now, plaintiffs try to distance themselves for
2 purposes of this hearing and say, well, we're just focused on
3 forward conflicts, but then they argue that everything in that
4 happened in the past somehow should cause Your Honor to grant
5 them expedited discovery and in the future a preliminary
6 injunction. And the articles deal with that issue clearly,
7 not in a complex fashion.

8 The other thing that came out from our prior
9 opposition, which is why I think it's still effective, and we
10 did a supplement for the company, is the credit agreement. It
11 goes back to what Harbinger's motivation here is. Harbinger
12 was in the process of trying to keep everybody out of its debt
13 so that none of them when it went bankrupt could come in and
14 buy its assets from the preferred position of the stalking
15 horse. They knocked out Dish. We don't dispute that. That's
16 [unintelligible] an issue that's before the Bankruptcy Court.
17 But they did not knock out Mr. Ergen, and Mr. Ergen made the
18 purchases. So it can't be that he stole a corporate
19 opportunity, because Dish never had that corporate
20 opportunity. It was disallowed by Harbinger, the folks that
21 plaintiffs align themselves with.

22 Now, that -- to move us past the simple aspect of
23 this case that is not complex, because we're just focused on
24 expedited discovery, and I'm not going to try to argue the
25 whole preliminary injunction here, though it does go to the

1 issue of good cause. When you talk about good cause you have
2 to have some reason to do this. We focus on Count 1. That's
3 the only count that plaintiffs say that they're going to move
4 for injunction on. So is there any substance to Count 1, the
5 demand futility issue?

6 Count 1 can be knocked out on demand futility.
7 Demand futility is appropriately heard on a case-by-case
8 basis. Demand futility happens to be one of the rare places
9 in Nevada law where the Nevada Supreme Court has said, by the
10 way, we'll look at Delaware for this aspect of law. I know
11 Your Honor has heard many lawyers come in here and say that
12 Nevada should look to Delaware corporate law on almost
13 anything; but this was a very unique place where the Nevada
14 Supreme Court has been clear and said, for demand futility
15 we'll look to Delaware law, [unintelligible].

16 So let's look -- but that does wrap us back into
17 where there's a conflict, because the question is
18 independence. And independence is whether there's a conflict.
19 Going forward on this prospective-looking claim there is no
20 conflict. The board that's in place is actually more
21 interested in its own personal holdings in Dish than they
22 could possibly interested in Mr. Ergen's affiliates' ownership
23 of the debt. Even Mr. Ergen himself, as we put together some
24 math for Your Honor, is more interested in his holdings in
25 Dish than he would be by any possible profit he could make on

1 the affiliates' ownership of the debt. So if the demand had
2 been made, this board would have been on this claim to
3 consider with its independent judgment and decide going
4 forward.

5 And that goes to really plaintiffs are seeking.
6 Plaintiffs are seeking to displace the judgment of the board
7 on an issue that's really just a matter of business judgment;
8 because there is no conflict. All they're talking about is
9 what's the best way to proceed to get in the bidding process
10 to win the bid. And that's just a matter of business
11 judgment. Nevada has a statutory business judgment rule, and
12 it should be applied here and allow the board to do its job.

13 Other things that the plaintiff has thrown out in
14 its pleadings that don't stand up. Number one, they do admit
15 that the Dish board's actions so far has actually put it in a
16 pretty good position in the bankruptcy. They got aligned with
17 the ad hoc group of lenders -- actually, they negotiated with
18 an independent group of the ad hoc group of lenders -- that
19 was presented and attached to our prior opposition -- and put
20 themselves as the cornerstone of that ad hoc group's proposed
21 claim, which could make it the stalking horse in the process.

22 Additional facts that go against what plaintiffs
23 claim is the problem here. They actually ignore what the
24 market has done. And we've talked about the Wall Street
25 Journal, but we've also attached an analyst's report. The

1 analyst's report from City Research shows that Dish has put
2 itself in position to make a seventeen -- to increase the
3 stock price by \$17. That's actually a pretty good position,
4 and plaintiffs should be happy about that.

5 Additionally, they talk about Mr. Howard's
6 resignation as meaning something and being in protest. It's
7 actually not even what their Wall Street Journal article says.
8 Mr. Howard resigned. There's not really much more I can say
9 about it without -- without potentially violating federal
10 securities law. I don't really know much more about it. But
11 also, plaintiffs haven't told you a case that says because
12 somebody resigned you should issue an injunction or you should
13 issue expedited discovery or there's any good cause for a
14 claim. Mr. Howard resigned. It's a fact. We can get away
15 with it. They claim that that was going to put us in danger
16 of delisting with NASDAQ. That was never really the case.
17 NASDAQ has a rule. The rule allows for between six months and
18 a year, depending on where your annual meeting is, to replace
19 a board member. The company has already done it. They
20 announced it two days ago. There's now a new independent
21 board member coming on. He'll be effective October 7th. So
22 that was just a red herring from plaintiffs.

23 And now, even though plaintiff would rely on their
24 allegation or assertion that there's a breakdown in corporate
25 governance, the corporate board of Dish has taken another

1 logical step and put together a special litigation committee.
2 It's hardly unusual, and I'm going to try to talk at the end a
3 bit about why the special litigation committee should be
4 considered by Your Honor on --

5 THE COURT: Why don't you talk about it now.

6 MR. RUGG: Sure. And actually we did take time -- I
7 appreciate that it was 11:00 a.m. on East Coast. It was
8 actually 8:00 p.m. here --

9 THE COURT: You mean 11:00 p.m.?

10 MR. RUGG: They said 11:00 p.m. on the East Coast.
11 And I thought we were all here on the Pacific Time Zone, so it
12 was actually at 8:00. But -- and that was when I found out
13 and I was able to provide the information. So I did.

14 But this is an interesting area, because it does
15 cross into the question of whether Nevada should follow
16 Delaware. There's not a lot of Nevada law, if any, on the
17 question of what to do with the special litigation committee.
18 I don't know if Your Honor has been -- had seen a case on a --

19 THE COURT: I've had special litigation committees
20 before.

21 MR. RUGG: Okay. Not something I'd seen in front of
22 you, so I didn't know. And, of course, not a lot of published
23 caselaw out there. But it is -- it is an aspect that follows
24 the issue raised in Schoen of demand futility, because it does
25 relate to the demand futility question and whether the board

1 can step in and do a special litigation committee. Delaware
2 has some pretty clear caselaw -- the key case is Zappata --
3 that says that what you do with a special litigation committee
4 is you test its independence after it reaches conclusions. So
5 we let the special litigation committee go forward with an
6 investigation. There's also a Delaware case, Abbey
7 [phonetic], that talks about why it stays important to allow
8 that to happen. I was only aware of one Nevada case that
9 talks about special litigation committees. It's over in the
10 Federal Court. It's actually not published. It involves
11 Sands Corp. And in that case Judge Du followed Delaware law
12 and granted a stay to allow the special litigation committee
13 to do its work.

14 We did take a little bit of time -- we had a short,
15 four-page memorandum of law, if Your Honor wants it, that goes
16 through some of the Zappata -- you know, what happened in the
17 Sands case and Zappata and --

18 THE COURT: No. I've had special litigation
19 committee cases before.

20 MR. RUGG: Okay. So I think that in this case --

21 THE COURT: And they predated Max. So they're old
22 cases.

23 MR. RUGG: I've got to hire more of your clerks,
24 Your Honor.

25 THE COURT: Why don't you call Steve Peek and ask

1 him what he did, you know.

2 MR. RUGG: But the bottom line is that the special
3 litigation committee is an extension of what Nevada
4 appreciates in both Schoen and its statute to allow the board
5 to operate the company. And this is a way for the special
6 litigation committee, as delegated the power by the full
7 board, to investigate these claims and act for the company.

8 THE COURT: I need two things from you on the
9 special litigation committee. Tell me what their scope of
10 their authority is. Hold on. Let me go to my statutes.

11 What is the committee's designated authority?

12 MR. RUGG: I don't believe there's a formal
13 resolution yet, so I'm only going to tell you what I
14 understand. But I would rather present you with the formal
15 resolution so that I'm not misspeaking for the board. Because
16 that's not my place.

17 THE COURT: Tell me what you think the designated
18 authority is.

19 MR. RUGG: They've been designated to investigate
20 the claims brought in this case, the Jacksonville Fire and
21 Police case, and make a decision for the corporation how to
22 proceed or whether to seek a dismissal or whether to act on
23 behalf of the company on these claims.

24 THE COURT: Okay. And what is the timing of the
25 special litigation committee's investigation?

1 MR. RUGG: That I don't have an answer for, because
2 it's going to be up to that committee that was just formed
3 last night. So you have Mr. Ortolf, who is an independent
4 member of the board, he's on the audit committee, and Mr.
5 Brokaw, who is coming as a citizen, a non board member, but
6 will be a board member within a couple weeks.

7 THE COURT: And do we know if the special committee
8 has yet hired counsel to assist them in their investigation?

9 MR. RUGG: That -- I'm fairly sure they have not yet
10 hired counsel.

11 THE COURT: Not since 8:00 o'clock last night.

12 MR. RUGG: Right. Though I understand that's going
13 to be one of the things that they look at first, which, you
14 know, puts me in an awkward position, I suppose. But still
15 we're here right now.

16 THE COURT: Usually they have separate counsel from
17 everybody else in this room.

18 MR. RUGG: I understand, Your Honor. But given that
19 they're --

20 THE COURT: It's important to know what their -- the
21 reason I'm going to back to the statute is we have a Nevada
22 statute that relates to an overlapping issue. I need to know
23 what their designated authority is.

24 MR. RUGG: And as soon as we have the resolution we
25 can provide that for Your Honor. I don't think it's

1 appropriate for me to paraphrase it any more than I have.

2 THE COURT: I understand what you're saying, Mr.
3 Rugg.

4 MR. RUGG: So I do think that down that line --

5 THE COURT: So they're not investigating the ongoing
6 transaction and bidding process or having any responsibility
7 of that; they're looking at what is alleged in the complaint
8 to be the prior conflicts and potential breaches.

9 MR. RUGG: Correct, Your Honor.

10 THE COURT: Okay.

11 (Pause in the proceedings)

12 MR. RUGG: As Mr. Frawley was sharing with me, of
13 course, the complaint does add that aspect. The complaint
14 says there's an ongoing complaint.

15 THE COURT: That's Claim 1, injunctive relief.

16 MR. RUGG: Right. So it is part of their task in
17 investigating these claims to address that issue, but it's not
18 specific. And I thought that's what Your Honor was asking
19 about.

20 THE COURT: Well, no. I was going to my statutory
21 language of what the committee's designated authority is.

22 For those of you who aren't familiar with Nevada
23 statutes, that's in 78.138(2)(c).

24 MR. RUGG: It's pretty much right below the business
25 judgment rule.

1 THE COURT: It's part of the business judgment rule.

2 MR. RUGG: I think that answers the Court's
3 questions about the special litigation committee. I'm not
4 sure.

5 THE COURT: That did. I was just trying to find out
6 where I was going to be on this.

7 MR. RUGG: On other issues of whether there's good
8 cause to issue -- demand expedited discovery there is a
9 question here of whether what plaintiffs are asking the Court
10 to do is prejudice an issue that's before the Bankruptcy Court,
11 whether it be the -- what Bankruptcy refers to as designation
12 of Mr. Ergen's affiliates' vote or whether it be the role of
13 Dish where Harbinger wants to say Mr. Ergen's acting for Dish
14 in order to get around -- you know, in order to meet the issue
15 of their credit agreement. Plaintiffs seem to want to take
16 the position that Mr. Ergen is controlling Dish, as opposed to
17 Dish controlling Mr. Ergen, back and forth. Either way, those
18 are issues that are before that Bankruptcy Court. There is a
19 motion to dismiss that's been filed by Dish in the adversary
20 proceeding brought by Harbinger and LightSquared that will be
21 heard at a hearing on October 29th. I'm not counsel there, so
22 I can't say much more than that. But that's something that
23 the Bankruptcy Court's already prepared to address, and I
24 think it's an area where this Court's discretion comes into
25 play and whether it should allow the Bankruptcy Court to make

1 a decision that's appropriately before the Bankruptcy Court
2 and that the DBSD case that plaintiffs like to rely on
3 actually says is something for the expertise of a bankruptcy
4 judge. And, with all due respect to Your Honor, there is --
5 there are differences over there in that bankruptcy world.

6 THE COURT: Yes. I understand that. And I never
7 practiced in Bankruptcy Court on purpose.

8 MR. RUGG: I was just -- just to supplement that,
9 the bankruptcy judge has indicated that she intends to rule
10 either on October 29th or soon thereafter on that issue.

11 THE COURT: Who's the bankruptcy judge?

12 MR. FRAWLEY: Your Honor, it's Shelly Chapman in the
13 Southern District of New York.

14 MR. RUGG: So when we look down -- and the reason to
15 look at the injunction claim right now on good cause is just
16 to see whether there's any likelihood of success and whether
17 there's irreparable harm. For likelihood of success we've
18 already been through the issue of whether there's a conflict.
19 Mr. Ergen's getting -- Mr. Ergen's affiliate is going to be
20 paid on the debt, the rest of the board and Mr. Ergen all have
21 a strong financial interest in Dish and are motivated to help
22 Dish. So in terms of their ongoing conflict claim there does
23 not appear to be a likelihood of success on the merits.

24 With regard to the DBSD case there are significant
25 differences, and it's kind of interesting, because plaintiff

1 in their complaint suggest that if dish had been given the
2 corporate opportunity, if it had been a corporate opportunity,
3 to buy the debt, they would have found a way to do it; but
4 that would have put them closer to the facts of DBSD and more
5 dangerously closer to the facts of DBSD, though --

6 THE COURT: And arguably violated the credit
7 agreement.

8 MR. RUGG: And arguably violate the credit
9 agreements and be knocked out for that. But the real issue in
10 DBSD that the court was concerned about was what interest did
11 the creditor have. And in that case the DBSD debt had been
12 bought at 100 percent par when you already knew the bankruptcy
13 plan was going to pay you at 100 percent par. So there wasn't
14 an interest on a return. Here plaintiffs trumpet the fact
15 that Mr. Ergen's affiliate entity stands to make a return on
16 its debt, and that takes it outside the DBSD context and takes
17 it outside of the caselaw, because the caselaw is focused on
18 what is your real interest, do you have an interest as a
19 creditor. And plaintiffs themselves say that Mr. Ergen's
20 affiliate entity has an interest as a creditor. The interest
21 happens not to be in conflict with Mr. Ergen's interest in
22 Dish.

23 We've already talked about Mr. Howard's resignation
24 and that being relatively meaningless.

25 On irreparable harm, you know, the money amounts

1 here are not insignificant, obviously, but they really are
2 just money amounts. There are analysts ready and able to
3 consider what a spectrum is worth. In fact, that's what the
4 Dish board, whether it be the existing Dish board that's duly
5 elected or the Dish board that plaintiff wants to make this
6 decision, will have to decide on a dollar figure that the
7 spectrum's worth. And that's not irreparable harm once you
8 have a dollar figure.

9 On the relevancy of discovery. Everything
10 plaintiffs are looking at is backward looking. The special
11 committee -- the previous special committee, not as special
12 litigation committee, considered an individual question. That
13 question is no longer relevant to what is going forward in
14 terms of conflict of interest. That question was about
15 whether to make an initial bid. They made a recommendation,
16 the board followed the recommendation, initial bid is made.
17 Nothing that can be undone by an injunction at this point. So
18 looking at that won't tell the Court anything about whether
19 there's going to be a future problem.

20 In terms of whether there's a future problem it's
21 really just two questions, and we put this in our brief.
22 It's, you know, they want to say that it's a conflict because
23 of the debt. That fact's known. They want to say that Mr.
24 Ergen controls the board. The proxies that we can produce for
25 the Court, they're all public, that show what Mr. Ergen's

1 interest is in the company and what his relationship is with
2 the other board members, you know, they're a huge stack of
3 documents, but they all say the same thing. Plaintiff knows
4 this. It's a controlled company. Nothing improper about
5 that. It's fully disclosed. If plaintiffs think that's
6 enough, then we can go forward on their preliminary injunction
7 motion just on that, and we'll argue that at the appropriate
8 time.

9 In terms of the depositions, a little bit of a
10 moving target here, because now I think plaintiffs have moved
11 from five depositions to two. One of those depositions seems
12 to -- Mr. Howard, I don't know how Mr. Howard's going to tell
13 you what the board's doing now. He resigned. So that's not
14 forward looking. If it's Mr. Goodbarn, Mr. Goodbarn has
15 addressed the issues for the Court, and I don't need to go
16 over those again. But it's still not going to tell the Court
17 whether there's a future breach of fiduciary duty that the
18 Court has to prevent through an injunction.

19 I know I was a little haphazard there, but I'm
20 mixing between myself and responding to some of what
21 plaintiffs said. So unless the Court has further questions,
22 I'll sit down.

23 THE COURT: I don't have any more questions.

24 MR. RUGG: Thank you.

25 MR. REISMAN: We're just going to rest on our

1 briefs, Your Honor.

2 MR. MARKEL: Your Honor, if I may be heard briefly.

3 THE COURT: Absolutely.

4 MR. MARKEL: And thank you for that. My name is
5 Gregory Markel, representing Mr. Goodbarn. And I just have a
6 couple of very brief points I would like to make.

7 As a matter of background, we have -- and this is
8 just a brief background -- we have moved to dismiss -- I know
9 it's not on today -- but the reason for that is because there
10 are no allegations of wrongdoing by Mr. Goodbarn. He doesn't
11 belong as a defendant in this case. And in fact in their
12 preliminary injunction motion, and this is a quote, plaintiff
13 goes so far as to say that, "Mr. Goodbarn possibly engaged in
14 fiduciary duties." It doesn't allege that he did -- breaches
15 of fiduciary duties. It doesn't say that he did, it says
16 "possibly" he did. So that's a bit of background here that we
17 think that he is not a proper defendant and -- but that's not
18 for today's decision.

19 I think the two points I do want -- that I do think
20 are for today, and Mr. Rugg has already mentioned one of them,
21 but I just want to emphasize that Mr. Goodbarn was a member of
22 the special committee that operated earlier this summer, and
23 the plaintiff nowhere alleges that he lacked independence in
24 both his qualifications and in the way he acted as a member of
25 that committee. He is -- that committee is no longer in

1 existence. He has not -- he has not -- and I don't know the
2 details about the formation of the new special committee, I
3 found out about it last night, but he is not on that
4 committee.

5 THE COURT: But he remains on the board.

6 MR. MARKEL: He remains on the board. And so if
7 we're looking at the difference between -- and I thought Your
8 Honor's questions were very clear, both last time and today,
9 how does the proposed discovery relate to the requested relief
10 on the preliminary injunction. If that is what we're focused
11 on today, then as I understand it, although I may have it
12 wrong, but I've heard a few times and read it several times,
13 my understanding is that the relief that's being requested on
14 the preliminary injunction is that in the future somehow Mr.
15 Ergen be barred from interfering with the process of bidding
16 on this spectrum. That's what I understand is being
17 requested.

18 Whatever happened with respect to the special
19 committee that no longer is, I suggest to Your Honor,
20 irrelevant to the question of whether or not an injunction in
21 the future should be granted. And so, as Mr. Lebovitch said,
22 they have -- they're focusing their discovery requests here on
23 this preliminary injunction motion, expedited discovery that
24 they're asking for, they're focusing that on something that
25 happened in the past and that involves different people and

1 has nothing to do with what they're requesting from this Court
2 on a preliminary injunction motion. And that is, as I
3 understand, Your Honor -- and correctly me, obviously if I've
4 got it wrong -- that's the only issue on which we are talking
5 about expedited discovery.

6 So, Your Honor, I would respectfully request that
7 the discovery of the activities of the special committee and
8 Mr. Goodbarn in particular and all of the people whose
9 depositions are being requested with respect to this expedited
10 discovery are unnecessary in connection with the preliminary
11 injunction.

12 The only other point, and it's even briefer, Your
13 Honor, is my understanding is that under Nevada law that
14 discovery of counsel for a party is only granted in
15 exceptional circumstances.

16 THE COURT: That is Nevada law.

17 MR. MARKEL: Right. Thank you. And, Your Honor,
18 what I hear is, well, sometimes it's happened in other cases
19 that Mr. Lebovitch has been involved in. I don't question
20 that it may have happened in other cases, perhaps in other
21 jurisdictions with perhaps very different fact patterns. I
22 don't know specifically. But what I do know is that at least
23 in my humble opinion nothing close to exceptional
24 circumstances have been demonstrated here for taking discovery
25 from counsel to that special committee. Thank you very much

1 for hearing me, Your Honor.

2 THE COURT: Thank you.

3 Can I ask one question of Mr. Rugg before we go back
4 to the plaintiffs. Mr. Rugg, Exhibit 5 to your brief that was
5 filed yesterday is the report from the City Research folks.

6 MR. RUGG: Yes, Your Honor.

7 THE COURT: That is a report that was not requested
8 by the corporation or the board or special committee, it was
9 just something in the market; is that correct?

10 MR. RUGG: Correct, Your Honor.

11 THE COURT: I just wanted to make sure. Thank you.

12 MR. RUGG: Independent piece of research. Yeah,
13 they do these all the time.

14 THE COURT: Somebody in the market doing whatever
15 the market's going to do.

16 MR. RUGG: Correct, Your Honor.

17 THE COURT: All right. Thank you.

18 MR. BOSCHEE: I have -- I have one request of Your
19 Honor before we rebut or -- I have calendar call in nine
20 minutes in front of Judge Bare.

21 THE COURT: Okay. We'll take a short break for you
22 to go to the third floor.

23 MR. BOSCHEE: Fair enough. I will be back. If you
24 want to --

25 THE COURT: How long are you going to be?

1 MR. BOSCHÉE: I'm happy to let Counsel continue
2 without me.

3 THE COURT: No. Go. How long are you going to be?

4 MR. BOSCHÉE: I shouldn't be more than 10 or 15
5 minutes, I hope.

6 THE COURT: I'll see you when you get back.
7 Everybody else feel like taking a personal comfort break?

8 (Court recessed at 10:49 a.m., until 11:08 p.m.)

9 THE COURT: Anybody want to add anything before I
10 hear rebuttal? Okay.

11 MR. LEBOVITCH: Thank you, Your Honor. Thank you
12 for your patience.

13 Let's briefly start with where we ended, and then
14 I'll go through Mr. Rugg's arguments. But as far as Mr.
15 Goodbarn goes we do concede his independence, Your Honor, and,
16 frankly, in terms of an injunction that would bring back, you
17 know, the status quo, the appropriate position -- I mean, one
18 way to implement the injunction, an obvious way would be to
19 put Mr. Goodbarn and if there's another independent director
20 -- apparently the company just hired -- just retained a new
21 director. If there's two independent directors, that would be
22 a logical way to cure essentially any injunction that's
23 granted. It's the easiest thing. We did name Mr. Goodbarn.
24 There's really multiple reasons, and, I'll be very frank about
25 it, we didn't want an argument that he's an indispensable

1 party if he's not named, even tough we concede his
2 independence -- to the extent we concede his independence,
3 because he is the person who we're saying should be in charge.
4 So that's one issue.

5 And also, he didn't resign. Mr. Howard resigned.
6 We believe it was a protest. We think that's confirmed. We
7 didn't know what happened, but, you know, frankly the focus is
8 we're seeking relief, which logically gets cured by empowering
9 Mr. Goodbarn and, if there is another truly independent
10 director, perhaps another independent director. But we think
11 that and our approach always has been if it turns out he
12 really has been acting independently and perhaps without
13 resigning trying to fight for the shareholders, we would not
14 be continuing the claim against him.

15 I'll get to Mr. Markel's discovery points in the
16 context of dealing with Mr. Rugg's other issues. I'll try to
17 be very efficient. We're really not asking to take out the
18 duly elected board. I mean, again, I think -- that's the way
19 companies work. They set up a board however they want to.
20 This board happened to have two independent directors
21 initially. They expect that when there's a conflict they're
22 going to have an independent committee take over. That's what
23 happens. It happened in Hollinger, it's what happens many
24 companies that are controlled companies. Here our view is Mr.
25 Ergen changed his mind. He didn't want to let the independent

1 directors have their authority. That's exactly the problem
2 here. But, again, there's nothing radical about it, that the
3 conflicted directors routinely step aside and let the
4 independent directors do their thing.

5 Section 78.140, it doesn't have -- it talks about
6 what's void or voidable, Your Honor, the statute. It also
7 talks about fairness, and it doesn't say anything about
8 injunctive relief. And so our position on it is this
9 provision, 78.140, is similar to other interested transaction
10 statutes in other states. While the words will be different,
11 there's going to be nuances, we don't see anything in that
12 provision that goes beyond saying a transaction is not void or
13 voidable -- a transaction that has taken place is not void or
14 voidable solely because of a conflict if you have certain
15 criteria met. But many, if not most or all, of the courts
16 who've interpreted similar positions have said that this
17 doesn't eliminate fiduciary duties. The statute does talk
18 about a transaction still be fair. And, again, I think
19 there's a lot of precedent that says, well, we read that
20 fairness as an overlay to the provision, and so you're
21 protecting third parties who engage in transactions with the
22 company, you're protecting the contracts themselves that get
23 executed. It doesn't mean there can't be equitable relief.

24 Mr. Rugg spoke about Harbinger, saying, well,
25 they're suing everyone. We're not -- we're not trying to

1 prove Harbinger's claims, okay. Our point is that the board,
2 by allowing Ergen to control its process, is lending credence
3 to Harbinger's claims, whereas, again, obviously if the
4 independent directors were controlling Dish's process,
5 Harbinger's claims against Dish would be fair less forceful.

6 The articles, the articles of incorporation, the
7 charter, that -- really we tried to be very express. That
8 claim for corporate opportunity, which we do think is valid,
9 we think the special committee must have seen some validity to
10 it, we're prepared to litigate that on a non-expedited
11 schedule, but I will note, Your Honor, there is no reading of
12 the charter that would permit Mr. Ergen to misappropriate
13 corporate information in order to identify his business
14 opportunities, nor would it absolve him of his duty of loyalty
15 such that even if he's allowed to pursue an opportunity under
16 the charter, he can't pursue an opportunity which knowingly,
17 predictably will cause harm to Dish. And so that's a breach
18 of the duty of loyalty independent of the charter.

19 Now, Harbinger knocked out Dish with its investments
20 contract, its loan contract. It didn't knock out Ergen. I
21 mean, that's an issue that is being litigated in Bankruptcy
22 Court. We're not trying to prove that Ergen could or could
23 not have bought the debt pursuant to the investment agreement.
24 It is possible that that provision will be struck down, in
25 which case Dish could have done something. But that's not the

1 issue now. Again, our point, simple point is Ergen, by buying
2 the debt knowing he's the controller of Dish, it's not
3 surprise that he and Dish would get sued for the way he bought
4 the debt, which we've alleged was secretive and indirect.
5 That is bad faith. He used corporate information about where
6 Dish would look to buy spectrum, to find his target, and he
7 also knew that that was going to expose Dish to a lawsuit
8 which -- it's Exhibit 2 to my affidavit, Your Honor. I mean,
9 they're seeking \$4 billion in damages and various other
10 remedies against Ergen, and there's other filings that seek
11 remedies against Dish.

12 The point about the lack of a conflict, Your Honor,
13 and Ergen's interest in Dish being very significant, the
14 board's stock in Dish, I just want to start, I guess, with
15 maybe the basic premises. I'm not aware of any precedent that
16 would say that the fact the directors own stock in a company
17 will outweigh them otherwise being beholden to a director.
18 The cases -- I'm not aware of anyone -- any situation where a
19 director -- where a court says, well, this director under the
20 law would be beholden but they own stock and so therefore
21 they're not. I've never even heard of that.

22 But let's talk about the argument about Ergen's
23 incentives. It's a billion-dollar personal investment. Now,
24 he's a wealthy man, but he has a billion-dollar personal
25 investment that faces going to zero. That's what Harbinger

1 and LightSquared are trying to do if they disallow the claims
2 or he'll take a huge loss on it.

3 THE COURT: And you're talking about the debt
4 purchases.

5 MR. LEBOVITCH: The debt purchases that he made in
6 his own account. So let's assume he's allowed to pursue that
7 opportunity, Your Honor. He's facing economic risk. He's
8 facing the loss of his voting rights. That's real and
9 immediate. The City Group report that the defendants put in,
10 which I'll talk about a little bit more, I mean, analysts will
11 say a lot of things. This analyst is saying something which
12 we agree with, is buying the spectrum would be a really good
13 thing. It's not a controversial statement. It doesn't
14 establish I think for the Court's purposes what in fact the
15 market thinks or does. I mean, that's done with expert
16 reports and submissions.

17 But that's one analyst's report that says it would
18 be a good thing. We agree. We want Dish to get the spectrum.
19 But that's not proof that Ergen is going to see the stock drop
20 -- his stock drop if they fail. In fact, because of the Wall
21 Street Journal article, because of knowledge coming out that
22 Ergen is dominating the process, it's entirely possible that
23 other analysts would say, well, yeah, the reason there's \$17
24 of upside is because the market right now is skeptical because
25 Ergen is interfering, he is dominating the process. That's

1 creates a discount on the stock. Well, what there's no
2 showing of, and I could go back, but what there's no showing
3 of, Your Honor, is that Ergen has a choice of I'm going to
4 lose a couple hundred million dollars here or I'm going to
5 lose anything on the Dish side. The lost opportunity may
6 already be priced into the stock. There's no evidence to say
7 right now on a motion to expedite to allow discovery for the
8 Court to essentially adopt and say, well, he's going to lose
9 much more if Dish is hurt than he would preserve by preserving
10 his debt at Dish's expense. We know there's an immediate
11 risk, and there's a completely abstract, hypothetical
12 possibility that Dish stock would go down if they don't get
13 the spectrum, and yet there's equal reason to believe that
14 right now Dish stock has upside because it's been depressed by
15 controlling shareholder misconduct.

16 The SLC very briefly. Again, I'm not aware of any
17 precedent that says that the creation of an SLC can override
18 the Court's ability to expedite and consider an injunction.
19 I'm not arguing a case where that's actually happened.
20 Typically an SLC happens where there's a non-expedited matter,
21 there's no irreparable harm. What we -- what I think I heard
22 is there's no resolution yet even creating this SLC. There's
23 a decision to do so. And I've not heard any explanation how
24 the SLC could actually provide the relief sought in Count 1 if
25 it finds it meritorious. And I think that's critical, because

1 it's not good enough for our friends to say, well, they're
2 going to have authority over the amended complaint. Well, as
3 a particular matter the committee is putting the proverbial
4 rabbit in the hat, because there's no way they can give the
5 relief sought in Count 1, well, then what they're doing is
6 they've already denied Count 1 through their creation, because
7 Count 1 either will -- it'll rise and fall over the next few
8 weeks. It's not a count that can be remedied in six months,
9 nine months, or a year. So really what they're saying is,
10 well, we'll consider the non-expedited matters, but they have
11 no practical ability to consider the expedited matters. And I
12 just think that, again, the SLC's existence can be a factor
13 for the other claims. But if Your Honor believes we should
14 get the chance to get discovery, what we think is limited, and
15 present the record to Your Honor, it is no offense to the SLC
16 to say, you go do your thing but right now I'm not going to
17 stop my process, because I know that if I stop my process
18 plaintiff's lose Count 1, they'll never get a remedy if I rely
19 on you.

20 Mr. Rugg said something about Harbinger's theory is
21 that Ergen's acting for Dish and our theory is Dish is acting
22 at the whim of Ergen. I think -- I think it's a little bit
23 semantic. Your Honor, our whole point is that right now today
24 Dish needs to act independently of Ergen. That's the
25 Corporate Governance 101 point that we make, that's the point

1 that in light of the creation of a special committee, its
2 subsequent disbanding when they try to act independently,
3 that's the remedy that we seek, which unquestionably can only
4 help Dish in connection with its problem, which is a lawsuit
5 that it never wanted. And that's Exhibit 2.

6 I talked about Ergen's financial interest.

7 The DBSD case, again, Mr. Rugg talked about, you
8 know, how this isn't DBSD. The fear we have is not that the
9 Court's going to say DBSD is being repeated, let's impose bad
10 faith. The fear we have is the Harbinger complaint and the
11 other filings in the Bankruptcy Court that do put Dish at risk
12 today. The DBSD point is really to show this board knows it
13 can get in trouble, should be hypersensitive even though we
14 think any independent board would keep Ergen out of the
15 process here.

16 The discovery. I'm getting down to the end, Your
17 Honor. The discovery, I believe Mr. Rugg said it's all
18 backwards looking, Mr. Markel said the special committee --
19 you know, what happened there was irrelevant to what's
20 happening today. We disagree and we think again we're putting
21 the rabbit in the hat. I'm sure that if that argument had any
22 validity, then there would be no discovery until what happened
23 in the Conrad Black case, because he had already disbanded his
24 committee. And so if that committee disbanded and it's not
25 relevant because that's all old history, why would you ever

1 have a record developing how you got here. And in the end,
2 Your Honor, I believe anytime that Your Honor or frankly any
3 judge has considered a basis for injunctive relief, to the
4 extent there's any record it's a record of what has happened
5 to date. So there's always a backwards-looking view. And
6 what we say is the way to identify the predicate breaches and
7 the harm and to shape the relief that Your Honor may grant is
8 to say, okay, we know a committee was created, the defendants
9 stipulated to that, but why were they created, what was their
10 charge, what did they do, what were their conditions. Because
11 there's a representation that they authorized a bid to be
12 made. Well, I do think that that Journal article
13 substantiates our concerns that maybe there were conditions to
14 the bid. we know the committee wasn't around when the bid was
15 actually made, so we don't know what problems that committee
16 had. And by finding out what they expected in the process,
17 what the independent directors wanted to see in the process
18 then Your Honor can say, okay, I can see that having the
19 independent process would put Dish in a better position and I
20 can craft my remedy around essentially what the correct
21 process looked like, assuming the special committee's process
22 was a truly independent process. This is what I'm now seeing.
23 So to say that we don't get to prove the predicate breach in
24 an injunction hearing is, again, to put the rabbit in the hat
25 and to just say, well, you'll never prove your claims.

1 So if Your Honor has concerns, thinks it's
2 conceivable that you will grant an injunction, we -- I
3 respectfully submit that we should get the discovery until
4 what happened with the committee.

5 The depositions, I think Mr. Rugg said we seek two.
6 No, no. We seek Mr. Ergen, who knows what's going on now. We
7 asked for Mr. Goodbarn, and I said that, you know, maybe
8 that's a conversation that can happen. We ask for Mr. Howard.
9 Again, you know, maybe we would drop one of those and take one
10 of the current directors. And we ask for the advisors. And
11 on the advisors, I mean, the banker -- to the extent that
12 Perella Weinberg did an analysis and gave advice to the
13 committee and negotiated, those negotiations clearly are fair
14 game, and we think the bankers' advice is not subject to
15 attorney-client privilege. And for the lawyers I don't know
16 how much more I can say. Unless they waive a privilege, we're
17 not trying to force them to waive a privilege, but when you
18 have a contract negotiated by lawyers or a transaction or a
19 proposal negotiated typically by lawyers and bankers, not the
20 special committee members handling those negotiations, they
21 are the best source of that evidence, and I do think, Your
22 Honor, when the lawyers are the ones doing the negotiation
23 it's routine. If it turns out, Your Honor, that the lawyers
24 here were not having the negotiations --

25 THE COURT: It's not routine here.

1 MR. LEBOVITCH: I understand. And again, we're not
2 asking for litigation counsel --

3 THE COURT: I mean, in Nevada it's clearly not
4 routine when they're negotiating deals. Even though it may
5 not be privileged, it's clearly not routine.

6 MR. LEBOVITCH: You know, I appreciate that, Your
7 Honor. And in the end I think that if we get other -- if we
8 have another ability to provide discovery and the fact that we
9 may not have a principal negotiator I guess used against us,
10 then I'm not going to -- I'm not going to push for the lawyer.
11 I just am trying to go to the best source of what happened in
12 the discussions. But if it's -- you know, we think it would
13 be appropriate, and we're not going to try to pierce a
14 privilege, but if Your Honor would prefer we not do it, then
15 I'm not going to push it.

16 THE COURT: It's not me. It's the Nevada Supreme
17 Court, those guys in Carson City.

18 MR. LEBOVITCH: Understood, Your Honor. We think
19 that if someone was leading a negotiation that that would be
20 acceptable. But --

21 THE COURT: I understand what you're saying.

22 MR. LEBOVITCH: Yes.

23 THE COURT: I'm just telling you that's not it here.

24 MR. LEBOVITCH: I don't dispute that it's not
25 routine.

1 THE COURT: Okay. Anything else you want to tell
2 me?

3 MR. LEBOVITCH: I believe the answer to that is no.
4 I think that covers it, Your Honor.

5 THE COURT: Okay. I want to thank counsel for the
6 arguments you've made today. They are very informative, and I
7 want to tell you they are very well done. I sat on a panel
8 with Chief Justice Steel earlier in the week, so I'm familiar
9 with Delaware law and the quality of practitioners, and it's
10 been refreshing to have that quality of folks in front of me.

11 The formation of the special litigation to me --
12 committee to me is a very important step that the company has
13 made, and I'm going to give the special litigation committee a
14 little bit of leeway to do some things. So here's the plan.

15 The plaintiff's going to make a demand on the
16 special litigation committee within 24 hours. So that means
17 by Monday at maybe 10:00 a.m. Pacific Time you're going to
18 have your demand to the special litigation committee.

19 The special litigation committee by noon Pacific
20 Time on October 3rd will respond to that demand. That does
21 not mean they have to complete their investigation; it simply
22 means they must respond to that demand.

23 I need a status report by counsel by close of
24 business Pacific Time on October 3rd. The matter will be on
25 my chambers calendar on Friday, October 4th, and I will issue

1 a written decision on the motion for expedited discovery.

2 MR. LEBOVITCH: Your Honor, may I ask one question?

3 THE COURT: You can ask as many questions as you
4 want.

5 MR. LEBOVITCH: I just -- we will follow the Court's
6 instructions, make a demand. And I may be unfamiliar with
7 this aspect of Nevada law. I just don't want to concede any
8 challenge to independence particularly to Mr. Ortolf.

9 THE COURT: You're not conceding anything.

10 MR. LEBOVITCH: Okay. Just sometimes making a
11 demand is a concession. I just -- as long as we preserve our
12 arguments --

13 THE COURT: I'm not saying you've conceded anything.

14 MR. LEBOVITCH: That's fine, Your Honor.

15 THE COURT: I'm telling you I want to give the
16 special litigation committee the benefit of the doubt and the
17 opportunity to act. They can't do that if you don't make the
18 demand on them.

19 MR. LEBOVITCH: We will make a demand as Your Honor
20 instructed.

21 THE COURT: You probably don't know the Schoen case
22 went up and down, up and down, and up and down, and I think
23 Steve Peek and the others settled it, what, on the fourth
24 attempt in front of Brent Adams. So, I mean, it's --

25 MR. LEBOVITCH: We'd hope to avoid that kind of

1 rollercoaster.

2 THE COURT: We're not going to do that. We're just
3 going to do this. I understand it may have issues, it may
4 cause concerns. We're going to make the demand, I'm going to
5 then make a decision. What you put in the status reports may
6 influence what I decide to do. But I've heard the documents,
7 I have an idea about what I think we should do, but I want to
8 wait and give the special litigation committee the opportunity
9 to do something.

10 Mr. Ferrario, go catch your plane.

11 MR. FERRARIO: Thank you, Your Honor.

12 THE COURT: You're supposed to be in Cleveland at a
13 deposition.

14 MR. BOSCHEE: And all the parties are going to file
15 a separate status report? Is that what Your Honor's
16 contemplating, just so I'm clear?

17 THE COURT: I would prefer separate status reports,
18 because my guess is you guys won't see eye to eye, and by
19 giving you the very short time frame I did it will be
20 impossible to work out the issues that would permit it to be a
21 joint status report.

22 MR. BOSCHEE: I just want to make sure, Your Honor.

23 THE COURT: Remember, I gave you very short time
24 frames.

25 MR. LEOVITCH: Yes, Your Honor.

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THE COURT: And the reason is because I'm cognizant about the issues related to the injunctive relief that's being requested.

Anything else?

MR. LEBOVITCH: Thank you, Your Honor. Thank you for hearing us.

THE PROCEEDINGS CONCLUDED AT 11:28 A.M.

* * * * *

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

**FLORENCE HOYT
Las Vegas, Nevada 89146**

9/24/13

FLORENCE HOYT, TRANSCRIBER

DATE