

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. _____

CITY OF DAYTONA BEACH POLICE OFFICERS' AND FIREFIGHTERS' RETIREMENT SYSTEM, derivatively on behalf of nominal defendant DISH NETWORK CORPORATION,

Plaintiff,

v.

CHARLES W. ERGEN,
JOSEPH P. CLAYTON,
JAMES DEFRANCO,
CANTEY M. ERGEN,
STEVEN R. GOODBARN,
DAVID K. MOSKOWITZ,
TOM A. ORTOLF, and
CARL E. VOGEL,

Defendants,

and

DISH NETWORK CORPORATION,

Nominal Defendant.

VERIFIED SHAREHOLDER DERIVATIVE COMPLAINT

Plaintiff City of Daytona Beach Police Officers' and Firefighters' Retirement System ("City of Daytona" or "Plaintiff") brings the following Verified Shareholder Derivative Complaint (the "Complaint"), for the benefit of nominal defendant DISH Network Corporation ("Dish" or the "Company"), against the Company's founder, chairman, and controlling shareholder Charles W. Ergen ("Ergen") and the members of the board of directors of Dish (the

“Board”). The allegations of the Complaint are based on the knowledge of Plaintiff as to itself, and on information and belief, including the investigation of counsel and review of publicly available information, as to all other matters.

INTRODUCTION

1. This action arises from the complete failure of the Company’s Board of Directors (the “Board”) to withstand the domineering influence of Dish’s controlling shareholder Ergen. Dish is a satellite TV provider that recently has spent billions of dollars to expand its business by acquiring wireless spectrum licenses. In April 2013, Ergen completed the purchase of more than \$1 billion of debt of a bankrupt company, LightSquared, L.P. (“LightSquared”), which owns such spectrum licenses. In May, 2013, Ergen launched a personal \$2 billion bid for LightSquared’s spectrum assets – a bid that directly competed with Dish’s clear interests in bidding for these same assets.

2. Acknowledging this conflict, the Board created a two-person special committee (the “Special Committee”), comprised of Gary Howard (“Howard”) and Defendant Steven R. Goodbarn (“Goodbarn”), in connection with Dish’s possible bid for LightSquared’s spectrum assets. It quickly became clear, however, that something had gone terribly wrong with the Special Committee. According to *The Wall Street Journal*, the Board disbanded the Special Committee at a July 21, 2013 meeting, “to the surprise of the committee’s members.”¹ With the Special Committee disbanded, on July 23, 2013, Dish submitted a competing \$2.2 billion bid for LightSquared’s assets as part of a reorganization plan that LightSquared’s secured lenders, including Ergen, submitted for approval in the LightSquared bankruptcy. If approved, Dish’s bid

¹ Sharon Terlep, *Dish Director Quit Amid Flap*, Wall St. J., Sept. 10, 2013, available at <http://online.wsj.com/article/SB10001424127887323864604579065130544679594.html>.

ensures that Ergen will receive hundreds of millions of dollars in personal profit on his \$1 billion debt purchases.

3. On July 25, 2013 – only two days after Dish submitted the \$2.2 billion bid that will significantly enrich Ergen if approved – Howard, an eight-year veteran of the Board who is reported to have been a member of the Special Committee, resigned. Howard’s resignation occurred so abruptly that Dish was at risk of being delisted from NASDAQ for failure to comply with minimum listing requirements.

4. Additional problems soon emerged. On August 6, 2013, LightSquared’s principal shareholder, Harbinger Capital Partners (“Harbinger”), sued Ergen and Dish in federal bankruptcy court in New York, accusing them of bad faith conduct and seeking *billions* of dollars in compensatory and punitive damages (the “Harbinger Lawsuit”). Among other things, the Harbinger Lawsuit alleges that Ergen purchased the \$1 billion in LightSquared debt in a way that would give Dish an unfair advantage in the LightSquared bankruptcy. That lawsuit also alleges that, because Ergen controls Dish, those purchases and any bad faith on the part of Ergen can be attributed to Dish. The crux of Harbinger’s complaint is that Dish is not independent from Ergen and acts as Ergen’s co-conspirator in trying to improperly acquire LightSquared’s assets. On August 22, 2013, LightSquared filed a notice of intent to join the Harbinger Lawsuit.

5. On August 30, 2013, Harbinger submitted a plan of reorganization that competes with the July 23, 2013 plan submitted by the secured lenders. Under the terms of Harbinger’s proposed plan, LightSquared’s assets will not be sold. According to Harbinger, one of the reasons for approving its plan over the plan proposed by the secured lenders (involving the sale of LightSquared’s assets) is that Dish is not acting in good faith in the LightSquared bankruptcy.

Moreover, based on certain findings made in different bankruptcy proceedings three years ago, Harbinger alleges that this is not the first time that the Company has acted in bad faith in connection with a bankruptcy case.

6. Specifically, several years ago, Ergen caused Dish to purchase the debt of another spectrum owner – DBSD North America, Inc. (“DBSD”) – and then used Dish’s creditor position to manipulate that bankruptcy process. The bankruptcy court, federal district court and U.S. Court of Appeals for the Second Circuit all concluded that Dish’s vote against a competing reorganization plan should be disqualified because the Company’s debt purchases were made to manipulate the bankruptcy proceedings and, thus, were not made in good faith. *See In re DBSD N. Am., Inc.*, 421 B.R. 133, 139-40 (S.D.N.Y. Bankr. 2009); *In re DBSD N. Am., Inc.*, No. 09 Civ. 10156(LAK), 2010 WL 1223109 (S.D.N.Y. Mar. 24, 2010), *aff’d in part and rev’d in part on other grounds*, 627 F.3d 496 (2d Cir. 2010); *In re DBSD N. Am., Inc.*, 634 F.3d 79, 104 (2d Cir. 2011).

JURISDICTION

7. This Court has jurisdiction over all causes of action asserted herein pursuant to 28 U.S.C. §§ 1332(a), (c), and (d) as Plaintiff and the defendants are domiciled in different states and the amount in controversy exceeds \$75,000, exclusive of interests and costs. This action is not a collusive one to confer jurisdiction on this Court.

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because one or more of the defendants, including Dish, either resides in or maintains executive offices in this District, and a substantial portion of the transactions and wrongs that are the subject of the Complaint, occurred in substantial part in this District. Finally, the defendants have received substantial

compensation in this District by doing business here and engaging in numerous activities that had an effect in this District.

THE PARTIES

9. Plaintiff City of Daytona is a defined benefit pension plan administered by a Board of Trustees, each member of which is a citizen of Florida. Each person employed by the City Fire Department or Police Department as a fulltime firefighter or police officer becomes a member of the System as a condition of his or her employment. City of Daytona currently owns shares of Dish common stock, owned shares while the events and transactions complained of herein transpired, and has committed to continue to own Dish common stock throughout this litigation.

10. Nominal Defendant Dish, through its subsidiary DISH Network L.L.C., provides satellite TV services to approximately 14 million customers. The Company is incorporated under the laws of the State of Nevada, and its principal executive offices are located at 9601 South Meridian Boulevard, Englewood, Colorado. The Company is publicly traded on the NASDAQ under the ticker symbol "DISH." According to the Company's Code of Ethics for Financial Reporting, "each of [its] directors, officers and other employees" will, in relevant part, "[e]ngage in honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships . . . and [p]roduce full, fair,

accurate, timely and understandable disclosure in reports and documents that we file with or submit to the Securities and Exchange Commission.”²

11. Defendant Ergen is the founder, Chairman, and controlling shareholder of Dish. Ergen beneficially owns approximately 52.1 % of the Company’s total equity and possesses approximately 88.0% of the Company’s total voting power through his ownership of 96% of the Company’ super-voting Class B common stock. Ergen co-founded Dish in 1980 with his wife Cantey Ergen and James DeFranco (“DeFranco”). From the Company’s founding until June 2011, Ergen was Dish’s Chief Executive Officer (“CEO”) and Chairman. Defendant Ergen is a citizen of Colorado.

12. Defendant Joseph P. Clayton (“Clayton”) is the Company’s President and CEO and has served on the Dish Board since June 2011. Clayton previously served on the board of directors of EchoStar – an Ergen-controlled company from which Dish was spun-off in 2008 – from October 2008 until June 2011. Defendant Clayton is a citizen of Colorado.

13. Defendant DeFranco is one of the Company’s Executive Vice Presidents and has been one of Dish’s vice presidents and a member of the Board since the Company’s formation in 1980. DeFranco co-founded Dish with Ergen and Cantey Ergen in 1980. Defendant DeFranco is a citizen of Colorado.

14. Defendant Cantey Ergen, Ergen’s wife, has served on the Board since May 2001, and is currently a senior advisor to the Company. She has held a variety of operational

² DISH Network Corp., Code of Ethics for Financial Reporting, available at http://files.shareholder.com/downloads/DISH/2702248628x0x505330/cfe72154-d097-4b8c-bc17-438951a7f89a/2011_10_03_DISH_Network_Code_of_Ethics__Investor_Relations_Website_10.4.11_.pdf.

responsibilities with Dish since the Company's formation. Defendant Cantey Ergen is a citizen of Colorado.

15. Defendant Goodbarn has served as a member of the Dish Board since December 2002. Goodbarn served as a member of the board of directors of EchoStar from its formation in October 2007 until November 2008. Defendant Goodbarn is a citizen of Colorado.

16. Defendant David K. Moskowitz ("Moskowitz") has served as a member of the Board since 1998. Moskowitz is one of the Company's senior advisors and was an Executive Vice President as well as the Company's Secretary and General Counsel until 2007. Moskowitz joined Dish in March 1990. Moskowitz performs certain business functions for Dish and its subsidiaries from time-to-time. From October 2007 until May 2012, Moskowitz served as a member of the board of directors of EchoStar. Defendant Moskowitz is a citizen of Colorado.

17. Defendant Tom A. Ortolf ("Ortolf") has served as a member of the Board since May 2005. Ortolf served as Dish's President and Chief Operating Officer from 1988 until 1991. He also has served as a member of the board of directors of EchoStar since October 2007. Defendant Ortolf is a citizen of Colorado.

18. Defendant Carl E. Vogel ("Vogel") has served as a member of the Dish Board since May 2005 and is currently a senior advisor to the Company. He served as Dish's President from September 2006 until February 2008 and served as the Company's Vice Chairman from June 2005 until March 2009. From October 2007 until March 2009, Vogel served as the Vice Chairman of the board of directors of, and a senior advisor to, EchoStar. He was also one of the Company's executive officers from 1994 until 1997, including serving as Dish's President from 1995 until 1997. Defendant Vogel is a citizen of Colorado.

19. The defendants listed in paragraphs 11 through 18 above are collectively referred to herein as the “Individual Defendants” or the “Director Defendants.”

SUBSTANTIVE ALLEGATIONS

I. ERGEN FOUNDS AND ESTABLISHES CONTROL OVER DISH AND ECHOSTAR

20. In 1980, Ergen founded EchoStar with Cantey Ergen and James DeFranco. Ergen and DeFranco started selling satellite dishes door-to-door in Colorado.

21. EchoStar began using Dish Network as its consumer brand in March 1996, after the successful launch of its first satellite, EchoStar I, in December 1995.

22. In January 2008, Dish was spun-off from EchoStar (the “Spin-Off”). Pursuant to the Spin-Off, Dish now provides subscription satellite TV service and EchoStar owns and operates the technology and infrastructure, including the satellites that Dish utilizes to provide its services.

23. Ergen controls both EchoStar and Dish’s business and affairs. The Company’s most recent annual report, filed with the Securities and Exchange Commission (“SEC”), states:

Through his voting power, *Mr. Ergen has the ability to elect a majority of our directors and to control all other matters requiring the approval of our stockholders.* As a result, DISH network is a “controlled company” as defined in the Nasdaq listing rules and is, therefore, not subject to Nasdaq requirements that would otherwise require us to have: (i) a majority of independent directors; (ii) a nominating committee composed solely of independent directors; (iii) compensation of our executive officers determined by a majority of the independent directors or a compensation committee composed solely of independent directors; and (iv) director nominees selected, or recommended for the Board’s selection, either by a majority of the independent directors or a nominating committee composed solely of independent directors.³

³ Dish Network Corp., Annual Report (Form 10-K) at 40 (Feb. 20, 2013) (“Dish Network 2012 Annual Report”) (emphasis added).

24. Similarly, according to the definitive proxy statement disseminated in connection with the Company's 2013 annual meeting of shareholders:

We are a “controlled company” within the meaning of the NASDAQ Marketplace Rules because more than 50% of our voting power is held by Charles W. Ergen, our Chairman. Mr. Ergen currently beneficially owns approximately 52.1% of our total equity securities and possesses approximately 88.0% of the total voting power.⁴

II. DISH ENTERS THE WIRELESS INDUSTRY AND ACQUIRES SPECTRUM

25. Although Dish had previous success in the satellite television business, business has begun to decline. The Company's subscriptions have increased at an average rate of only 0.4% during the past five years.

26. Observing Dish's declining growth, Chetan Sharma, the founder of Chetan Sharma Consulting, stated: “If they don't have some form of a wireless play, then it's very hard for them to survive longer term.”⁵

27. Dish already has spent billions of dollars to purchase wireless spectrum licenses, including \$712 million to acquire certain 700 MHz wireless spectrum licenses in 2008. In March 2012, the Company spent \$2.86 billion to complete the acquisitions in bankruptcy of 100% of the equity of DBSD and substantially all of the assets of TerreStar Networks, Inc., pursuant to which Dish acquired, among other things, 40 MHz of 2 GHz wireless spectrum licenses.

28. In May 2013, Dish proposed a merger with Sprint and raised approximately \$2.5 billion in capital for that proposed transaction. Dish also made a public offer to acquire

⁴ Dish Network Corp., Proxy Statement (Form DEF 14A) at 5 (Mar. 22, 2013) (emphasis added).

⁵ Stephen Lawson, *Dish is likely eyeing new acquisitions after losing Sprint*, pcworld.com (July 27, 2013), available at <http://www.pcworld.com/article/2045359/whats-next-for-dish-after-losing-out-on-sprint.html>.

Clearwire, the holder of a significant amount of wireless spectrum, which Sprint controlled. Neither proposal was successful, leaving Dish to seek out other alternative strategic opportunities.

III. LIGHTSQUARED ENTERS BANKRUPTCY

29. LightSquared is a wireless company focused on developing a nationwide, fourth generation wireless broadband communication network integrated with satellite coverage across the United States. Prior to its bankruptcy, LightSquared wanted to build a network that would provide high-speed voice and data coverage to 92% of the U.S. population by 2015. To achieve this goal, LightSquared acquired large amounts of “L-Band” wireless spectrum. Until recently, the L-band consisted of numerous thin slices of airwaves, scattered across the band, which could not be used for a conventional wireless network. LightSquared and others, however, reorganized the L-Band by bundling the slices into more usable blocks. According to Lance Vitanza, a senior telecom analyst at brokerage CRT Capital Group, this spectrum, if made marketable, could be worth “in excess of \$10 billion.”

30. LightSquared ran into problems, however, when it became apparent that its wireless network could potentially interfere with adjacent spectrum that is used for global positioning system (“GPS”) signals – a government technology that has a number of civilian and military uses. Because the two blocks of spectrum were adjacent, federal regulators raised a concern that LightSquared’s stronger signal would overwhelm the GPS signal, rendering GPS devices unusable.

31. LightSquared had assumed approximately \$1.7 billion of private secured debt to fund the enterprise of building out its wireless network. When the market learned of

LightSquared's regulatory issues, creditors became concerned. As a result, LightSquared's debt was trading as low as forty cents on the dollar around December 2011 to January 2012.

32. On February 14, 2012, the Federal Communications Commission announced that it intended to suspend LightSquared's wireless spectrum license until conflicts with the GPS system were resolved.

33. After failing to reach a deal with its lenders to extend a waiver to a default on its debt, LightSquared filed a petition pursuant to Chapter 11 of the Bankruptcy Code in the bankruptcy court for the Southern District of New York, on May 14, 2012. Around this time, LightSquared debt was trading around fifty cents on the dollar.

A. Ergen Seizes An Opportunity For Himself

34. With LightSquared now in bankruptcy, Ergen pounced. He created an investment vehicle named SP Special Opportunities, LLC ("Sound Point") to purchase LightSquared debt. Ergen then instructed Stephen Ketchum, a former investment banker with long-standing ties to Ergen, to purchase over one billion dollars in LightSquared debt securities through Ketchum's hedge fund.

35. Between April 2012 and May 2013, Sound Point made the following purchases of LightSquared secured debt for Ergen's personal benefit and without Dish's or the Board's knowledge:

Trade Date	Closing Date	Par Value of Purchase	Trading Price of LightSquared Debt at Time of Trade (% of par)⁶	Market Value of Purchase at Time of Trade
04/13/12	09/06/12	5,000,000.00	48.75	2,437,500.00
05/03/12	07/23/12	4,545,500.00	44.00	2,000,020.00
05/03/12	07/26/12	20,000,000.00	44.00	8,800,000.00
05/03/12	09/06/12	3,000,000.00	44.00	1,320,000.00
05/03/12	09/06/12	2,000,000.00	44.00	888,000.00
05/03/12	07/23/12	5,000,000.00	44.00	2,200,000.00
05/04/12	05/31/12	247,259,046.62	59.00	145,882,837.51
10/04/12	11/30/12	19,417,287.99	74.50	14,465,879.55
10/23/12	02/06/13	3,000,000.00	84.50	2,535,000.00
11/15/12	01/08/13	7,997,057.00	84.50	6,757,513.17
12/12/12	06/11/13	2,000,000.00	84.50	1,690,000.00
12/13/12	03/12/13	7,000,000.00	84.50	5,915,000.00
12/20/12	04/09/13	14,782,302.32	88.50	13,082,337.55
12/28/12	03/13/13	15,000,000.00	88.50	13,275,000.00
01/02/13	03/07/13	20,000,000.00	100.50	20,100,000.00
01/02/13	04/05/13	6,000,000.00	100.50	6,030,000.00
01/03/13	03/07/13	17,999,999.97	100.50	18,089,999.97
01/07/13	05/24/13	7,000,000.00	88.00	6,160,000.00
01/14/13	05/24/13	9,410,420.00	90.00	8,469,378.00
02/01/13	-----	20,000,000.00	91.50	18,300,000.00
03/25/13	05/24/13	88,262,536.00	94.00	82,966,783.84
03/28/13	-----	168,759,227.85	91.50	154,414,693.48
04/01/13	06/25/13	5,500,000.00	100.00	5,500,000.00
04/19/13	06/14/13	122,250,172.79	97.50	119,193,918.47
04/26/13	06/18/13	145,712,408.57	97.50	142,069,598.36
04/26/13	06/18/13	46,186,366.57	97.50	45,031,707.41
TOTALS		\$1,013,082,326.30		\$847,567,167.30

⁶ The trading prices of LightSquared secured debt are from data collected by Bloomberg.

36. In total, Ergen purchased more than one billion dollars of LightSquared's debt, thereby becoming LightSquared's single largest secured creditor.

37. A reporter at *Bloomberg* noted the following regarding Ergen's clever move to purchase LightSquared's debt:

The conflict is fairly straightforward: The more Dish pays for LightSquared, the more money Ergen makes on his LightSquared debt. He's got incentives to try to make Dish overpay to line his own pocket, and he's got enough power over Dish to be able to do so. Recognizing this conflict, Dish's board set up a special committee to approve its bid for LightSquared. Howard served on the committee, and it approved the bid – but was then disbanded two days later, “to the surprise of the committee's members,” the [Wall Street] Journal reports. Howard and the committee members planned to stick around to supervise the bid – which is still being fought over in bankruptcy court – and perhaps try to negotiate to get Ergen to give some of his profits to shareholders. Ergen had other ideas.

.....

But this specific issue – an executive going around and buying up an asset for cheap, then convincing his company to buy all of that asset for a higher price – doesn't come up a lot because it's so obviously shady: If you're supposed to be devoting your time and energy to finding opportunities for your company, it looks pretty bad to steal those opportunities for yourself.⁷

38. Additionally, whereas most investors would be cautious about purchasing nearly \$1 billion of debt out of bankruptcy, Ergen had reason to be confident: he knew as an insider at Dish that the Company was looking to acquire spectrum assets like those owned by

⁷ Matt Levine, *How Shady Was Charlie Ergen's Wireless Shopping Spree?*, Bloomberg, Sept. 11, 2013, available at <http://www.bloomberg.com/news/2013-09-11/how-shady-was-charlie-ergen-s-wireless-shopping-spree-.html> (emphasis added) (footnote call number omitted).

LightSquared. In fact, he admitted as much in an interview at the *D: Dive Into Media Conference* in February 2013:

[Dish would] like to own a wireless network. . . . [I]deally we'd compete with the AT&T's and Verizon's so we can give customers different choices, different way of doing things. ***To do that we would need more spectrum.***⁸

39. Thus, with this substantial debt purchase not only did Ergen take for himself (in stealth-like fashion) a strategic opportunity that was otherwise available to Dish, he did so knowing that his personal risk was minimized because the Company's strategic plans ***already*** included purchasing more spectrum.

40. With his personal position secure, Ergen set in motion his plan to cause either Dish or EchoStar to purchase LightSquared's assets out of bankruptcy at a price that would personally benefit him.

41. On May 15, 2013, Ergen, through an entity named L-Band Acquisition, LLC ("LBAC"), a Delaware limited liability company in which Ergen was the sole member and managing member, personally made an offer for substantially all of the assets of LightSquared for \$2 billion in cash. This offer therefore set a floor price in any bankruptcy auction for LightSquared's assets. Moreover, because LightSquared only had \$1.7 billion in total outstanding secured debt, the \$2 billion offer effectively ensured that Ergen would be made whole on his LightSquared debt holdings.

42. Only after learning about Ergen's personal bid for LightSquared's assets did the Board form the Special Committee in order to determine whether Dish should make a competing

⁸ Video Interview, *Meet Charlie Ergen, the Guy Who Now Wants to Buy Sprint*, All Things D (Apr. 15, 2013), <http://allthingsd.com/20130415/meet-charlie-ergen-the-guy-who-now-wants-to-buy-sprint/> (emphasis added).

bid. Perhaps in recognition of this obvious conflict of interest, Ergen shortly thereafter transferred LBAC to Dish.

B. Dish Bids For LightSquared

43. On July 23, 2013, a group of LightSquared's secured creditors, including Ergen (the "Secured Group"), submitted a bankruptcy plan that, if approved, will result in the sale of LightSquared's assets in a public auction. Dish submitted a "stalking horse agreement"⁹ whereby LBAC (an entity established by Ergen and subsequently transferred to Dish) would acquire substantially all of LightSquared's assets for approximately \$2.2 billion.

44. Only two months earlier, however – and before Ergen transferred his interest in LBAC to Dish – LBAC offered to buy the same LightSquared spectrum assets for \$2 billion – \$200 million less than LBAC's July 23, 2013 bid.

45. If approved, the proposed stalking horse agreement (which contains certain protections) will make Dish (as LBAC's designee) the leading contender to acquire LightSquared's spectrum assets. These protections include:

- LBAC receiving a break-up fee of 3% of the ultimate purchase price (at least \$66 million based on the \$2.2 billion bid) if it is not the winning bidder in the auction.
- A proposed "Purchasers Protections Order" that imposes significant threshold requirements on competing bids. Thus, LBAC (and in turn Dish as its designee) will enjoy significant advantages during the proposed bankruptcy auction of LightSquared's spectrum assets if the Secured Group plan and the stalking horse agreement are approved.

⁹ A "stalking horse bid" allows a distressed company to avoid low bids on its assets. Once the stalking horse has made its bid, other potential buyers may submit competing bids for the bankrupt company's assets. In essence, the stalking horse sets the bar so that other bidders cannot low-ball the purchase price.

46. In connection with its offer, the Company filed a Form 8-K with the SEC on July 23, 2013. That public filing stated:

DISH's Board . . . approved entering into the [agreement] based, among other things, on the recommendation of a [Special Committee] and a fairness opinion that was prepared by a financial advisory firm at the request of the Special Committee.¹⁰

47. The Form 8-K, however, failed to disclose the identities of the members of the Special Committee. Nor did it address other material subjects, such as the Special Committee's mandate, whether any recommendation was unanimous, the identity of any "financial advisory firm," and, perhaps most significantly, whether Ergen had recused himself from any deliberations.

48. Most troubling, however, the Form 8-K did not disclose that only two days earlier, on July 21, 2013, the Board had disbanded the Special Committee after its two members insisted that the Special Committee should have an on-going role in the deal discussions given Ergen's personal interests.

49. On July 25, 2013, Howard, one of the two Special Committee members, unexpectedly resigned from the Board. The sudden nature of the resignation placed Dish at risk of being delisted from the NASDAQ, as illustrated by a Form 8-K that Dish filed with the SEC on July 31, 2013:

Upon the effective date of the resignation of Gary S. Howard described below, DISH Network Corporation (the "Corporation") will no longer have three audit committee members as required by Rule 5605(c)(2) of the NASDAQ Listing Rules, and the Corporation provided the required notice to NASDAQ to this effect on July 31, 2013. In the interim until this vacancy is filled, the Corporation

¹⁰ Dish Network Corp., Current Report (Form 8-K) at 2 (July 23, 2013).

will be relying on the cure period specified in Rule 5605(c)(4)(B) of the NASDAQ Listing Rules.¹¹

C. Ergen's Actions Place Dish At Risk

50. Following these events, on August 6, 2013, LightSquared's controlling shareholder, Harbinger, filed a complaint in federal bankruptcy court in New York against Ergen *and Dish*. The complaint sought more than \$4 billion in damages. In its action, Harbinger alleged that Ergen improperly purchased LightSquared debt with the goal of infiltrating the Secured Group and then using his control over Dish to execute a fraudulent scheme to obtain LightSquared's spectrum assets in the bankruptcy proceeding.

51. On August 22, 2013, LightSquared filed a notice of intent to intervene as a plaintiff in the Harbinger Lawsuit. LightSquared seeks equitable disallowance of any claims in bankruptcy based on Ergen's debt purchases. In addition, LightSquared submitted a proposed reorganization contemplating an open bidding process that would be led by LightSquared itself rather than the secured creditors, including Ergen. This would have the effect of denying Dish favorable "stalking horse bidder" status.

52. On August 30, 2013, Harbinger proposed a reorganization plan. That plan would pay off all creditors through the distribution of cash and new secured notes *without* selling LightSquared's spectrum assets. If approved, Dish would fail to acquire LightSquared's spectrum assets. According to Harbinger:

DISH, the Presumptive Stalking Horse Purchaser, Is Not A Good Faith Purchaser.

[T]he Bankruptcy code requires that a purchaser of a debtor's assets must act in good faith for the Bankruptcy Court to approve the sale. Courts have held that

¹¹ Dish Network Corp., Current Report (Form 8-K) at 2 (July 31, 2013)

misconduct including fraud, concealment of material facts, or other attempts to take grossly unfair advantage of other bidders destroys a purchaser's good faith.¹²

53. Ergen's conduct here is far from a one-off. Just three years ago, Dish was found to have failed to act in good faith in the DBSD bankruptcy litigation as it had purchased the bankrupt company's debt as a "strategic investor" in an illicit effort to influence the bankruptcy proceedings so that it could obtain DBSD's spectrum rights. *See In re DBSD N. Am. Inc.*, 421 B.R. at 139-40. There, after purchasing DBSD's debt, Dish voted against the DBSD bankruptcy plan (which would have stripped Dish of any equity interests or the right to execute upon DBSD's spectrum assets). As a result, the bankruptcy court disqualified Dish's vote against the plan. The District Court for the Southern District of New York and Second Circuit Court of Appeals both upheld the bankruptcy court's determination. *See In re DBSD N. Am., Inc.*, 2010 WL 1223109, at *3 (noting "an abundance of evidence" that Dish had not acted in good faith); *In re DBSD N. Am., Inc.*, 634 F.3d at 104 (noting that "DISH purchased the claims as votes it could use as levers to bend the bankruptcy process toward its own strategic objective of acquiring DBSD's spectrum rights, not toward protecting its claim").

54. Notwithstanding these egregious violations, the Board has continued to accede to Ergen's will and has refused to isolate him from Dish's bid. Unless the Board does so, there is a significant risk that the bankruptcy court will find that Dish was complicit in the bad faith actions described herein.

¹² Specific Disclosure Statement for the Joint Plan of Reorganization for LightSquared Inc. and its Subsidiaries Proposed by Harbinger Capital Partners, LLC at 23, *In re LightSquared Inc.*, No. 12-12080 (SCC) (Bankr. S.D.N.Y. Aug. 30, 2013).

DERIVATIVE ALLEGATIONS

55. Plaintiff incorporates by reference all preceding and subsequent paragraphs as though they were fully set forth herein.

56. Plaintiff brings this action derivatively in its right and for the benefit of Dish to redress injuries suffered, and to be suffered, by Dish as a direct result of the breaches of fiduciary duties by Individual Defendants.

57. Dish is named as a nominal defendant in this case solely in a derivative capacity. This is not a collusive action to confer jurisdiction on this Court that it would not otherwise have.

58. As alleged above, Plaintiff is and was a stockholder of Dish at the time of the breaches of fiduciary duties complained of and will adequately and fairly represent the interests of the Company and its shareholders in enforcing and prosecuting their rights.

59. The wrongful acts complained of herein subjected, and continue to subject, Dish to harm.

Demand On The Dish Board Is Excused As Futile

60. Plaintiff has not made a demand on the Dish Board to bring suit asserting the claims set forth herein because pre-suit demand is excused as a matter of law.

A. Ergen Dominates The Entire Board

61. The Board is dominated and controlled by Ergen, who is singularly the most powerful person at the Company. Indeed, Ergen personally directs virtually all aspects of the Company's business strategies. It is to his directives and views that the Board has consistently acceded and will continue to accede. This domination of the Board of Directors by Ergen has impaired the Board's ability to exercise validly its business judgment and renders it incapable of

reaching an independent decision as to whether to initiate this action. As evidence of this control, one need look no further than Dish's own public filings:

*We are a “controlled company” within the meaning of the NASDAQ Marketplace Rules because more than 50% of our voting power is held by Charles W. Ergen, our Chairman. Mr. Ergen beneficially owns approximately 52.1% of our total equity securities and possesses approximately 88.0% of the total voting power.*¹³

62. In light of Ergen's control over Dish, the Board is incapable of acting independently with respect to whether to initiate an action against Ergen, both in his role as a majority shareholder and a director of Dish. Notably, Ergen also has direct control over Dish's Board:

*Through his voting power, Mr. Ergen has the ability to elect a majority of our directors and to control all other matters requiring the approval of our stockholders.*¹⁴

63. This means that, if one or more of the directors agreed to initiate this action in response to a litigation demand, Ergen alone could end their tenure on the Board. Given Ergen's control over the Board, as well as his control over the Company as a whole, the current Board members are incapable of acting independently in response to a demand. Thus, demand is futile as a matter of law.

B. Half The Board Is Interested Or Not Independent

64. In addition to the above, demand is futile if at least one-half of the directors has a personal financial interest at stake that prevents the directors from fairly and impartially considering a demand to initiate this action.

¹³ Dish Network 2012 Annual Report at 5 (emphasis added).

¹⁴ *Id.* at 40 (emphasis added).

65. As explained more fully below, seven of the eight members of the Board are incapable of acting impartially (in addition to the fact that they are dominated by Ergen) because initiating a lawsuit against Ergen and the Board would, *inter alia*, put at risk their current employment and/or lucrative consulting arrangement with Dish.

66. **Ergen.** Ergen is conflicted with respect to determining whether to initiate and aggressively prosecute this action because he dominates the Board and because his alleged misconduct forms the gravamen of Plaintiff's allegations. Therefore, pursuing the claims asserted herein could potentially force Ergen to disgorge hundreds of millions of dollars in profits which would run contrary to his personal financial interests. Accordingly, he cannot fairly and impartially consider a demand to initiate this action.

67. **Cantey Ergen.** Cantey Ergen, wife of Ergen, is unable to fairly and impartially consider a demand to initiate an action that likely would prevent her husband (and arguably herself as his spouse) from obtaining hundreds of millions of dollars in potential profits related to Ergen's LightSquared debt purchases. In view of this close familial relationship, neither of these individuals could fairly and impartially consider a demand to initiate litigation against the other.

68. **DeFranco.** DeFranco, through his close personal friendship with Ergen, has become vastly wealthy. According to the 2013 Dish Annual Meeting Proxy, DeFranco owns 4,576,027 shares of Dish Class A common stock which, based on Dish's closing stock price of \$46.84 on September 23, 2013, are worth approximately \$214.3 million. Furthermore, in 2011 and 2012, DeFranco sold approximately \$40 million of his personal Dish equity. DeFranco is an officer at the Company and he also founded EchoStar in 1980 along with Ergen and Cantey Ergen. If DeFranco agreed to initiate litigation against Ergen and the other Board members, his

status as an employee would be at risk. Thus, DeFranco cannot fairly and impartially consider a demand to initiate this action.

69. **Clayton.** Clayton, Dish's President and CEO, is likewise incapable of acting impartially with respect to a demand to initiate this action. His principal occupation and primary means of earning a living is through employment with Dish, a Company that is controlled by Ergen, who directed the strategies at the center of Plaintiff's allegations. Moreover, Ergen personally selected Clayton to succeed him as the Company's CEO in 2011. As a result of this employment relationship, Clayton has received and will continue to receive valuable financial benefits from the Company which could be at risk if Clayton agrees to initiate an action against Ergen and the other Board members. As such, Clayton maintains personal financial interests that render him incapable of fairly and impartially considering a demand.

70. Three other members of the Board – Moskowitz, Vogel, and Ortolfo – also have personal financial interests or otherwise cannot act independently when considering a demand to initiate this action. As explained more fully below, all three formerly served as Dish senior executives, and Moskowitz and Vogel continue to serve as senior advisors to the Company, roles which reward them with lucrative remuneration that they otherwise would not receive and that would be at risk if they agreed to initiate an action against Ergen and the other Board members.

71. **Moskowitz.** Moskowitz served as the Company's General Counsel from 1990 until his retirement in 2007, but has continued his relationship with Dish since that time. During 2012, for example, Dish employed Moskowitz as a senior advisor to the Company and paid him a salary and bonus totaling \$250,000. According to the 2013 Dish Annual Meeting Proxy, the Company expects to continue Moskowitz's employment as a senior advisor to Dish during 2013.

Moskowitz's service has led to him being awarded 944,352 shares of Dish Class A common stock which, according to the 2013 Dish Annual Meeting Proxy, is worth approximately \$44.2 million based on Dish's September 23, 2013 closing price. Furthermore, the close relationship between Ergen and Moskowitz is evidenced by the fact that Moskowitz is the trustee for certain trusts established for the benefit of Ergen's children. Moskowitz's previous role as Dish's General Counsel and continuing role as a senior advisor at the Company, combined with his position of trust as a trustee to the Ergen family, will prevent him from exercising independent judgment. He is, therefore, unable to fairly and impartially consider a demand.

72. **Vogel.** Vogel was hired by Ergen in 1994 to serve as a Company executive, and was promoted to President in 1995, a position he occupied until 1997. In 2005, Vogel returned to Dish as the Vice Chairman of the Board, a role he had until March 2009. In September 2006, Ergen appointed Vogel as the Company's President. Vogel served in this role until February 2008. From 2006 through 2008, Vogel received total compensation of over \$9 million from the Company. After retiring, Vogel has continued to work for Dish as a senior advisor and director. According to the 2013 Dish Annual Meeting Proxy, Vogel owns 357,244 shares of Dish Class A common stock which, based on Dish's closing stock price of \$46.84 on September 23, 2013, are worth approximately \$16.7 million. Furthermore, Vogel recently served on the board of EchoStar, serving as Vice Chairman between October 2007 and March 2009. These close ties between Vogel and Ergen, combined with Vogel's work as a senior advisor at Dish, render Vogel unable to fairly and impartially consider a demand.

73. **Ortolf.** Ortolf served as Dish's President and Chief Operating Officer from 1988 until 1991. In 2005, he returned to Dish to serve as a director. During his more than seven years

as a Dish director, Ortolf has received total directorship fees of approximately \$730,000. Furthermore, in 2007, Ergen added Ortolf to the board of directors of EchoStar and rewarded him with over \$520,000 in additional directorship fees over the last five years. Given Ortolf's former employment under Ergen and lucrative board service at both Dish and EchoStar, he is unable to fairly and impartially consider a demand to initiate this action.

74. Even if a majority of the Dish Board is independent (which they are not), demand would still be futile. First, the claims alleged herein, which involve a controlling shareholder standing on both sides of a transaction, implicate the entire fairness standard. Indeed, Defendant Ergen is the singularly most powerful person at the Company and he personally directed the strategies outlined herein. Second, independent of the entire fairness test, the Board's decision to not isolate Ergen from the remainder of the LightSquared bidding process despite his clear conflict of interest amounts to a breach of the duty of loyalty that falls outside the scope of the business judgment rule.

COUNT I

Against the Individual Defendants for Breach of the Duty of Loyalty (Dish's Bid for LightSquared's Assets)

75. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

76. As a controlling shareholder and Dish director, Ergen owes a duty to the Company's shareholders to act with the utmost loyalty, candor, good faith and fair dealing, including when Ergen's personal interests conflict with those of Dish and its public shareholders.

77. As detailed herein, Ergen's status as LightSquared's largest creditor creates an ongoing conflict with Dish's interest in acquiring LightSquared's spectrum through the bankruptcy process.

78. By permitting Ergen to continue to interfere with and influence Dish's actions with respect to the LightSquared bankruptcy, the Individual Defendants have violated, and are continuing to violate, their duties to the Company's shareholders. Ergen's actions have already harmed, and are continuing to harm, Dish. These risks include the prospect that Dish will suffer monetary damages through, *inter alia*, the additional cost in acquiring LightSquared or its assets, the related costs defending itself from the Harbinger Lawsuit, and the possibility of significant damages if the Harbinger Lawsuit is successful.

79. Accordingly, Plaintiff seeks an award of monetary damages from the Individual Defendants to compensate them from the costs Dish has already incurred in its efforts to acquire LightSquared and defending itself from the Harbinger Lawsuit. Plaintiff likewise seeks monetary damages for any future harm suffered on account of Ergen's and the Individual Defendants' breaches of fiduciary duty.

COUNT II

Against Ergen for Breach of the Duty of Loyalty (Purchase of a Controlling Stake of LightSquared Debt)

80. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

81. As a controlling shareholder and Dish director, Ergen owes a duty to the Company's shareholders to act with the utmost loyalty, candor, good faith and fair dealing, including when Ergen's personal interests conflict with those of Dish and its public shareholders.

82. By pursuing a personal business opportunity that was reasonably likely to cause harm to the Company, Ergen was obligated to permit Dish's independent directors to decide, with the benefit of full information and without any interference, whether the business opportunity should be permitted or should be conditioned in any respect, to prevent the Company's interests from being harmed.

83. Rather than doing so, Ergen used the opportunity to purchase the majority of LightSquared's secured debt at a discount for his personal benefit – one that will provide him with a windfall if and when Dish pays a premium to acquire LightSquared's assets.

84. Rather than disclose the material facts about his desire to personally acquire LightSquared debt and allow the Board and independent directors to determine whether this should be permitted or conditioned, Ergen surreptitiously and in breach of his duty of loyalty acquired over one billion dollars of LightSquared debt.

85. There now exists a possibility that the bankruptcy court may impute Ergen's bad faith to Dish. This would impair the ability of the Company to participate in any bankruptcy auction for LightSquared's spectrum assets.

86. Defendant Ergen misused confidential corporate information in his acquisition of LightSquared debt and failed to act in good faith toward Dish. As a result of Ergen's actions, the Company has been and will be damaged.

87. Plaintiff seeks an award of monetary damages from Ergen to compensate the Company from the costs Dish has already incurred in its efforts to acquire LightSquared, defending itself from the Harbinger Lawsuit, and for any future harm suffered on account of Ergen's breach of fiduciary duty.

COUNT III

Against Ergen for Breach of the Duty of Loyalty (Denying Dish the Opportunity to Purchase a Controlling Stake of LightSquared Debt)

88. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

89. As a controlling shareholder and Dish director, Ergen owes a duty to the Company's shareholders to act with the utmost loyalty, candor, good faith and fair dealing, including when Ergen's personal interests conflict with those of Dish and its public shareholders.

90. When Ergen saw that Dish had a strategic opportunity to purchase LightSquared, he was required to present that opportunity to the Board. Ergen was not permitted to secretly invest in the LightSquared's debt and therefore jeopardize Dish's ability to participate in a bankruptcy auction.

91. Furthermore, before pursuing this personal business opportunity, Ergen was obligated to allow the Company's independent directors to decide, on full information and without interference, whether the Dish should pursue the opportunity and whether Ergen should have been at all limited in his actions.

92. Indeed, Article VIII of Dish's Charter expressly required Ergen or other Dish directors or officers to refer the LightSquared opportunity to the Company if, as here:

(A) the Corporation has expressed an interest in such business opportunity . . . as evidenced by resolutions appearing in the Corporation's minutes; (B) such Potential Business Opportunity was expressly offered to such director or officer solely in his or her capacity as a director or officer of the Corporation . . . ; and

(C) such opportunity relates to a line of business in which the Corporation or any Subsidiary of the Corporation is then directly engaged.¹⁵

93. Here, Ergen has publicly stated that acquiring spectrum assets is a strategic imperative for Dish and the Company has previously acquired such assets.

94. Upon information and belief, Defendant Ergen learned of the opportunity to purchase LightSquared debt solely in his capacity as Dish's Chairman and leader of the Company's strategic initiatives.

95. Plaintiff seeks an order of disgorgement or, alternatively, the award of money damages for any profits Ergen obtains through his usurpation of this corporate opportunity.

COUNT IV

Against Ergen for Unjust Enrichment

96. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

97. If Ergen is able to profit on his LightSquared debt purchases, he will be unjustly enriched at the Company's expense. Because Ergen identified, pursued, and secured the opportunity to purchase LightSquared's debt through his misappropriation and use of Dish's confidential and proprietary information, it would constitute unjust enrichment if Ergen is able to profit from it.

98. Plaintiff does not have an adequate remedy at law.

99. Plaintiff seeks an order that Ergen should be ordered to disgorge any enrichment that he is able to obtain at the Company's expense.

¹⁵ EchoStar Commc'ns Corp., Definitive Information Statement (Schedule 14C) at A-6 (Dec. 31, 2007).

RELIEF REQUESTED

WHEREFORE, Plaintiff demands judgment as follows:

1. Finding that demand on the Dish Board would be futile;
2. Finding that the Director Defendants breached their fiduciary duties by allowing Ergen to guide, and continuing to guide, Dish's bidding for LightSquared's assets despite the clear conflict of interest between Ergen and the Company and the significant threat of harm to Dish presented by Ergen's continued involvement in the process to acquire LightSquared's spectrum assets;
3. Finding that Ergen breached his fiduciary duties as a Company director and Dish's controlling shareholder by misappropriating confidential corporate information in connection with purchasing LightSquared debt for himself, which was done in bad faith and in disregard of the significant risks those debt purchases created for Dish's ability to acquire LightSquared's spectrum assets;
4. Finding that Ergen breached his fiduciary duties as a Company director and Dish's controlling shareholder by usurping Dish's opportunity to purchase LightSquared's secured debt;
5. Finding that Ergen has been unjustly enriched as a result of his LightSquared debt purchases;
6. Ordering the disgorgement of any profits that Ergen has or will receive as a result of his purchase of LightSquared's debt;
7. Awarding damages (including punitive damages), together with pre- and post-judgment interest;

8. Awarding Plaintiff the costs and disbursements of this action, including reasonable attorneys' fees; and

9. Awarding such other and further relief as is just and equitable.

JURY DEMAND

Plaintiff demands a trial by jury.

Dated this 25th day of September, 2013.

Respectfully submitted,

/s/ Jeffrey A. Berens

Jeffrey A. Berens

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Counsel for Plaintiff

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VERIFICATION

STATE OF FLORIDA)
) ss.:
COUNTY OF VOLUSTIA_____)

I, Mark Eisner, verify and declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

1. I am Chairman of the City of Daytona Beach Police Officers' and Firefighters' Retirement System in the above-entitled action.

2. I have reviewed the Verified Shareholder Derivative Complaint (the "Complaint") prepared on behalf of the City of Daytona Beach Police Officers' and Firefighters' Retirement System, and I authorize its filing.

3. I have reviewed the allegations made in the Complaint, and to those allegations of which I have personal knowledge, I believe those allegations to be true. As for the allegations of which I do not have personal knowledge, I rely on my counsel and their investigation and for that reason believe them to be true.

4. I further declare that the City of Daytona Beach Police Officers and Firefighters' Retirement System is a current shareholder, and has been a holder, of the common stock of Dish Network Corporation in the time period in which the wrongful conduct alleged and complained of in the Complaint was occurring.

Dated: September 23rd, 2013



Mark Eisner, Chairman
City of Daytona Beach Police Officers' and Firefighters' Retirement System