

August 9, 2010

**Via Electronic Submission**

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW, Room TW-A325  
Washington, DC 20554

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**Re: Notice of Ex Parte Presentation, and Written Ex Parte Presentation**

**WT Docket No. 02-55; ET Docket Nos. 00-258, 95-18;  
New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for  
Transfer of Control of Earth Station Licenses and Authorizations, File  
Nos. SES-T/C-20091211-01575, SES-T/C-20091211-1576, SAT-T/C-  
0091211-00144.**

Dear Ms. Dortch:

On Friday, August 6, 2010, Lawrence Krevor and Trey Hanbury of Sprint Nextel Corporation (“Sprint Nextel”), and John Culver of K&L Gates LLP, had a teleconference with Austin Schlick, General Counsel of the Commission, regarding the above-captioned proceedings.

During that conversation, Sprint Nextel discussed the oral argument that took place on Thursday, August 5, 2010, before the United States Court of Appeals for the Second Circuit in Sprint Nextel’s appeal of the confirmation order in the DBSD bankruptcy case.<sup>1</sup> Sprint Nextel explained that the Second Circuit panel indicated at oral argument that it understood the appeal was expedited, and that it intends to issue a decision quickly.<sup>2</sup>

With respect to DBSD’s transfer of control applications, Sprint Nextel stated, as explained in greater detail below, that one of DBSD’s three interrelated transfer of control applications was never formally accepted for filing or issued on public notice; therefore, it is

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<sup>1</sup> A copy of the August 5, 2010 oral argument transcript (“August 5 Oral Argument”) is enclosed as **Attachment A**.

<sup>2</sup> August 5 Oral Argument, at 16:22-17:9.

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not clear that the Commission could take action on that application without accepting it for filing or issuing it on public notice.

Sprint Nextel also requested that if, notwithstanding Sprint Nextel's requests in the record to the contrary, the Commission takes action on the DBSD applications prior to the issuance of a decision by the United States Court of Appeals for the Second Circuit, then the Commission should also formally defer the effective date of its action or otherwise defer the effectiveness of the decision for a period of at least ten (10) business days. This deferral would minimize potential mootness issues related to premature Commission action and potential changes to the Reorganization Plan, and would afford the parties sufficient time to seek further expedited resolution of the associated bankruptcy appeal issues.

Sprint Nextel submits the following supplemental information with respect to matters raised during the telephone conversation.

\* \* \*

**Address Procedural Status of DBSD Application Not Yet Accepted for Filing.** As mentioned above, it is not clear as a threshold matter that the Commission is currently in a position to take action on all three of DBSD's interrelated applications. The International Bureau ("IB") issued a Public Notice on December 16, 2009, finding *two* of DBSD's three applications "to be acceptable for filing."<sup>3</sup> However, the IB has not yet "accepted for filing" or issued a Public Notice listing the receipt of File No. SAT-T/C-20091211-00144, the "2 GHz MSS Letter of Intent."<sup>4</sup> Because this third DBSD application does not appear to fit any exception to the applicable public notice period, it would seem premature for the Commission to act on this application.<sup>5</sup> Accordingly, the Commission appears to be precluded from taking action to grant this application.<sup>6</sup>

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<sup>3</sup> See *Re: Satellite Radio Applications Accepted for Filing*, Report No. SES-01202 (Dec. 16, 2009), at \*6; see also Sprint Nextel Petition to Deny, at 4 n.1 (noting that one DBSD application has not been accepted for filing, but requesting its denial on the same grounds should it ever be accepted).

<sup>4</sup> For example, the IB lists the "Accepted for Filing PN Date" for File No. SAT-T/C-20091211-00144 as "[None](#)." Sprint Nextel also has not separately located any public notice for that application.

<sup>5</sup> See 47 C.F.R. § 25.151(c).

<sup>6</sup> See, e.g., 47 C.F.R. § 25.151(d); 47 U.S.C. § 309(b).

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**Deny the Applications.** When the Commission ultimately does consider DBSD's applications,<sup>7</sup> it should deny them due to DBSD's failure to meet its burden of proving that its proposed transactions serve the public interest by a preponderance of the evidence.<sup>8</sup> As Sprint Nextel showed, DBSD submitted almost no evidence in support of its optimistic claims as to the presumed benefits that exiting bankruptcy would have *only on DBSD*.<sup>9</sup> In contrast to DBSD's dubious representations to the Commission, numerous facts as well as information and testimony DBSD itself provided in the bankruptcy proceeding show that DBSD has no resources or plans to build out its system and provide commercial service, and that grant of the applications would result in mothballing of the MSS system, spectrum warehousing, and the exclusion of other potential entrants.<sup>10</sup>

**Defer the Effective Date of Any Disposition to Preserve the Commission's Regulatory Objectives and Avoid Prejudice to the United States Court of Appeals for the Second Circuit.** In the event the Commission chooses to grant the DBSD applications, then the Commission should avoid acting precipitously on DBSD's applications, particularly when the United States Court of Appeals for the Second Circuit has indicated that it expects to issue a decision quickly. Alternatively, should the Commission choose to act on the DBSD applications prior to the court's issuance of a decision, Sprint Nextel requests that the

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<sup>7</sup> Sprint Nextel has also repeatedly requested that the Commission affirm the direct (*i.e.*, joint and several) reimbursement responsibility of ICO Global through the above-captioned rulemaking proceedings prior to taking action on the above-captioned DBSD transfer of control applications. *See, e.g.*, Sprint Nextel Notice of *Ex Parte* Presentation, WT Docket No. 02-55, ET Docket Nos. 00-258, 95-18; New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control of Earth Station Licenses and Authorizations, File Nos. SES-T/C-20091211-01575, SES-T/C-20091222-1576, SAT-T/C-0091211-00144, at 3 & n.6 (July 27, 2010) (noting that the issue was also raised in Sprint Nextel's July 24, 2009 reply comments in the rulemaking proceedings).

<sup>8</sup> *Petition to Deny of Sprint Nextel Corporation*, New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control of Earth Station Licenses and Authorizations, File Nos. SAT-T/C-0091211-00144, *et al.* (filed Jan. 14, 2010), at 8-17 ("*Sprint Nextel Petition to Deny*"); *Reply of Sprint Nextel Corporation to Opposition of New DBSD Satellite Services G.P. to Petition to Deny*, New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control of Earth Station Licenses and Authorizations, File Nos. SAT-T/C-0091211-00144, *et al.* (filed Feb. 3, 2010), at 4-7 ("*Sprint Nextel Reply to DBSD Opposition*").

<sup>9</sup> *See, e.g.*, Sprint Nextel Petition to Deny, at 9-15; Sprint Nextel Reply to DBSD Opposition, at 4-7.

<sup>10</sup> Sprint Nextel Petition to Deny, at 9-15; Sprint Nextel Reply to DBSD Opposition, at 4-7.

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Commission formally defer the effective date of its action or otherwise defer the effectiveness of the decision for a period of at least ten (10) business days. The Commission has deferred its own actions in the past where consequential events would “seriously encumber [the Commission’s] regulatory functions” or significant factual issues with the applicant’s representations have been identified.<sup>11</sup> The same considerations are evident here. The Commission should defer the effective date of any action on DBSD’s applications to allow the parties sufficient time to seek further expedited resolution of the associated bankruptcy issues, or a stay if necessary. Potential harms and mootness issues related to premature Commission action on the applications could at least be minimized if the Commission formally defers the effective date of any it may take action for a period of ten days.

Pursuant to Section 1.1206 of the Commission’s Rules, a copy of this letter is being filed electronically in the above-referenced dockets and electronic copies are being submitted to Commission staff listed below. If you have any questions, please feel free to contact me at (202) 778-9859.

Sincerely,

/s/ Marc S. Martin  
Marc S. Martin

cc: Austin Schlick  
Stewart Block  
David Horowitz  
Andrea Kearney  
Sally Stone  
Julie Veach

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<sup>11</sup> *In re Applications of RKO General, Inc.*, Docket Nos. 18759, 18760, 18761, FCC 77-313 (May 5, 1977), at ¶ 12; *In re Applications of Roy M. Speer*, File Nos. BTCCT-950913KG, *et al.*, 11 FCC Rcd 18393, ¶ 1 (June 6, 1996) (issuing order staying effectiveness of simultaneous grant of transfer of pro forma control application where other party had raised issues as to applicant’s misrepresentations or lack of candor). Sprint Nextel has likewise identified significant issues with respect to the veracity of statements in DBSD’s applications. *See, e.g.*, Sprint Nextel Petition to Deny, at 5-6, 15, 16; Sprint Nextel Reply to DBSD Opposition, at 8 (noting that “[t]he discrepancies between DSBD’s apparent misstatements to the Commission in the Applications and the actual financial evidence in the bankruptcy proceeding remains striking”).

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Roderick Porter  
Charles Mathias  
John Giusti  
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## **ATTACHMENT A**

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UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT

IN RE:	.	
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DBSD NORTH AMERICA, INC., ET AL.,	.	
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Debtors.	.	
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	.	
SPRINT NEXTEL CORPORATION,	.	
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Appellants,	.	Case No. 10-1352
	.	
v.	.	
	.	
DBSD NORTH AMERICA, INC., ET AL.,	.	
	.	
Appellees	.	
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.....	.	
	.	
DISH NETWORK CORPORATION,	.	
	.	
Appellants,	.	Case No. 10-1175
	.	Case No. 10-1201
v.	.	
	.	
DBSD NORTH AMERICA, INC., ET AL.,	.	
	.	
Appellees.	.	
	.	
.....	.	

TRANSCRIPT OF ORAL ARGUMENT  
 Thursday, August 5, 2010  
 10:00 a.m.  
 Daniel Patrick Moynihan Courthouse  
 Ceremonial Courtroom 9th Floor  
 500 Pearl Street  
 New York, New York 10007

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21 Trading Association:22 EVAN M. JONES, ESQ.  
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1 (Time Noted: 11:48 a.m.)

2 MR. RIEMER: So, it will be all three people on  
3 the Appellant side, and then we will divide our time.  
4 You've given a total of twenty minutes to DBSD, --

5 THE COURT: I did.

6 MR. RIEMER: -- and, Your Honor, I will use  
7 fourteen minutes for DBSD, --

8 THE COURT: I see that.

9 MR. RIEMER: -- and then give three minutes to  
10 the other parties.

11 THE COURT: That's fine.

12 MR. BYRNE: Yes, Your Honor, we've agreed. You  
13 have given the two Appellants fifteen minutes, that each  
14 of the two Appellants will take seven and a half minutes,  
15 and then the *Amicus* has been granted five minutes.

16 THE COURT: That's fine. That's fine.

17 MR. RIEMER: Thank you.

18 THE COURT: Okay, let's start. We'll start  
19 with Appellants, as is our custom.

20 (Pause)

21 ORAL ARGUMENT ON BEHALF OF APPELLANT

22 SPRINT NEXTEL CORPORATION

23 MR. CULVER: It's still morning. Good morning,  
24 Your Honors. I am John Culver, on behalf of Sprint.

25 Sprint is an aggrieved party with respect to

1 this case, because its economic interests were impaired by  
2 the confirmation of the plan. Just as in the *Kane* case,  
3 what matters is whether, under the plan that was confirmed  
4 in this case -- not some other plan that may have been  
5 proposed, but whether under the plan that was confirmed in  
6 this case, Sprint receives less than that to which it is  
7 entitled under the Bankruptcy Code.

8 We believe that, under the clear language of  
9 1129, which I'll address in a second, that Sprint has  
10 clearly received less than that to which it was entitled  
11 under the Code; and therefore, under the *Kane* case, which  
12 considered an 1129 challenge, Sprint is aggrieved  
13 pecuniarily.

14 In addition to that, under the *Colony Hill* case,  
15 which is a case cited in our reply brief, --

16 THE COURT: This really comes down to how we're  
17 going to view this gifting doctrine, doesn't it?

18 MR. CULVER: I believe it does, Your Honor. I  
19 think that --

20 THE COURT: You might --

21 MR. CULVER: -- I think the aggrieved issue is  
22 bound up with the merits, and that is one of our  
23 arguments, which is that you can't find a party to lack  
24 standing because it's going to lose on the merits. I  
25 mean, I really do think these issues are the same.

1           And, in *Colony Hill*, this Court --

2           THE COURT:    Can you tell -- explain to us why  
3 you don't think we should accept application of the  
4 gifting doctrine.

5           Assume, at least at the start, that we would  
6 recognize it only with respect to secured creditors, not  
7 unsecured creditors.  There are any number of cases that  
8 criticize its application to those who are unsecured.

9           But, with respect to a secured creditor, the  
10 argument being made to us here is that but for what the  
11 secured creditor agreed to, it would have received all of  
12 the assets that were available; and therefore, you're in  
13 no different position than you would have otherwise been.

14           So, tell me why we shouldn't find that argument  
15 persuasive.

16           MR. CULVER:   I don't think there is any such  
17 exception in the language of Section 1129(b)(2)(B)(ii).  
18 It doesn't say that a dissenting class can be skipped in  
19 the distribution priority if -- or, let me say it a  
20 different way.  It doesn't say that a dissenting class can  
21 never be skipped unless the senior class gives up  
22 something to a junior class.  It just doesn't provide  
23 that.

24           The language is crystal clear, in terms of what  
25 it says.

1 THE COURT: So, what would we have to do?  
2 Require that all the money go to the secured creditor?

3 MR. CULVER: No, the plan provides -- or the  
4 entire bankruptcy process provides a mechanism by which  
5 the plan is proposed. And if a dissenting class -- excuse  
6 me -- if an intervening class votes in favor of a plan,  
7 then the equity interests can, in fact, share in the  
8 distribution of the proceeds. There is a very specific  
9 process by which that could be accomplished.

10 But if a dissenting class in fact dissents, then  
11 the junior class can't receive anything. That's the plain  
12 language of Section 1129(b)(2)(B)(ii). And, the valuation  
13 simply doesn't matter.

14 And, there are two -- three additional reasons  
15 why valuation doesn't matter. In the *Norwest Bank* case,  
16 at Page 207 to 208 -- and I'll quote from that decision --  
17 "Even where debts far exceed the current value of assets"  
18 -- even where debts far exceed the current value of  
19 assets. In other words, just the situation that you're  
20 posing, Your Honor.

21 A debtor who retains his equity interest in the  
22 enterprise retains property. So, there is no doubt that  
23 with respect to the argument that is made by DBSD, that no  
24 property is being given, because we wouldn't have gotten  
25 anything, anyway, *Norwest Bank*, the *Ahlers* case,

1 specifically addresses that. *Boyd* specifically addresses  
2 that, at Page 505 and 507.

3 And, with respect to their argument that no  
4 property is being received or retained, they have two  
5 arguments. One is that there is no property. And the  
6 other is that you're not getting anything because this is  
7 all ours and nothing is being distributed under the plan.  
8 *Norwest Bank* again speaks to that. It says --

9 THE COURT: Well, as a practical -- as a  
10 practical matter, the argument of the debtor, as I take  
11 it, is that the secured creditors really should get all of  
12 this, and we don't care who they give it to. But, I take  
13 it your argument is not -- that would only happen if it  
14 were liquidated. If they insisted on their security, they  
15 could do that, and break up the company. And then, they  
16 could give whatever they were awarded to anybody they felt  
17 like.

18 But presumably, they don't want to do that.  
19 What they want to do -- what everybody wants to do is to  
20 take advantage of the reorganization mechanism. And what  
21 you're really expecting to happen here is not that the  
22 secured creditors will say "Okay, we'll take our marbles  
23 and go home." What you're expecting to happen is that  
24 there will be a renegotiation in which you -- your clients  
25 will do better.

1 MR. CULVER: That's precisely the point, Your  
2 Honor. And that's the structure that the Bankruptcy Code  
3 creates for this particular negotiation.

4 THE COURT: And you suggest that there is  
5 legislative history that says that Congress intended to  
6 give people in Sprint's position more bargaining power or  
7 more leverage by giving them the opportunity to throw a  
8 monkey wrench in here and stop what the senior creditors  
9 would like to see done.

10 MR. CULVER: You said it better than I could  
11 say it.

12 THE COURT: And what I want to know is why  
13 would Congress want to do that? Why would they want to  
14 give this leverage to intermediate creditors?

15 Did you read -- are you familiar with Mr.  
16 Miller's Law Review article about that?

17 MR. CULVER: I've read it, yes. I've read it  
18 several times.

19 THE COURT: And, you know, I understand where  
20 Mr. Miller's position --

21 MR. CULVER: Who he is, right.

22 THE COURT: -- who he is and where he might be  
23 coming from. But the argument he makes is that this just  
24 gives you the right to hold up what is for the greatest  
25 good for the greatest number, in order to leverage

1 something more for yourself that isn't really what you're  
2 entitled to, because you're out of the money anyway.

3 And, I guess what I'm interested in is, as a  
4 policy matter, I realize Congress can do what it wants,  
5 and -- but I'm just trying to understand what might have  
6 motivated Congress? You know, why should we think that  
7 Congress intended to do that?

8 Can you explain why there is a policy reason  
9 they would have wanted to do that?

10 MR. CULVER: Well, let me put one little twist  
11 on that and then try to answer your question.

12 The statute doesn't give an individual creditor  
13 the right to do that.

14 THE COURT: Yeah, --

15 MR. CULVER: And, I am sure --

16 THE COURT: -- it's a class.

17 MR. CULVER: -- Your Honor understands that.  
18 It's a class that's given the right to do that.

19 And, the reason that it's there is prior to the  
20 '78 statute, an individual creditor could do that in  
21 public reorganizations and could raise this problem. And  
22 the Congress ratcheted back that ability to be a holdout,  
23 if you want to call it that. I don't like to use that  
24 pejorative term.

25 I think the point is that if the equity wants to

1 get something and wants to get, as you said, the benefit  
2 of this reorganization process, wipe out my client's  
3 claim, essentially, now it's been estimated at or allowed  
4 for voting purposes at \$2 million, but we say it's a \$200  
5 million claim. That's not decided. It's probably  
6 irrelevant.

7 But the point is that the claim goes away while  
8 the existing equity gets to keep a substantial portion of  
9 this business, with a substantial value. Under those  
10 circumstances, the Code forces the equity who is proposing  
11 this plan to negotiate with my client's class for a better  
12 recovery.

13 It is -- there is a policy issue. Where should  
14 that line be drawn? Congress certainly could have drawn  
15 it at a different place and said, all right, it does --  
16 it's going to be all classes voting together, or could  
17 have somehow manipulated the voting procedures, but it  
18 didn't. You vote by classes. You vote two ways in  
19 classes. And that allows, as in some of the cases you  
20 read about this, where the classes vote in favor, and one  
21 creditor objects.

22 The *Kane* case, for example, in that case found  
23 that the way in which votes were allocated was it was  
24 challenged under a separate voting provision, but that was  
25 an immaterial violation of the statute. The class voted

1 in favor and, therefore, 1129(b)(2)(B)(ii) didn't apply.

2 I mean, it's a very complex structure, and this  
3 is one part of it, albeit a part that gives --

4 THE COURT: Counsel?

5 MR. CULVER: -- a dissent --

6 THE COURT: I have a question.

7 MR. CULVER: Yes, ma'am.

8 THE COURT: Were you through answering  
9 Judge Lynch?

10 MR. CULVER: Yes, ma'am.

11 THE COURT: Could you tell me why you haven't  
12 forfeited your challenge to the valuation because you  
13 didn't appeal it?

14 MR. CULVER: We did not appeal the valuation  
15 issue, and we're not challenging the valuation issue. I  
16 don't think that that is determinative of any issue with  
17 respect to 1129(b)(2)(B)(ii), because I don't think  
18 valuation matters for the reasons I mentioned earlier; and  
19 not only because the *Norwest Bank* case says it doesn't,  
20 the *Boyd* case addresses this at 505 to 507 and identifies  
21 the absolute priority rule in different terms there, but  
22 as a fixed principle, even in that case where the debts  
23 far exceeded the value of the assets.

24 And, even in the *LaSalle* case, which we place  
25 considerable reliance upon, the value of the collateral

1 there was less than the debt. And, at Page 450, the  
2 Supreme Court gives an example of an 1129 violation and  
3 says that a common instance of an 1129 violation would be  
4 debtor's retention of an interest in an insolvent business  
5 reorganized under the plan. So, I don't think that the  
6 valuation matters.

7 The last point that I would like to make, unless  
8 I can respond to any other questions -- two last points I  
9 would like to make.

10 THE COURT: Your -- your time has long expired,  
11 so make those two points and we'll move along.

12 MR. CULVER: Yes, ma'am.

13 With respect to the on account of argument in  
14 the joint appendix at Page 101, 103, 104, and 113, those  
15 are provisions of the plan. The actual language "on  
16 account of" is used at Page 101 when describing how the  
17 stock is going to be distributed to the existing equity.  
18 It's on account of their obligations under the plan  
19 support agreement. The reason they're a party to that  
20 agreement is because of their pre-existing stock  
21 ownership.

22 Finally, I would --

23 THE COURT: If I may ask just a factual  
24 question? At the conclusion -- the conclusion of your  
25 brief, which I realize is an expedited schedule, and this

1 was only a month ago, you said "In the event that vacating  
2 the confirmation order is no longer possible based on  
3 intervening events," you asked for other relief.

4 I take it that this plan, though confirmed, has  
5 not been consummated yet?

6 MR. CULVER: That's correct.

7 THE COURT: And the reason, am I right, is that  
8 people are waiting for the FCC to do something?

9 MR. CULVER: DBSD has filed a transfer  
10 application with the FCC, and the FCC has not ruled on  
11 that. The transfer -- the approval is a condition to  
12 consummation, which could be waived by the parties, but  
13 has not.

14 THE COURT: All right. But so, at this point,  
15 there is no obstacle if we were to agree with you, to our  
16 just vacating the confirmation and sending it back to the  
17 Bankruptcy Court. And, if something happens before the  
18 FCC that makes consummation imminent, at that point,  
19 somebody will come back and ask us for a stay if the case  
20 is still *sub judice*?

21 MR. CULVER: We would expect to do that. And,  
22 Judge Gerber --

23 THE COURT: But right now, we don't have to  
24 worry about that.

25 MR. CULVER: You don't have to worry about

1 that. And we --

2 THE COURT: Okay, thank you.

3 MR. CULVER: -- would have three days, I  
4 believe. I'd have to double-check this. But, I think  
5 under one of Judge Gerber's orders, we would have three  
6 days to come back before this Court and ask for a stay.

7 THE COURT: Okay. I just wanted to make sure  
8 we don't have to worry, at this moment, about what's going  
9 to happen tomorrow somewhere that could moot this, or  
10 change the posture, or -- nothing has happened yet that  
11 would do that, and if something would, the parties will  
12 come and tell us about it.

13 MR. CULVER: Well, we would, Your Honor. But,  
14 you asked a number of questions there.

15 With respect to should the Court be worried  
16 about something that is imminent, I would say yes. And,  
17 as recently as yesterday, DBSD filed a notice of *ex parte*  
18 communications with the FCC. Under these administrative  
19 procedures, you can have *ex parte* communications. And  
20 they met with -- this notice states, and I don't have it  
21 with me --

22 THE COURT: Well, I'm sorry. I don't mean to  
23 cut you off, but I don't know that we need to know the  
24 details. I was just trying to assure -- and I understand  
25 it's expedited. We want to act quickly. I just wanted to

1 make sure I was correct that there is no stay in place,  
2 but that at this moment no one is asking us for a stay,  
3 and nothing has happened that would call into question the  
4 need to do what you suggested in the alternative in your  
5 request for relief.

6 MR. CULVER: That's correct. We would ask that  
7 the Court, respectfully ask that the Court act as quickly  
8 as possible.

9 THE COURT: Sure.

10 THE COURT: Thank you.

11 (Pause)

12 ORAL ARGUMENT ON BEHALF OF APPELLANT

13 DISH NETWORK CORPORATION

14 MR. BYRNE: Good afternoon. May it please the  
15 Court. My name is Larry Byrne. I'm from Linklaters, and  
16 I represent the Appellant first secured lienholder DISH  
17 Network.

18 And, before I get into the argument, the same is  
19 true with respect to DISH, Judge Lynch, that nothing is  
20 imminent; and therefore, all of the issues that we raise  
21 we believe remain ripe for decision by this Court.

22 THE COURT: And, I take it if either Appellant  
23 were successful with its respective argument, that would  
24 require that the plan that currently exists be  
25 un-confirmed, and we'd be back to the drawing board.

1           But if, for example, we agreed with Sprint -- I  
2 didn't ask him this question, so I'm asking you. If we  
3 agreed with him, you would still want -- it would still be  
4 important for us to address your issues, because if it  
5 then went back to the Bankruptcy Court, your issues would  
6 still be live there.

7           MR. BYRNE:    Yes. Our issues are very different  
8 than --

9           THE COURT:    I understand that.

10          MR. BYRNE:    -- Sprint's issues. Just to be  
11 clear, because I don't want the Court to have a  
12 misimpression, if the Court were to agree with us about  
13 the incorrect decision that Judge Gerber made on  
14 designation, and the incorrect interpretation he  
15 admittedly made on a new statute as to whether our class,  
16 the first senior secured lienholders, had, in effect,  
17 acquiesced in the plan, and if you don't accept his  
18 cramdown analysis, you would still have to remand for our  
19 treatment. But, as a theoretical matter, you could reject  
20 our argument that the plan is not feasible and that, per  
21 se, would not disrupt the plan, except that we would then  
22 have to be treated in accordance with the guidance that  
23 this Court would give Judge Gerber.

24          With respect to the issues that we have raised,  
25 there are four. There is the issue of designation or, in

1 plain English, disqualification of our vote as the first  
2 secured lienholder. There is the way Judge Gerber then  
3 dealt with the 1126(c) issue of whether having designated  
4 and disqualified our vote, two-thirds of the first secured  
5 lien class by amount, and half of the class by holding or  
6 claim, voted in favor of the plan, and --

7 THE COURT: You were the only member of the  
8 class. Isn't that correct?

9 MR. BYRNE: That's correct. And that's exactly  
10 why Judge -- both of those decisions by Judge Gerber were  
11 incorrect.

12 And then, whether his -- if he got the two  
13 designation issues right, whether his cramdown analysis  
14 was correct, which we don't believe that it was. And, the  
15 ultimate question of whether this plan is really feasible,  
16 which I'll address.

17 On the designation issue, from a policy point of  
18 view, that is probably the most troubling, in terms of  
19 precedent beyond this case and has caused great  
20 consternation among people who regularly rely on the U.S.  
21 creditor regime to resolve claims and have orderly  
22 reorganizations of business.

23 What Judge Gerber said for the first time, and  
24 what no Court has ever said, is if you are a secured  
25 creditor, and you also have a strategic interest in the

1 debtor or an asset of the debtor, unless you lie down and  
2 support everything the debtor and the plan supporters want  
3 to do, you're acting as an evil bankruptcy person and --

4 THE COURT: Well, he didn't say that.

5 MR. BYRNE: Yes, he did. That's the  
6 consequence of his ruling. He didn't use that language,  
7 but what he said is --

8 THE COURT: But the rationale for his ruling is  
9 that the acquisition was in order to take control of the  
10 company, and that that was a rationale that made for your  
11 vote not being in good faith.

12 MR. BYRNE: And actually that -- if that was  
13 Judge Gerber's rationale, then he got it wrong as a  
14 factual matter. Because, if that was DISH's goal, what  
15 DISH could have done, with less risk and less expense, is  
16 instead of buying up 100 percent of the senior first  
17 secured liens at par, we could have bought a third plus  
18 one percent at par or less, and then we could have bought  
19 a third of the second secured notes at 33 percent plus  
20 one, at par or less, --

21 THE COURT: But the fact that you --

22 MR. BYRNE: -- and then we would have had --

23 THE COURT: -- could have done --

24 MR. BYRNE: -- a blocking position.

25 THE COURT: -- [inaudible] acquired control in

1 other ways is not the question.

2 His factual determination whether your purpose  
3 was to acquire control, we would review only for clear  
4 error. Then, whether or not that conduct constitutes bad  
5 faith is perhaps a mixed question of law and fact.

6 But are you suggesting that he clearly erred in  
7 finding that your purpose of acquisition was to gain  
8 control?

9 MR. BYRNE: Yes.

10 THE COURT: Okay.

11 MR. BYRNE: There is nothing in the record to  
12 support that. And buying 100 percent of the first lien  
13 secured debt does not give you control of the estate or --

14 THE COURT: Well, what about this memo --

15 MR. BYRNE: -- the ability to dispose of the  
16 assets.

17 THE COURT: What about the memo that says that  
18 blocking the reorganization was the goal of entering -- of  
19 purchasing these shares?

20 MR. BYRNE: The memo was written by a junior  
21 person, early on in the process.

22 THE COURT: Well, that may be, --

23 MR. BYRNE: It is --

24 THE COURT: -- but that's enough to support his  
25 finding. You can argue that it shouldn't -- it -- that

1 the Judge shouldn't have given it the weight he did. But,  
2 I think you're hard pressed to argue that there's not --  
3 that he clearly and convincingly erred in relying on such  
4 a document.

5 MR. BYRNE: But, it -- under -- under what he  
6 called the *Allegheny* doctrine, to designate and therefore  
7 disqualify our vote, which is about the most important  
8 right a secured creditor has in a bankruptcy proceeding,  
9 --

10 THE COURT: We'll get in a moment to whether or  
11 not this could constitute the bad faith for designation,  
12 but you're telling us you disagree right at the start with  
13 the factual determination that the purpose was control.  
14 And, he relied on the memo, he relied on --

15 MR. BYRNE: Yes.

16 THE COURT: -- the fact that you paid par, he  
17 relied on a number of facts and then reached this factual  
18 conclusion.

19 MR. BYRNE: I think he was clearly erroneous,  
20 but if as a factual matter you agree with his observation,  
21 it doesn't change the outcome that he implied --

22 THE COURT: It's not whether we agree. It's --

23 MR. BYRNE: -- the wrong law.

24 THE COURT: -- whether we identify clear and  
25 convincing error.

1 MR. BYRNE: Fair enough.

2 THE COURT: Yes.

3 MR. BYRNE: So, if you -- if you don't feel  
4 that he committed clear error, it doesn't change the  
5 result, which is that he got the designation issue wrong  
6 because the issue is not just what the intent was, but  
7 what did the secured creditor with bad intent do.

8 And here -- and this is the fundamental  
9 distinction between the cases he relies on and this case.  
10 In all of those other cases, the secured creditor was  
11 acting to the detriment of other secured creditors to get  
12 a special benefit for themselves, to use leverage to say  
13 "You may be 110 cents on the dollar on my claim or my  
14 notes, and I'll support the plan. I don't care what you  
15 do with Tom and Sally and Harry, who are also in my  
16 class." That's not this case.

17 DISH was the entire class of the first secured  
18 lien. And he completely disallowed their vote, based on  
19 intent, but not based on any hostile action. There is  
20 nothing DISH did, other than exercise its legal rights as  
21 a first secured creditor under the Bankruptcy Code, and  
22 that can't possibly lead to a finding that you had bad  
23 intent and, in fact, you acted to disrupt the plan.

24 THE COURT: Now, let me ask you on this. I  
25 understood the Bankruptcy Court to be somewhat concerned

1 that even if you were not looking actively to harm other  
2 creditors, that the purpose of gaining control was  
3 basically to eliminate a competitor.

4 And, to the extent that you could frustrate a  
5 reorganization that would allow this entity to be viable,  
6 the Judge thought you were acting in bad faith. You  
7 weren't really seeking to recoup your investment. You  
8 were basically looking to make this competitor --

9 THE COURT: Disappear.

10 THE COURT: Yes.

11 MR. BYRNE: Your Honor, that may well be Judge  
12 Gerber's observation. The fact is this competitor is not  
13 a competitor. This competitor is not doing business.  
14 This competitor has no business plan.

15 THE COURT: Well, again, I think that that  
16 finding --

17 MR. BYRNE: This competitor has no customers.

18 THE COURT: -- will be factual. So, you'd have  
19 to convince us that it was clear --

20 MR. BYRNE: There is nothing --

21 THE COURT: -- and convincing law --

22 MR. BYRNE: -- in the evidence --

23 THE COURT: -- that that was --

24 MR. BYRNE: -- there is --

25 THE COURT: -- that was the goal here.

1 MR. BYRNE: -- absolutely nothing in the record  
2 that would allow Judge Gerber to infer that the reason  
3 DISH bought up 100 percent of the first secured lien notes  
4 was to put a competitor out of business. There's not a  
5 shred of evidence in the record below to support that.

6 I understood Judge Gerber's concern to be that  
7 DISH was trying to manipulate the process to steal an  
8 asset out of bankruptcy for less than it would otherwise  
9 be worth, and proposing -- or asking permission to propose  
10 a competing plan that the creditors then vote on class by  
11 class, is not stealing an asset for less than it's worth.

12 It's doing what the bankruptcy regime is  
13 supposed to do, which is letting creditors decide how they  
14 want to have their claims satisfied according to the  
15 priorities. Here, he eliminated DISH's vote entirely. He  
16 eliminated an entire class. And then, by his own  
17 admission, he ruled on a legal issue of first impression  
18 and said that because zero class members did not vote  
19 against the plan, having prevented all of the class  
20 members from voting, therefore the class members have  
21 accepted the plan, and the plan can go forward.

22 THE COURT: Or the class should be regarded as  
23 vacant and just not count.

24 MR. BYRNE: Well, he can't say that, because  
25 the Bankruptcy Court doesn't allow that. And 1129(c) does

1 not contemplate a class where there is only one member of  
2 the class.

3 The whole point of 1129(c) and of designation is  
4 to make sure that within the same class of creditors, one  
5 or more creditors can't disadvantage or prejudice other  
6 creditors in that class. By definition, if a bankruptcy  
7 works properly, the first secured lienholders are superior  
8 to the second secured lienholders and the unsecured  
9 claimants.

10 So, what this provision is designed to deal  
11 with, and what designation is designed to deal with, is  
12 creditors prejudicing creditors to get a better position  
13 either to buy the asset or better terms, and you don't  
14 have that policy concern when there is only one creditor  
15 in the first tranche.

16 THE COURT: Well, what --

17 THE COURT: Do we --

18 THE COURT: -- I'm sorry.

19 THE COURT: Do we consider here that the plan  
20 itself states that any class of claims that's not occupied  
21 at the time of the confirmation hearing, and that would  
22 mean no ballots are cast, and the class entitled to vote  
23 shall be deemed eliminated?

24 I mean, this plan deals with this possible  
25 circumstance.

1 MR. BYRNE: That's the plan, but the plan terms  
2 don't become effective until there is a vote. So, we  
3 can't say after the fact that now because the plan has  
4 been confirmed by the Judge but not yet gone effective,  
5 the plan has --

6 THE COURT: But, you purchased --

7 MR. BYRNE: -- wiped out the class.

8 THE COURT: -- you purchased at a time when  
9 that plan was already in existence. So, you purchased --

10 MR. BYRNE: No, that's not correct, --

11 THE COURT: -- on notice of that.

12 MR. BYRNE: -- Your Honor.

13 THE COURT: Did I misunderstand that?

14 MR. BYRNE: No.

15 THE COURT: No? Help me out, then.

16 MR. BYRNE: We purchased the notes on  
17 approximately July 9th. At that point, an initial  
18 disclosure statement had been filed, which talked about  
19 the plan to refinance the first tier notes.

20 THE COURT: I'm sorry. Now, what was it that  
21 you purchased as of that time?

22 MR. BYRNE: On July 9th?

23 THE COURT: Yes.

24 MR. BYRNE: We purchased 100 percent of the  
25 first secured lien notes.

1 THE COURT: The first lien debt? That's when  
2 you purchased that?

3 MR. BYRNE: The first lien debt, the people who  
4 were the primary lenders to the company.

5 THE COURT: And I thought at that point that  
6 the plan had already been formulated. That's mistaken,  
7 you're telling me?

8 MR. BYRNE: I don't believe that's correct. I  
9 think a --

10 THE COURT: Okay, I'll check.

11 MR. BYRNE: -- a disclosure statement --

12 THE COURT: I don't want to take up your time.

13 MR. BYRNE: -- had been filed, and there had  
14 been discussions. But, I don't think a formal plan had  
15 been submitted or that we had seen it, at least.

16 THE COURT: All right. I may be mistaken.  
17 I'll check.

18 MR. BYRNE: Remember, the plan supporters were  
19 talking among themselves about what they would all agree  
20 to, but we were not a party to that discussion, even --

21 THE COURT: In conclusion, counsel?

22 MR. BYRNE: -- though we were the first secured  
23 lien holder.

24 I'm sorry, Your Honor?

25 THE COURT: I said "in conclusion."

1 MR. BYRNE: In conclusion, Your Honor, I think  
2 that Judge Gerber has made a clear legal error in  
3 designating or disqualifying DISH's vote; and then in  
4 going the second step and saying, in effect, that the  
5 class therefore had approved this vote under 1126(c). We  
6 think both of those decisions should be reversed and  
7 remanded.

8 We think his analysis of cramdown was correct,  
9 because he did not apply the correct legal standard.

10 And we do not think, on the face of this, the  
11 plan is feasible. If Judge Gerber applied his own  
12 feasibility test from *Adelphia*, in which he said, in  
13 substance, speculation that the plan might succeed does  
14 not make the plan feasible, just as speculation that the  
15 plan won't succeed does not mean the plan is not feasible.

16 All we have here is speculation of a company  
17 that is in its second bankruptcy with no different plan  
18 than the first bankruptcy.

19 THE COURT: Well, speculation in the form of  
20 speculation by an expert who's allowed to testify and is  
21 qualified becomes evidence, doesn't it?

22 MR. BYRNE: Well, but their own expert  
23 testified, as well as their own financial advisors, that  
24 they needed to raise more capital, and that they would  
25 raise more capital --

1 THE COURT: Well, but the expert said that it  
2 was going to happen, that a -- to a reasonable degree of  
3 economist certainty, whatever that's worth, --

4 MR. BYRNE: But --

5 THE COURT: -- that it was going to be okay.

6 MR. BYRNE: But notably, what the expert didn't  
7 say is how much capital they would raise, and how they  
8 would do that, and when. There's no testimony to support  
9 that, and that's a critical part.

10 The Debtor and the plan supporters admit that  
11 over the next four years they're going to need at least  
12 \$100 million of capital just to keep this piece of metal  
13 in the air flying around, while they decide whether they  
14 can turn it into a business. To date, they have only  
15 raised roughly \$50 million, by paying interest rates of  
16 24 percent plus equity to get that; whereas we have been  
17 given, as the first secured lenders, a 12 1/2 percent note  
18 that may get paid off in four years if the company is  
19 still around and doesn't go into liquidation again.

20 THE COURT: Well, you obviously have a higher  
21 impression of what the company is worth, based on your  
22 offer.

23 MR. BYRNE: Which offer, Your Honor? I'm  
24 sorry.

25 THE COURT: The offer to purchase the company.

1 MR. BYRNE: At the time that we made the offer,  
2 DISH was prepared to put that forward as a competing  
3 alternative. I don't believe that DISH would do that  
4 today, because events have changed with this company and  
5 with the credit markets.

6 But what DISH was willing to pay for total  
7 control of the company at the time is a different issue  
8 than what DISH is entitled to receive as a first lien  
9 secured creditor. And there, what we bought was 13 months  
10 secured lending, backed by all of the assets of the  
11 company. The debtor had gone into default under that  
12 facility before it filed for bankruptcy. The debtor  
13 entered into forbearance agreements with the principal  
14 lenders, which escalated the interest rate first to 14  
15 percent and then to 16 percent.

16 And then, in May of '09, my understanding is,  
17 and I think the record supports this, when the lenders  
18 would no longer extend the forbearance agreement, DBSD  
19 filed for bankruptcy. That had the consequence of staying  
20 or terminating the forbearance agreement.

21 We bought the paper at par value, 100 percent.  
22 We didn't need to buy 100 percent if all we wanted to do  
23 was have a blocking position. And, we bought it with the  
24 expectation that, in a reorganization, we would be in the  
25 same position, collateral-wise and risk-wise, that we were

1 when we bought the paper, and that's the fundamental  
2 principle of cramdown, and we're not.

3 We had liquid assets, the prior lenders and us  
4 supporting this paper in the form of auction rate  
5 securities. As we speak, those securities are being sold  
6 off to raise money for the company. So, our liquid  
7 security is disappearing. And, we have a satellite  
8 floating around in space that produces no revenue but  
9 costs \$25 million a year to maintain. And, if the company  
10 goes into liquidation, there may be enough money in that  
11 satellite to pay off our notes in four years, or there may  
12 not be.

13 THE COURT: Thank you, counsel.

14 MR. BYRNE: I should have said at the outset,  
15 Your Honor, I asked permission to reserve two minutes for  
16 rebuttal with the Clerk earlier today.

17 (Pause)

18 ORAL ARGUMENT ON BEHALF OF *AMICUS CURIAE*  
19 LOAN SYNDICATIONS AND TRADING ASSOCIATION

20 MR. JONES: Good afternoon, Your Honors. Evan  
21 Jones of O'Melveny and Myers. Your Honor, we represent  
22 *Amicus* Loan Syndications and Trading Association, which  
23 Your Honors have been kind enough to grant time today.

24 We appear only on the issue of designation of  
25 the votes. Your Honor, we believe the Bankruptcy Court

1 erred in two fundamental ways in ruling that the votes  
2 cast by DISH were in bad faith.

3 The first way it erred is in ruling that claims  
4 purchased to promote a strategic transaction with the  
5 buyer are in bad faith. Your Honor, that error arises  
6 from reliance on two phrases taken out of context in cases  
7 long ago.

8 The first phrase -- "a ulterior motive" --  
9 arises in the Supreme Court's *Young* case. Your Honor, the  
10 facts of that case illustrate what the phrase is intended  
11 to reach. In that case, the appellant brought an appeal,  
12 said he was representing an entire class, but then took a  
13 payment on the side to dismiss the appeal, payable only to  
14 him. And the Supreme Court said that was an ulterior  
15 motive inconsistent with equity that could not be  
16 tolerated.

17 The case said that what the inquiry properly  
18 went to was whether all members of a class were receiving  
19 the same dividend. And, in that case, they were not, and  
20 the Court said that was unfair. Your Honor, the Supreme  
21 Court makes clear it doesn't look to how a creditor values  
22 a dividend received by all creditors in the class. It  
23 doesn't look to whether one creditor is strapped for cash  
24 and wants a immediate cash dividend, while another may  
25 want a long-term security. As long as all the creditors

1 are receiving the same dividend, the ulterior motive  
2 doctrine is not violated.

3 Similarly, Your Honor, in this Court's *P-R*  
4 decision, where the Court coined the phrase "an interest  
5 other than as a creditor," the facts illustrate the exact  
6 same point. And, by the way, Your Honor, in *P-R*, all the  
7 discussion of designation was dicta. No one objected to  
8 designation in that case or, excuse me, appealed  
9 designation.

10 But again, the critical point in *P-R* was that  
11 some creditors were being paid in full and other creditors  
12 were not. And, Your Honor, what this yields is a  
13 misunderstanding of what this doctrine is to address, and  
14 the Court below concludes that if a creditor is trying to  
15 support a strategic transaction, that is a, quote,  
16 "ulterior motive" or "interest other than a creditor" that  
17 permits designation of its claims as being in bad faith.  
18 That is simply inconsistent with the case law, Your Honor,  
19 and is a mistake.

20 THE COURT: What if a creditor's motive was to  
21 block any reorganization at all, to keep a creditor -- a  
22 competitor out of the market.

23 MR. JONES: Your Honor, we would agree that  
24 that's in bad faith, and I did want to respond to the  
25 comment.

1           Judge Gerber observes that this is a creditor.  
2           Judge Gerber makes no finding at all that this --

3           THE COURT:    A competitor, did you mean to say?

4           MR. JONES:    I'm sorry, is a competitor.  I'm  
5           sorry.

6           Judge Gerber makes no finding at all that this  
7           competitor is attempting to destroy the debtor.  There is  
8           no question that that would be an act of bad faith.

9           And, Your Honor, that goes to the second point  
10          that we would raise, that in this case Judge Gerber  
11          divorces the requirement of bad faith --

12          THE COURT:    Well, but I guess what -- putting  
13          to one side the question of whether that is the case here,  
14          does that create some wedge between what you were just  
15          saying, or at least what Mr. -- I understood Mr. Byrne to  
16          be saying, that a sort of strategic objective just can  
17          never be a bad faith, because bad faith only involves  
18          discrimination among classes of creditors.  Destroying a  
19          competitor, preventing the reorganization, is not about  
20          getting an edge on one of the other creditors in the same  
21          class, in terms of payouts.

22          MR. JONES:    Your Honor, that's correct.  I  
23          would point out, though, if you go back and look at the  
24          cases, what they talk about is a creditor who has an  
25          ulterior motive or has an interest other than a creditor,

1 and that goes to the payment on the side or seeks to  
2 destroy the debtor out of spite or an anti-competitive  
3 effort. In other words, that's a third category.

4 Your Honor is absolutely right. There are lots  
5 of very interesting facts in this case. Claims were  
6 bought late. Claims were bought on the verge of  
7 confirmation. Claims were bought by a competitor.

8 If the decision below held that this competitor  
9 was motivated by destruction of the debtor, my client  
10 would not be here today. But, Your Honor, this is not a  
11 jury finding where the Court looks to all of the  
12 circumstances that might support --

13 THE COURT: Okay, I hear that, and I understand  
14 your argument that factually this is not a creditor  
15 destruction case. But, in terms of the law, where do  
16 these three categories of bad faith come from, and what  
17 says there are only three, as opposed to these are the  
18 ones that have been recognized so far?

19 Once you get beyond the limiting principle that  
20 it's all -- which Mr. Byrne was arguing for -- that it's  
21 all about equity between creditors of the same class, then  
22 how do you decide what other kinds of motivation? What's  
23 the limiting principle that says destroying a competitor  
24 is no good, that's bad faith, but that's it. There can't  
25 be any other categories of bad faith --

1 MR. JONES: Your Honor, my --

2 THE COURT: -- that we decide?

3 MR. JONES: -- my answer to that would be what  
4 Justice Douglas said, and the 9th Circuit said in the  
5 *Marin* case, that we aren't going to look to a creditor's  
6 motivation about whether he wants to create or support a  
7 strategic transaction that benefits everyone, whether he's  
8 desperate for cash and will take the lowest payment he can  
9 get, whether he wants a long-term recovery.

10 I can't tell you exactly what the limits are,  
11 but I can tell you the case law tells us that the mere  
12 desire to promote a strategic transaction is not bad  
13 faith. This Court made that error. It divorced it from  
14 the requirement of an egregious act, which it had  
15 previously noted was required.

16 THE COURT: And what -- and, by a strategic  
17 transaction, suppose the idea were to block the  
18 reorganization because forcing liquidation would allow the  
19 creditor to buy up some particular asset that the company  
20 -- the bankrupt company had, notwithstanding that the --  
21 you know, all the creditors qua creditors would do worse,  
22 including this creditor would do worse qua creditor, but  
23 would do great, because they really want this one thing  
24 and they want it cheap.

25 MR. JONES: Your Honor, I think that's the

1 *Marin* case, in which the bank bought claims in order to  
2 block the reorganization and be permitted to foreclose.  
3 And, in that case, the 9th Circuit held that that was not  
4 bad faith.

5 Now, Your Honor, I don't think we need to reach  
6 that here, because that's not the issue before this Court.  
7 Because what we know of this plan, or proto-plan, because  
8 it was never filed. We don't know what's in it. But it  
9 seems to envision a continued operation of the business  
10 with creditors receiving payment from this merger.

11 Your Honor, if I might take a moment? I do want  
12 to respond to -- Your Honor raised the question is this a  
13 question of law, or is this a question of discretion, or  
14 so forth? And, I would refer the Court to --

15 THE COURT: Fact.

16 MR. JONES: I'm sorry?

17 THE COURT: Fact. Not discretion. Fact.

18 MR. JONES: Well, Your Honor, there are clearly  
19 questions of --

20 THE COURT: Facts -- there are factual  
21 findings, and I suggested those would clearly -- those  
22 would be reviewed for clear error.

23 And then, there are questions as to whether the  
24 findings of fact can support a finding of bad faith, which  
25 then begins to implicate questions of law.

1 MR. JONES: Your Honor, I certainly agree that  
2 if the Court had made a finding of an intent to destroy a  
3 competitor, which it did not, that would be a question of  
4 fact.

5 But, the question of whether this claim should  
6 be designated we say is a question of law. Our opponents  
7 say that's a question of discretion. Your Honor, I'd like  
8 to suggest that it doesn't matter, because this Court just  
9 recently observed, in the *New York City* case, that an  
10 erroneous view of the law is -- a Court bases its ruling  
11 on an erroneous view of the law, it abuses its discretion.

12 The Court, by the way also, Your Honor, observed  
13 that the phrase "abuse of discretion" is, in fact,  
14 unfortunate, because it is usually an erroneous view of  
15 the law that leads to such an abuse of discretion. Your  
16 Honor, I think that's a perfect example of what we suggest  
17 happens here with the phrases "interest other than  
18 creditor" and "ulterior motive" taken out of context.

19 Perhaps, in plain meaning, one might say a  
20 creditor who wants to support a strategic transaction has  
21 an ulterior motive. But, if we look at the cases, just as  
22 we learned abuse of discretion, as this Court said --

23 THE COURT: May I ask you, with respect to  
24 that, --

25 MR. JONES: Yes.

1 THE COURT: -- what is the strategic  
2 transaction?

3 MR. JONES: Your Honor, again, as best we can  
4 tell, because the creditor's plan wasn't filed, it was a  
5 merger. It was an acquisition of assets. And, I -- I  
6 should qualify myself. I --

7 THE COURT: That's the strategic transaction  
8 that you're saying that DISH -- that DISH was looking to  
9 --

10 MR. JONES: Yes, Your Honor, --

11 THE COURT: -- [inaudible]

12 MR. JONES: -- and I should be very clear. I  
13 don't know whether it is a merger or an acquisition of  
14 specific assets because that plan didn't get into the  
15 record. When DISH showed up and said "We want to file our  
16 own plan," the Court held that exclusivity was not going  
17 to be terminated.

18 Again, Your Honor, we don't quibble with that  
19 decision. The Court could well have said "You're too late  
20 to my party. I am going to determine whether their plan  
21 is acceptable or not." But, what the Court said is, "You  
22 can't file a plan, and the fact that you want to file a  
23 plan to consummate a strategic transaction shows that when  
24 you acquired these claims, you acted in bad faith, and  
25 your votes will be ignored."

1 THE COURT: Counsel, your time has expired.

2 MR. JONES: Thank you, Your Honor.

3 THE COURT: Thank you. We'll hear from  
4 Appellees.

5 (Pause)

6 ORAL ARGUMENT ON BEHALF OF APPELLEE

7 DBSD NORTH AMERICA, INC., ET AL.

8 MR. RIEMER: May it please the Court. I know  
9 we've been going quite a long time, and I'll try to be  
10 brief, but of course respond to all questions. Yosef  
11 Riemer for the debtors, from Kirkland and Ellis.

12 Let me start with DISH, because we heard it most  
13 immediately. And, I think there is one thing we can agree  
14 with our friends on the other side on. And, that is that  
15 there is a way to decide the DISH appeal that involves far  
16 less in the way of matters that we're told are a public  
17 controversy, concern to the bankruptcy bench, and so on,  
18 to the extent that making that as an assertion is even  
19 proper here, based on a record I would have thought guides  
20 this.

21 The Court has before it two alternative  
22 holdings, both in the Bankruptcy Court and the District  
23 Court in our favor. The affirmance of either one of those  
24 would eliminate DISH's objections as to the subject,  
25 either affirming the determination that the amended

1 facility they received is the indubitable equivalent, or  
2 going through this analysis of designation. And I submit  
3 to you that the former is the bread and butter vanilla  
4 determination of Bankruptcy Courts and reviewing courts  
5 every day. It is really very simple.

6 The legal standard, we submit, is a  
7 determination for the factual matters of whether it's  
8 clearly erroneous. I didn't think that would be disagreed  
9 with. The legal standard, while there was some effort in  
10 the papers to suggest there were legal issues here, what  
11 the Bankruptcy Court used as the standard is what was in  
12 their briefs at the time on the standard. It's a simple  
13 standard and it's being mischaracterized now. It is very  
14 simple. Two parts.

15 One, does the amended facility ensure the safety  
16 of DISH's principal? Not is there any change in the  
17 nature of the universe. Does it -- this prong -- but does  
18 it ensure the safety of DISH's principal? Now that they  
19 too are no longer contesting valuation, there is a finding  
20 that's binding on them and all of us that they are over-  
21 secured by 9.6 times the amount of their facility. Does  
22 the amended facility ensure the safety of their principal?  
23 By 9.6 times, yes. And, there's a great deal of other  
24 evidence, but surely that ought to end the inquiry.

25 Second, are they receiving --

1 THE COURT: So, in your view, the law is clear  
2 that the indubitable equivalent means is the principal  
3 secure, not is it as secure. I mean, if it was previously  
4 secured by 20 times the facility, but now it's only 9  
5 times, --

6 MR. RIEMER: If that --

7 THE COURT: -- you're saying 9 times is -- if  
8 9 times is good enough, it doesn't matter that it's less  
9 secure than it was.

10 MR. RIEMER: Yes, Your Honor. I think the  
11 determination is that, on the second prong, is the present  
12 value of the claim, not whether there has been some change  
13 in the credit support agreement -- in credit support, and  
14 we cite many cases in our brief where there is some  
15 reduction in the credit support, but the senior creditor  
16 is getting the indubitable equivalent, the present claim.  
17 And, we cite cases where somebody is losing one part of  
18 the collateral, but they're still over-secured and,  
19 frankly, over-secured by much less than 9 times which is  
20 what is now undisputed here, 6 times if you want to fast-  
21 forward to the end of the four years, if you assume no  
22 increase in the value whatsoever. The Bankruptcy Court  
23 thought there would be an increase. But again, 6 times  
24 ought to be the end of the inquiry.

25 That would obviate entirely the need to reach

1 designation, which I agree with counsel raises interesting  
2 questions. I don't agree with them in the way they've  
3 characterized the record, and I think some of the  
4 questions that were asked -- and I recognize they were  
5 just questions -- pointed to some of those issues. But,  
6 let me just capture, if I can, a few points very briefly.

7 We were met previously with the argument there  
8 was some per se rule, and I think one thing the colloquy  
9 shows this morning is this was not a per se rule. This  
10 was rather a debate about whether or not there were  
11 sufficient -- whether there is a basis for the facts, and  
12 whether those rise to the level.

13 THE COURT: Well, what --

14 MR. RIEMER: Yes, Your Honor.

15 THE COURT: -- what is the fact finding that  
16 you're relying on that is -- that constitutes the bad  
17 motive or the bad faith? What -- what did Judge Gerber  
18 find that they were trying to do that is improper?

19 MR. RIEMER: There were -- if I might, Your  
20 Honor, just grab a [inaudible]. There were a series of  
21 findings, and I believe they are in the September 22nd,  
22 2009, transcript, starting at Page 83 -- I'm sorry, Page  
23 81, where, among other things, the Bankruptcy Court found  
24 that the creditors -- "Facts that inform the exercise of  
25 my discretion," said Judge Gerber, "in this regard include

1 DISH's purchase of its claims at par, a hugely significant  
2 fact." I might add, the --

3 THE COURT: Well see, these are things that  
4 they did. And, I guess what I'm saying -- maybe I'm being  
5 very --

6 MR. RIEMER: Yes.

7 THE COURT: -- over-simplistic -- simplistic  
8 here, but we heard that, for example, the intent to  
9 destroy a creditor is --

10 MR. RIEMER: Enough.

11 THE COURT: -- a bad motive and that should be  
12 held to be bad faith. We heard an argument that the mere  
13 desire to acquire the company should not be considered a  
14 bad motive and, therefore, bad faith.

15 So, I guess what I'm wondering is what is it  
16 that they were trying to do, other than get a good deal  
17 for themselves, that constitutes bad faith in your view?

18 MR. RIEMER: Yes, I don't -- with all respect,  
19 I don't accept the proposition that only if their intent  
20 was to destroy us does it rise to the level of bad faith.

21 THE COURT: Well, not only. I'm saying --

22 MR. RIEMER: I understand, and --

23 THE COURT: -- what is the intent --

24 MR. RIEMER: -- and the intent --

25 THE COURT: -- that is the bad intent that

1 Judge Gerber found?

2 MR. RIEMER: Yes, and if you continue, Judge  
3 Gerber talks about the terms of the plan being already  
4 known, the conditions to the purchase, including the  
5 objection and correctness of the representation that they  
6 would not be bound by the agreement.

7 And, if I could, and I'm going to come back to  
8 it, but I do just want to highlight. I think it was a  
9 question that you asked, Judge Raggi.

10 There was in the record, by the time they  
11 purchased it, in the description of the disclosure  
12 statement, before the purchase that, in fact, this is how  
13 it would work, and that can be found at -- give me just  
14 one moment. I'm sorry. That can be found at original  
15 plan 26, which is A232 of the record.

16 But, getting back to your question, Your Honor,  
17 I think what the Court found was that they were acting in  
18 a way which was not consistent with being creditors. This  
19 is not somebody holding the bag, oh, my gosh. They came  
20 in, they paid 100 cents on the dollar. In other cases,  
21 maybe that wouldn't be enough. But what's never been  
22 admitted in the argument this morning is that the  
23 statement was "We overpaid," and they said, their 30(b)(6)  
24 witness, "We overpaid because we were pursuing this  
25 strategic objective here."

1 Now, whether that's to keep us --

2 THE COURT: And what's the strategic objective?

3 MR. RIEMER: Whether the strategic objective is  
4 to keep us in bankruptcy or end up owning this thing,  
5 neither of those, if pursued in the way they were, are  
6 consistent with acting as creditors, which is what  
7 designation is about, --

8 THE COURT: Let -- let me --

9 MR. RIEMER: -- not acting as creditors.

10 THE COURT: So, you -- you --

11 THE COURT: -- ask you why that's so. I mean,  
12 if one pays par, as opposed to paying a discount amount,  
13 in order to acquire the creditor, as opposed to keep it in  
14 bankruptcy, I don't understand how one has taken advantage  
15 of any other creditor. Now one assumes a larger debt, --

16 MR. RIEMER: I -- I --

17 THE COURT: -- a larger -- is going to have a  
18 larger claim against this possibly, you know, tottering  
19 company.

20 MR. RIEMER: I agree with Your Honor, that --

21 THE COURT: So, what more --

22 MR. RIEMER: -- that, by itself, paying par, if  
23 the evidence was you weren't overpaying for a strategic  
24 reason, might not be evidence of trying to harm some other  
25 class.

1 I don't believe that one needs to show that you  
2 are trying to harm some other class. Bu, let's put that  
3 aside.

4 Again, I think we can parse the record, and I  
5 just want to be sure I have time to talk about the Sprint  
6 issues, because fundamentally that is so much clearer.

7 THE COURT: Really, the question is what  
8 finding did the Judge make. I mean, we can speculate  
9 about what the motivations here were, but did he make a  
10 finding that can support a conclusion of bad faith?

11 MR. RIEMER: He made a finding -- he made a  
12 series of factual findings -- paying more than they said  
13 it was worth, for the reasons they gave in order to pursue  
14 the strategic objective. He made a finding, for example,  
15 that in their opposition to the designation motion, they  
16 said it would be a different case if we moved to terminate  
17 exclusivity. It would be a different case if we asked the  
18 Court not to go forward in confirmation of the debtor's  
19 plan.

20 And, eight days after they said it would be a  
21 different case if those things happened, they did happen.

22 THE COURT: Yes, but maybe those were  
23 incautious for them to say. Why should we conclude that  
24 that makes it a different case?

25 MR. RIEMER: Because --

1 THE COURT: If I could ask a slightly different  
2 question.

3 MR. RIEMER: Sure.

4 THE COURT: Suppose the original holder of this  
5 debt who had it at par because they were the lender in the  
6 first place, and let's assume there's only one.

7 MR. RIEMER: There were three, but go ahead,  
8 Your Honor.

9 THE COURT: I'm going to assume there was only  
10 one, --

11 MR. RIEMER: Okay.

12 THE COURT: -- and it wants to acquire the  
13 company now. Would it be in bad faith to vote its shares  
14 against the -- its interest against the plan?

15 MR. RIEMER: I think we'd have to have a  
16 fuller record and, on those facts, I'm not sure that we  
17 have enough. But, we had more than those facts here.

18 THE COURT: Well, but I'm just trying to say  
19 what's the difference between an external party that wants  
20 to acquire the company, becomes a creditor for the purpose  
21 of pursuing that objective, and somebody who had the debt  
22 all along and has that objective? I mean, it sounds to me  
23 like you're saying exactly what Mr. Dunne says is wrong --  
24 and he may be wrong about it -- but that really you are  
25 saying anybody who has a strategic interest, rather than

1 just trying to maximize their return on the debt, is in  
2 bad faith.

3 MR. RIEMER: Well, I think the point was made  
4 earlier by one of the members of the panel, that one can  
5 credit these documents. How much weight to give them is a  
6 debate that was had and lost at the Bankruptcy Court.

7 "We believe" -- this is the DISH author -- "we  
8 believe there is strategic opportunity to obtain a  
9 blocking position in the second priority convertible notes  
10 and control the bankruptcy process for this potentially  
11 strategic asset." And then, it went on to talk about doing  
12 this to gain control of the unsecured impaired class, and  
13 that this was an attempt to convert to equity and acquire  
14 control of ICO North America.

15 Now, it might be that a group of people who had  
16 been creditors might in some cases share those objectives.  
17 But here, that was what motivated it, based on this  
18 evidence.

19 I do want to make sure I have enough time left  
20 to --

21 THE COURT: And that's a bad motive.

22 MR. RIEMER: I think -- I think when it's  
23 somebody who has spent years pursuing a company, owns a  
24 competitor of the company, and it puts forward a plan on  
25 the eve of confirmation and contradicts the distinction to

1 what it, itself, has said would -- would constitute  
2 crossing the line, and says "Don't go forward tomorrow on  
3 their plan. Terminate their exclusivity." These are big  
4 deals in bankruptcy courts when people say "Terminate  
5 exclusivity and let us put a plan on the table" that would  
6 have gotten them control.

7 Let me turn if I can, because again, I want to  
8 -- I'm sorry, Your Honor.

9 THE COURT: I'm wondering whether there has to  
10 be one more finding beyond that to find bad faith.  
11 Because all of those circumstances could be, as you've  
12 just shown us in the evidence they exist.

13 But, in order to have a stronger company, a  
14 belief that they could either merge it and have a stronger  
15 company emerge, or -- or, you know, decide to run a  
16 subsidiary, or whatever, doesn't there have to be some  
17 further finding that this would then all result in having  
18 that company not succeed, not reorganize successfully, to  
19 their -- to the advantage of their other competitive  
20 entity?

21 MR. RIEMER: I don't think it is required that  
22 there be a finding that it would have succeeded if not for  
23 the court order. And, I don't know really how you'd  
24 litigate it.

25 THE COURT: But doesn't it have to be that

1 that's the motive, rather than to have a genuinely  
2 successful reorganization?

3 MR. RIEMER: I think what the cases look at  
4 properly is whether somebody is acting in a way you would  
5 expect them to act if they didn't have the strategic  
6 interest, if they were a creditor. And, to the extent  
7 they're acting differently, then it is looked at  
8 differently. To the extent Your Honor and the panel  
9 thinks there is some finding not reached, it seems to me  
10 the remedy is simply to ask Judge Gerber to make a finding  
11 one way or the other on the question. But, I don't think  
12 that's necessary here.

13 Let me, again, because I do think that this  
14 Court should be able easily to dispose of this whole  
15 exercise and the Amicus's concerns never weigh in the  
16 balance, by simply looking at --

17 THE COURT: By -- by finding --

18 MR. RIEMER: -- indubitable equivalent.

19 THE COURT: -- that the tests were satisfied  
20 for the cramdown.

21 MR. RIEMER: Which they clearly were, for the  
22 reasons I talked about.

23 And, on feasibility, just to touch on it as  
24 briefly as perhaps it was, we think there was plenty of  
25 evidence there with respect to DISH, as well. And again,

1 that the factual findings underlying that are factual,  
2 subject to substantial evidence.

3 The case I would invite the Court's attention to  
4 is this Court's own decision in *Johns-Manville*, where the  
5 2nd Circuit said that there is no -- a reasonable  
6 assurance of success is what is required, not that success  
7 is guaranteed. There was a wealth of evidence in that  
8 regard, including evidence that the two companies everyone  
9 agreed were most comparable had raised hundreds of  
10 millions of dollars at times when they were significantly  
11 worse off, in terms of key metrics -- FCC licenses, state  
12 of the art satellites, and so on -- than the debtors were  
13 expected to be post-emergence.

14 Let me please, please, turn to Sprint, because I  
15 want to be sure I have time. On standing, the Court knows  
16 the standard of directly and adversely affect pecuniarily.  
17 I acknowledge that there is a closer connection in this  
18 case between standing and merits than some, because we are  
19 talking about the issue of redressability. But,  
20 nonetheless, there are cases where one looks at  
21 redressability and concludes that even though there are  
22 issues that also come up in the merits, those preclude a  
23 finding of standing.

24 I want to make clear the Court knows that the  
25 Article 3 requirement of redressability, that it's likely,

1 as opposed to merely speculative, that the injury will be  
2 redressed by a fair -- by a favorable ruling.

3 What was interesting in the colloquy before is  
4 that when a member of the Court asked Mr. Culver whether  
5 or not valuation mattered, I think I heard a different  
6 answer -- I'm sorry, I don't have the transcript and my  
7 notes are rough -- than I remember in the District Court.  
8 Because, in the District Court, when he was still  
9 contesting value, the argument began with Judge Kaplan  
10 saying about the Bankruptcy Court's valuations, quote, "If  
11 the valuations are right, the fact remains your client  
12 would have come out of this with zero, right?" And, Mr.  
13 Culver said, "If they are correct, yes, Your Honor." And  
14 so that, I think, is an important point here.

15 Now, let me emphasize a couple of things. I  
16 think the *Kane* --

17 THE COURT: But realistically, in the  
18 bankruptcy context, in the reorganization context, isn't  
19 what Congress apparently -- or at least they quote people  
20 in Congress who thought this -- that they would get more  
21 leverage and what really is going to happen is they will  
22 get money out of this, because at the end of the day there  
23 is a significant likelihood that if the senior creditors  
24 and the equity holders really want this to go forward,  
25 they will find some way to shovel some money to Sprint,

1 and it's up to Sprint to decide how much money and whether  
2 it's worthwhile.

3 MR. RIEMER: Your Honor, let me make two points  
4 that are critical.

5 One, on this legislative history point, the  
6 *North LaSalle* opinion itself shows that that's not the way  
7 that legislation should be understood. At Note 25, the  
8 Supreme Court says, "Given our obligation to give meaning  
9 to the on account of modifier" -- and I want to talk about  
10 that, too -- "we likewise do not rely on various  
11 statements in the House report or by the bill's four  
12 leaders which, read out of context, imply that Congress  
13 intended an emphatic, unconditional, absolute priority  
14 rule." So, I don't think that's a fair reading of the  
15 legislative history, number one.

16 Number two, with all respect, the flaw in the  
17 assumption that they have to get more is that they only  
18 have to get more for the existing stockholder to get  
19 something if they have standing and if they are right.  
20 But, there is no power, respectfully, in this Court, the  
21 District Court, the Bankruptcy Court, or the debtors that  
22 can compel the senior noteholders to give any of the  
23 equity that's theirs to anyone else. And so, if this  
24 Court finds that the five percent in some way raises some  
25 issue, the cure that they will be looking at is simply

1       okay, this problem arises if the existing stockholder  
2       receives equity, nothing can compel us to give them  
3       equity.

4               THE COURT:     Well, let me ask --

5               MR. RIEMER:     Now, we will have --

6               THE COURT:     -- you this --

7               MR. RIEMER:     I'm sorry, Your Honor.

8               THE COURT:     I mean, I understand the argument  
9       in the context in which the gifting doctrine was  
10      originally recognized, which was liquidation in Chapter 7  
11      proceedings, because then you are going to pay the secured  
12      creditor. I mean, this will function in that way.

13              But, I'm not sure that the argument makes as  
14      much sense in connection with reorganizations where  
15      basically all of the creditors may very well agree to some  
16      lesser payments, and why -- why this gets to be dictated  
17      by the secured creditor, as opposed to operating according  
18      to the plan set forth by Congress --

19              MR. RIEMER:     But, Your Honor, --

20              THE COURT:     -- is -- is what I think I need you  
21      to address.

22              MR. RIEMER:     Okay. Well, Mr. Dunne will speak  
23      to the title -- the Chapter 7 point.

24              THE COURT:     Okay.

25              MR. RIEMER:     But, let me -- let me --

1 THE COURT: Then, I will have to wait.

2 MR. RIEMER: -- you know, but let me speak to  
3 the Chapter 11 point, which I think is an important part  
4 of what you asked.

5 And that is whatever our perceptions of what  
6 happens in bankruptcy, and what gets agreed to, and so on,  
7 we deal with a statute. And the statute, as they read it,  
8 is only implicated in our situation where any equity is  
9 given to the existing stockholder. Absent the existing  
10 stockholder receiving equity, there is no question given  
11 the valuation that Sprint and the other unsecured  
12 creditors are out of the money. The only money they are  
13 getting under the current plan is a function of a  
14 different gift from the senior noteholders, with which  
15 they take no exception.

16 But, there is nothing that can compel -- if the  
17 cost of giving equity to the existing stockholder is some  
18 agreement with Sprint, there is nothing that compels the  
19 senior noteholder to give equity to the existing  
20 stockholder.

21 Now, I want to be clear. It is our right as the  
22 debtors to decide, in a scenario where I have to assume to  
23 answer your questions, that there has been some kind of  
24 remand. We will still have exclusivity until January to  
25 formulate whatever amendment to a plan, or if something

1 else needs to be done, in terms of a new plan. And again,  
2 I don't think that should happen here. But, if you assume  
3 it has happened, if we put forward, for example, a plan  
4 which does not involve equity for the existing  
5 stockholder, they have no right and the entire objection  
6 could not be asserted against that new plan. That's why  
7 the valuation piece so shows that there is no injury here.

8 It is all speculative that there might be a  
9 different process. There might be a different  
10 negotiation. But surely they have to show something more  
11 --

12 THE COURT: But, what if --

13 MR. RIEMER: -- than it's speculative.

14 THE COURT: -- what if Congress specifically  
15 intended to impose an absolute rule precisely for the  
16 purpose of assuring that everybody gets to participate in  
17 the negotiation, and that the senior creditors or the  
18 secured creditors don't get to dictate the outcome unless  
19 they're prepared to force liquidation by asserting their  
20 claims?

21 MR. RIEMER: But, Your Honor, --

22 THE COURT: I mean, -- and putting aside  
23 whether the legislative history tells you that that's what  
24 Congress wanted to do, if Congress wanted to do that, --

25 MR. RIEMER: It could have.

1 THE COURT: -- it could have, right?

2 MR. RIEMER: I agree. But, I think we're  
3 confusing some things. In the new value case, we're  
4 talking -- cases, we're talking about situations where the  
5 owners of the company want to put a plan forward of their  
6 own and will end up without offering that to anyone else  
7 owning all the equity even though they were out of the  
8 money when the case starts. That's not what we're talking  
9 about here.

10 We're talking about a situation where the senior  
11 noteholders are putting up money and they decided -- and I  
12 want to emphasize this -- for their own reasons. We  
13 actually have findings from Judge Gerber at Footnote 140  
14 of his opinion that there were good business reasons,  
15 independent of the pre-existing claim, why they wanted to  
16 give this gift.

17 I want to emphasize there are two independent  
18 reasons why we submit there is no violation. One is this  
19 issue of whether or not since the stock is not part of the  
20 estate of the debtors, because everything is secured and  
21 the liens are not being satisfied here, the recovery is  
22 less than 100 cents on the dollar for the senior  
23 noteholders, the senior noteholders are doing something  
24 they could do outside of bankruptcy. There might be ways  
25 to do it before, after, and there's nothing in the statute

1 that prohibits them doing it during.

2 The stock of DBSD today is fully secured by  
3 secured creditors who have liens on it, okay? The stock  
4 of the new company is going to be issued as part of this  
5 process. But, there is no scenario under which we could  
6 ever transmit that to anyone as the debtors without either  
7 satisfying the liens of the senior noteholders, or getting  
8 their agreement. There are some other dynamics on that,  
9 but nothing compels them to give equity to the pre-  
10 existing stockholder.

11 And, the negotiation you're contemplating,  
12 Congress could have written the law that way, but that  
13 doesn't have anything to do with the --

14 THE COURT: Well, but if Congress --

15 MR. RIEMER: -- absolute priority rule.

16 THE COURT: -- writes a law that says -- and I  
17 understand there are a variety of linguistic --

18 MR. RIEMER: Sure.

19 THE COURT: -- quibbles that are important, but  
20 if we were to read the statute as being an absolute  
21 priority rule, isn't there a kind of rationale for that --  
22 a potential rationale for that rule in the idea that the  
23 senior creditors, the secured creditors, rather, should  
24 not be in a position unless they want to actually do what  
25 their rights are, to dictate to all the other creditors

1 how this is going to come out. And, by providing that a  
2 class can't be skipped, it brings everybody to the table.

3 MR. RIEMER: But, Your Honor, the flaw in that  
4 is that it ignores the fact that the debtors could always  
5 agree on a plan with a group of secured lenders who were  
6 not being fully discharged that simply didn't give  
7 anything to equity, so that there was -- the existing --  
8 the pre-existing equity, so that there was no skipping  
9 issue whatsoever.

10 THE COURT: Well, that's -- that's fine. But,  
11 in this particular case, the secured creditors and the  
12 debtor, for their own reasons, want something else to  
13 happen, --

14 MR. RIEMER: And --

15 THE COURT: -- and given that they want  
16 something to happen that is otherwise inconsistent with  
17 the scheme of priority that Congress arguably set up, that  
18 gives the skipped class holders some leverage. Of course  
19 they wouldn't have the leverage if nobody wanted to do  
20 this deal.

21 MR. RIEMER: Well, let me go make sure that I  
22 highlight the second reason why we respectfully disagree  
23 that Congress did that here.

24 And that is, the statute clearly has a  
25 requirement that -- that for there to be a violation of

1 the absolute priority rule, the junior has to be receiving  
2 it by reason of --

3 THE COURT: On account of --

4 MR. RIEMER: -- on account of, that's right.

5 And we know from the Supreme Court's decision in 203  
6 *LaSalle* that we are to read that as "because of."

7 Now, there might be plenty of cases where one  
8 would conclude there is nothing else in play here but the  
9 existence of that interest. And therefore, if -- leaving  
10 aside the property point, there might be a violation. We  
11 don't have that case.

12 Among other things, the findings reflect the  
13 fact that the parent company at the time of the filing was  
14 providing almost all, or all of the employees of DBSD,  
15 office space to DBSD, computer networks to DBSD, a wealth  
16 of transition arrangements to DBSD, and was agreeing, as  
17 part of this, to continue to have a representative on the  
18 board of directors of DBSD, which the evidence indicated  
19 DBSD -- the new owners of DBSD thought would be of value.

20 And that, surely, is the basis on which we think  
21 one could find this is not on account of a junior claim.  
22 There's no evidence it is on account of a junior claim,  
23 but that it is on account of a number of things that have  
24 value. That was a finding by the Bankruptcy Court that  
25 there were good business reasons, apart from the pre-

1 existing claim, if you will, at Footnote 140 and some  
2 other portions of the opinion, not challenged on this  
3 appeal, subject obviously to a substantial evidence test.

4 Yes, Your Honor?

5 THE COURT: Your time has expired.

6 MR. RIEMER: Thank you.

7 (Pause)

8 ORAL ARGUMENT ON BEHALF OF  
9 OFFICIAL COMMITTEE OF UNSECURED CREDITORS

10 MS. FOUDY: May it please the Court. Theresa  
11 Foudy of Curtis, Mallet-Prevost, Colt and Mosle, for the  
12 Official Committee of Unsecured Creditors.

13 I know Your Honors have had a long morning, and  
14 you have heard fully from debtors' counsel, so I don't  
15 want to take up a lot of your time. But, I did want to be  
16 heard here, because if Sprint succeeds in what they're  
17 trying to do, the reality is is that all the unsecured  
18 creditors will end up with nothing or, at most, they'll  
19 end up with the opportunity to re-negotiate, maybe get  
20 some leverage. That's what they're looking for, right?  
21 Re-negotiation, get some leverage.

22 And the problem there is that there is no  
23 guarantee that we'll be successful in the re-negotiation  
24 or the leverage, and we could end up with nothing at all,  
25 everyone in the class. And that's the reason why there is

1 no standing here for Sprint, and why the standing issue is  
2 different than the merits issue.

3 Because, the standing issue is whether they're  
4 directly and pecuniarily affected. And what they're  
5 looking to get here isn't money, because they have no  
6 legal entitlement to money, even if they win. What  
7 they're saying is they're legally entitled to more  
8 leverage. We'll have more leverage.

9 Does that mean that they're going to get more  
10 money? No. It means maybe they will, maybe they won't.  
11 We're afraid we're going to get nothing, and they're just  
12 going to say "All right, let's enforce our liens. We'll  
13 take it all. We'll live without, you know, giving any  
14 money to the shareholders. We'll live without giving any  
15 money to the unsecured creditors at all. That's our  
16 right. If we want to -- we want play by the rules, we  
17 want to play strictly by the Bankruptcy Code? Let's do  
18 it. We'll take it all. Nice knowing you." And, they  
19 have every right to do that.

20 And maybe you're right. Maybe if you're right,  
21 maybe they're right that the absolute priority rule would  
22 give them more leverage. That doesn't mean they're going  
23 to get more money. And, the standing requirement  
24 requires, for bankruptcy appellate standing, not  
25 speculation that maybe this order hurt me, because maybe

1 if we go back and do it again maybe I'll do better.

2 THE COURT: So, bankruptcy appellate standing  
3 is a stricter standard than Article 3 standing.

4 MS. FOU DY: That's right. And it requires that  
5 they be pecuniarily -- directly and adversely pecuniarily  
6 affected. This order did not do that to them.

7 THE COURT: So, if there's no money involved,  
8 the just don't have standing. If they can't do better, in  
9 terms of money, they don't have standing.

10 MS. FOU DY: That's correct. That -- that's the  
11 standard that this Court has set forth. Directly and  
12 adversely pecuniarily affected.

13 The fact that maybe we could get some more  
14 leverage and maybe, if they really, really want to give  
15 the shareholders money, they'll give Sprint and the other  
16 unsecured creditors more, maybe they'll do that? That's  
17 not enough.

18 THE COURT: Let me ask you, if that's so, under  
19 what circumstances would a party that's been passed over  
20 in the reorganization and this ever, ever be able to -- to  
21 be heard?

22 MS. FOU DY: Where there is sufficient money  
23 that they actually were adversely pecuniarily affected, or  
24 if it was a question. Here, they said there's no question  
25 they're out of the money. The unsecured creditors are out

1 of the money.

2 THE COURT: That's --

3 MS. FOUDY: They've conceded that.

4 THE COURT: -- that's based on the liquidation  
5 value, correct?

6 MS. FOUDY: No, the total enterprise value, as  
7 found by the Bankruptcy Court. The unsecured creditors  
8 are over \$100 million out of the money.

9 And, they have said they're not challenging the  
10 valuation. They accept the valuation. The valuation  
11 doesn't matter because they're --

12 THE COURT: So that's really the determinative  
13 factor is, if I understand your argument, for why they  
14 could not argue pecuniary damages, because they have  
15 conceded that they're not challenging the valuation  
16 amount.

17 MS. FOUDY: That's right. That is --

18 THE COURT: If that had been in dispute, --

19 MS. FOUDY: -- exactly right.

20 THE COURT: -- that might present a different  
21 circumstance.

22 MS. FOUDY: That's right. Because then maybe  
23 they would be pecuniarily affected.

24 THE COURT: I understand. I understand that.

25 THE COURT: Thank you.

1 MS. FOU DY: Thank you.

2 (Pause)

3 ORAL ARGUMENT ON BEHALF OF  
4 AD HOC COMMITTEE OF THE SENIOR SECURED NOTEHOLDERS

5 MR. DUNNE: May it please the Court. Dennis  
6 Dunne, of Milbank, Tweed, Hadley and McCloy, LLP, on  
7 behalf of the Ad Hoc Committee of the Senior Secured  
8 Noteholders.

9 Before I address Judge Raggi's comments and  
10 questions about the Chapter 7 and gifting, I wanted to  
11 come back to what my co-counsel was just talking about and  
12 some of the comments from Judge Lynch, with respect to  
13 what would happen if we go back to Judge Gerber with a  
14 reversal. Because, I do think that we're going back and  
15 we're going back in the landscape of Judge Gerber having  
16 found that the reorganization going concern value of this  
17 enterprise is at least -- and maybe more -- \$100 million  
18 less than necessary to pay my clients in full.

19 So, I think all the parties recognize what my  
20 position would be. My position there is we don't need to  
21 do any of the gifting, or provide for any of the  
22 distributions to the lower classes. I have that finding.  
23 Maybe Sprint and DISH are free to argue that DISH -- like  
24 DISH's counsel did today, that the valuation is actually  
25 lower when asked about why their offer is no longer

1 outstanding. But, that would only make my job easier when  
2 we go back.

3 And, the whole point of the gifting cases is to  
4 facilitate confirmation. It's very difficult to do it in  
5 Chapter 11 when you have the top of the capital structure,  
6 the secured creditors, who are under-secured and you're  
7 trying to provide some currency to facilitate consensus.  
8 A ruling that the gifting doctrine doesn't apply would  
9 mean that every last holdout -- i.e., Sprint -- would have  
10 the right to decide what is that price. And that last  
11 dollar set by them would be where we clear and that would  
12 make plans, in my opinion, prohibitively expensive.

13 But, let's go to *SPM* for a second and -- and the  
14 Chapter 7 absolute priority issue. I think I may be one  
15 of the few, or maybe the only bankruptcy lawyer that's  
16 arguing before you today, and I remember when the *SPM*  
17 decision came down. And we were actually surprised that  
18 it came down in a Chapter 7 liquidation context. We had  
19 expected it to be lawful in Chapter 11, but we were unsure  
20 at the time about Chapter 7.

21 Why? Because Chapter 7 is pure absolute  
22 priority rule. If you look at Sections 725 and 726, there  
23 is no wiggle room to do anything but to distribute under  
24 Section 725 the value of property that's subject to a  
25 lien, until that bucket is paid in full; then, in 726, you

1 go to the unsecured priority claims, then you go to the  
2 unsecured non-priority claims, and so on, and so forth,  
3 and you have to fill up each bucket first.

4 Chapter 11 has the wiggle room in two ways: (a)  
5 Congress wanted to have a negotiating dynamic, so their  
6 presumption would be there would be a settlement first,  
7 and you would only get to the absolute priority rule if  
8 you're in a cramdown, which we are here.

9 In the cramdown, they weren't as crystal clear,  
10 and they didn't mandate strict adherence to the absolute  
11 priority rule as they did in Chapter 7, because of the on  
12 the account of language that is in 1129 and is not -- and  
13 I think it's clear and not disputed, and the Supreme Court  
14 has said this, that that language is actually limiting  
15 language. It presupposes conditions where there could be  
16 distributions to equity holders that are proper, but not  
17 on account of their pre-existing equity interests in the  
18 company. And, that's what I submit we have here.

19 THE COURT: Well, the -- that's very  
20 interesting to me, but in the Chapter 7 context, I thought  
21 the argument was that it almost doesn't matter, since if  
22 the secured creditors are going to get everything, they  
23 can give it to who they please after the plan, so it's not  
24 a big deal if they give some during the plan, right?  
25 You're going to get this money. It is your money.

1 There's no negotiation to be had. And, you could give it  
2 all to charity, or you could buy a new yacht, or you could  
3 give some to the equity holders for whatever reason. And,  
4 there might even -- it might even be harder to think of  
5 what a good business reason would be to do that. You  
6 might just be charitably disposed.

7 In the reorganization context, you can think of  
8 a lot of reasons why the secured creditors would want to  
9 give something to at least certain types of shareholders.  
10 But, in order to do it, they've got to enter a negotiation  
11 with a lot of other people, because they can't -- it might  
12 be bad for your folks, or worse for your folks to just  
13 liquidate, take the money, and give out charity than it  
14 would be to negotiate something that allows for an ongoing  
15 business.

16 MR. DUNNE: I -- it's funny. I agree with you,  
17 Your Honor, but I come out differently, for this reason.

18 In *SPM*, what did not happen was what you said.  
19 What did not happen was that the cash was distributed to  
20 the secured creditors and they, in turn, took a slice of  
21 it, leapfrogged some priority class, and gave it to some  
22 unsecureds.

23 What happened was that they wanted to use the  
24 Chapter 7 Trustee, the Bankruptcy Court Administrator, to  
25 actually take some of the proceeds that were in the estate

1 and not distribute it to the secured creditors, but to  
2 give it to a class designated by the secured creditors on  
3 the rationale that only the secured creditors were in the  
4 money. That is precisely the rationale here. Judge  
5 Gerber's findings support that, because the TEV -- the  
6 total enterprise value -- is south of our debt. So,  
7 nobody else is entitled to anything.

8 And, I want to make one other point. The  
9 1st Circuit used an analogy which I think is helpful here,  
10 to prove why it's not on account of. They said, look,  
11 this is no different in economic realities. It wasn't the  
12 form of the transaction. But, in economic substance, it's  
13 no different than if the bank there in *SPM* had assigned,  
14 transferred a sliver of their bank debt to the unsecured  
15 class, and nobody could complain about that. That's  
16 absolutely true here.

17 This is no different because of where the  
18 enterprise value is, south of our debt, than had the  
19 noteholders taken five percent of their notes and said,  
20 "Equity, we're going to transfer this to you outside of  
21 the plan. And then under the plan, voila, you're going to  
22 get five percent of the equity, because we get a hundred  
23 percent of it, because nobody else is entitled to money."

24 And, the 1st Circuit used that to get  
25 comfortable that they were not running roughshod over any

1 bankruptcy priority. And, I mean, I submit it's much  
2 harder to do that in Chapter 7 where there is nothing but  
3 absolute priority that exists there, than it is in Chapter  
4 11.

5 Thank you.

6 THE COURT: Thank you, counsel.

7 We have several rebuttals. Mr. Byrne?

8 REBUTTAL ARGUMENT ON BEHALF OF

9 DISH NETWORK CORPORATION

10 MR. BYRNE: Your Honor, with the Court's  
11 permission, I would propose to use my two minutes of  
12 rebuttal for DISH, and then the LSTA would like to use  
13 their one minute of rebuttal, and the Sprint would like to  
14 use their two minutes of rebuttal, if that's acceptable.

15 THE COURT: That's fine.

16 MR. BYRNE: I want to address a couple of  
17 points, Your Honors, just to clarify.

18 On the issue of what was in the record when DISH  
19 bought its first lien secured notes and second tier of  
20 secured notes on July 9th, there was a proposed plan on  
21 file, and there was a proposed disclosure statement, but  
22 neither of those had yet been considered, or agreed to, or  
23 approved by the Court.

24 THE COURT: Right, but it did indicate what I  
25 said to you about how an entity that did not have any

1 participation would be treated.

2 MR. BYRNE: It did indicate the debtors' and  
3 plan supporters' desire to accomplish that goal. No  
4 question about it, Your Honor. But, it was only proposed  
5 at that point.

6 I do want to stress and Judge Lynch, I think you  
7 carried my argument a bit further than I was carrying it,  
8 which is if there was evidence in the record that what  
9 DISH did here was done to try to destroy a competitor and  
10 take them out of the marketplace, put aside the anti-trust  
11 implications of that for the minute, that might have  
12 supported a finding of bad faith even if it didn't  
13 prejudice the other creditors.

14 But, Judge Gerber made absolutely no finding  
15 that it was DISH's intent, or attempt, or tactics deployed  
16 to try to destroy a creditor. Similarly --

17 THE COURT: Your adversary has devoted most of  
18 his argument to suggest that we don't have to reach this,  
19 that we could affirm on the findings that were made to  
20 support cramdown.

21 MR. BYRNE: If you affirm on the findings that  
22 support cramdown, there is an argument that the two  
23 designation issues we raise are moot. However, I think  
24 that that would -- that's a possible outcome, I agree, but  
25 not a desired outcome, because if you reverse on cramdown

1 and we go back to Judge Gerber, he still could avoid the  
2 cramdown by going back to the designation route.

3 So, I think he will need the guidance on the  
4 designation. I did --

5 THE COURT: I'm sorry. I don't follow.

6 THE COURT: Affirm on the cramdown?

7 MR. BYRNE: If you reverse on the cramdown.

8 THE COURT: If we were to --

9 THE COURT: Yes, --

10 THE COURT: -- but if we were to affirm on the  
11 cramdown, do you agree that the designation questions  
12 would --

13 MR. BYRNE: The designation questions --

14 THE COURT: -- similarly be moot?

15 MR. BYRNE: -- could be moot. The feasibility  
16 question is not.

17 THE COURT: Yes, of course.

18 MR. BYRNE: Okay. There also is absolutely no  
19 allegation, Judge Raggi, in the record below, let alone a  
20 finding, that DISH was trying to force liquidation.

21 And, while I'm limited on what I can say, not  
22 because I want to hold back, but because Judge Gerber  
23 sealed the record, I do want to say that there are  
24 actually two strategic proposals made by DISH. One was a  
25 financing proposal to extend financing to the debtor. The

1 debtor and the other interested parties decided not to  
2 take advantage of that, and Judge Gerber was aware of the  
3 terms.

4           And then, there was a proposal to acquire the  
5 debtor or, really, not the shares, but the debtors'  
6 principal asset, the satellite. In my experience,  
7 rational business people don't propose buying an asset for  
8 large sums of money to destroy it or take it out of the  
9 marketplace. And that's not the way DISH has done  
10 business for years and years.

11           So, the two strategic proposals were consistent  
12 with furthering the goals of the debtor and not bad intent  
13 to give DISH a special advantage in the case. That's very  
14 different than the types of cases Judge Gerber cited to  
15 address the issue of DISH's bad faith, in his view. So, I  
16 think he made a mistake there.

17           I do want to say that counsel for the debtors  
18 read to you a document that said DISH could acquire a  
19 blocking position. I want to say two things about that  
20 document, which is in the record. It's in the appendix.  
21 And, it's cited in the briefs of the Ad Hoc Committee.

22           The document talks about a blocking position in  
23 the second priority notes. And, the document is dated  
24 July 10th. DISH, according to the record below, bought  
25 100 percent of the first priority notes and approximately

1 15 percent of the second priority notes on July 9th. It  
2 made no subsequent purchases, although it could have.

3 And, as I said before, if DISH's bad intent was  
4 to hurt the other creditors or put the debtor out of  
5 business, they could have bought a blocking position in  
6 the second. They needed to buy on 35 -- 34 percent of the  
7 first secured lien, and then they could have blocked the  
8 plan.

9 So, while the document may make for interesting  
10 reading, at the end of the day it goes to the issue of  
11 what might have been considered, as opposed to what  
12 actually happened. And, that's the ultimate issue here.  
13 To find bad faith and to set aside the designation, you  
14 have to say that DISH actually did something, as opposed  
15 to DISH aspired to do something with bad intent. And,  
16 Judge Gerber can't point to anything in the record that  
17 DISH did that would evidence bad intent or be inconsistent  
18 with its rights as a first lien secured creditor under the  
19 terms of the Bankruptcy Code and this plan.

20 So, I think that's one of the mistakes he made.

21 THE COURT: Thank you, counsel.

22 MR. BYRNE: Could I just say one last thing on  
23 feasibility? And, I apologize. I know I've taken --  
24 taken a lot of the Court's time.

25 There is a bit of a tautology going on here,

1 because they said we overpaid for the first percent -- the  
2 first lien notes, because we paid 100 percent; but then,  
3 they say we're nine times over-secured. Well, if we're  
4 nine times over-secured, why is paying 100 percent for the  
5 top of the credit structure under-paying for the notes or  
6 over-paying for the notes?

7 As to feasibility, I think the Court should be  
8 aware that when the parties were before -- and this goes  
9 to a point to you raised this morning or earlier, Judge  
10 Lynch, about are there things happening that could affect  
11 this panel's ability to rule. When we were before Judge  
12 Gerber on May 18th, counsel for the Ad Hoc Committee  
13 represented to the Court, and I'm quoting from the  
14 transcript, "The entire reorganization is at risk through  
15 every day that passes without FCC approval," and that  
16 continues to this day.

17 And then, counsel continued that "The people who  
18 are now missing from the proposed officers" -- this was in  
19 the plan and the disclosure statement -- "the list are the  
20 chief executive officer, the general counsel, and the  
21 senior vice-president for regulatory affairs." And, his  
22 point was that because the plan hasn't been declared  
23 effective yet, their proposed senior management have  
24 defected. And I also understand that the financing that  
25 they have in place, both the DIP financing and the exit

1 financing, is due to expire on August 16th. It's not  
2 clear from the record whether that financing will be  
3 extended or not.

4 But, they have essentially acknowledged, after  
5 getting Judge Gerber to confirm the plan, that the plan is  
6 not feasible.

7 Thank you, Your Honor.

8 THE COURT: Thank you.

9 (Pause)

10 REBUTTAL ARGUMENT ON BEHALF OF *AMICUS CURIAE*  
11 LOAN SYNDICATIONS AND TRADING ASSOCIATION

12 MR. JONES: Your Honor, I understand I have  
13 very little time, so I'll speak quickly. Two points.

14 The first question, can the Court -- or should  
15 the Court avoid the designation issue? Your Honor, I'd  
16 suggest the answer is no, for two reasons.

17 The first one is we know that Judge Gerber went  
18 to the trouble to write a separate opinion and lengthy  
19 opinion on the question of whether they acted in good  
20 faith or not. Judge Gerber is an excellent jurist, but I  
21 find it difficult to believe that he would decide on one  
22 day that these folks acted in bad faith and be able the  
23 next day to call everything exactly down the line in his  
24 confirmation hearing. So, I don't think we can insulate  
25 or isolate these two opinions from each other.

1           Even if we can, though, Your Honor, the fact  
2           that Judge Gerber went to the trouble to write this  
3           opinion, and the impact it has had upon a billion dollar  
4           market, suggests that this Court should use its authority  
5           to provide guidance to the courts below.

6           And, Your Honor, the case I would cite is the  
7           Court's *Olsheds* (phonetic) opinion, where the Court makes  
8           clear that it is appropriate in your oversight authority  
9           to address things that may not be the dispositive holding  
10          before you.

11          Your Honor, the second point I wanted to  
12          address, counsel says that we have a creditor here who's  
13          acting not consistent with being a creditor. And, they  
14          suggest what that language is supposed to mean is that  
15          creditors can only sit back and collect coupons on  
16          distributions.

17          Your Honor, we need to return to where that  
18          phrase came from. This Court picked it up from the *Avon*  
19          decision in *P-R*. What happened in *Avon* was you had a  
20          fiscal agent who not only got a dividend on debt it  
21          bought, but received a bonus on the side, and that's where  
22          the phrase came from. The Court said that individual is  
23          not acting as a creditor because they're receiving a side  
24          deal.

25          Your Honor raised the question if we had had the

1 exact same noteholders and they voted in favor of a merger  
2 or a sale, of course no one would suggest that was in bad  
3 faith.

4 Your Honor raised the question well maybe  
5 they're trying to get a good deal. Of course they're  
6 trying to get a good deal. People don't act without  
7 personal motives. But, that's not what the bad faith  
8 inquiry looks to. If they were a third party who didn't  
9 buy claims, and offered to buy assets, we'd expect them to  
10 be looking for a good deal.

11 Similarly, as a party who seeks to -- and, Your  
12 Honor, the phrase was used "gain control of the  
13 bankruptcy." They're not doing that out of goodwill.  
14 They're not a charitable organization. Of course, when a  
15 creditor or any investor decides to invest millions of  
16 dollars in a potential strategic transaction, they want to  
17 know if they can have control of that process. No case  
18 suggests that merely desiring to control a bankruptcy is  
19 bad faith.

20 Thank you, Your Honor.

21 THE COURT: Thank you, counsel.

22 Mr. Culver?

23 REBUTTAL ARGUMENT ON BEHALF OF

24 SPRINT NEXTEL CORPORATION

25 MR. CULVER: Thank you, Your Honor. I'll be

1 very brief.

2 With respect to the senior noteholders' argument  
3 that the distribution to the equity is not on account of I  
4 think is the language they hang their hat on, primarily.  
5 I point again to Page 101 of the Joint Appendix, which  
6 says that the existing stockholder receives the stock in  
7 satisfaction and on account of the consideration -- on  
8 account of the consideration provided under the plan  
9 support agreement, which is an agreement they entered into  
10 as an equity holder.

11 And, with respect to the warrants, it says at  
12 104 "As holders of Class 9 interests, existing  
13 stockholders shall receive the warrants." It's clearly on  
14 account of their status as an equity holder. And --

15 THE COURT: I take it there is no evidence in  
16 this record that, for example, the shareholders who are  
17 going to get this equity are management that they expect  
18 to hold over, or anything like that? Or do we know  
19 whether that's the case? Is there anything about that?

20 MR. CULVER: Well, under the plan support  
21 agreement, there is an obligation as was discussed by  
22 Mr. Riemer, to provide certain services. And, I can't  
23 speak to whether the existing management was going to stay  
24 in place, --

25 THE COURT: Well, but then why --

1 MR. CULVER: -- but the employees certainly  
2 were going --

3 THE COURT: -- assume that there is a good  
4 faith reason to provide stock or some benefits to  
5 shareholders in order to secure their services going  
6 forward, why would that be on account -- that wouldn't be  
7 on account of the fact that they used to have stock.

8 That would be on account of whatever management  
9 skills or other things they can bring to the table, or am  
10 I --

11 MR. CULVER: That -- that's not --

12 THE COURT: -- wrong about that?

13 MR. CULVER: I'm sorry, Your Honor. That's not  
14 how it was proposed in this case.

15 THE COURT: I see.

16 MR. CULVER: And, if it is on account of their  
17 prior involvement in the debtor and their future services,  
18 *Ahlers* and *LaSalle* prohibits that, because that's not  
19 money's worth, assuming there is a new value corollary to  
20 the absolute priority rule, if you follow me on that.  
21 And, in addition, if it is a, quote/unquote "gift,"  
22 *LaSalle* specifically prevents it.

23 And also, Judge Lynch, with respect to your  
24 policy question, I would just point out, since you  
25 mentioned the Miller article that was -- I don't think was

1 cited in the papers, Justice Douglas, when he was at the  
2 SEC, did a multi-volume study of the way in which the  
3 Bankruptcy Code had operated throughout the history of the  
4 railroad cases, and leading up through the depression.  
5 And he devotes considerable pages -- thirty or forty pages  
6 -- to talking about the absolute priority rule. And I  
7 think that a review of that would demonstrate that the  
8 history of the rule is one of the reasons why Congress  
9 adopted this absolute rule that it did.

10 THE COURT: Thank you. Thank you, all, for  
11 lively argument.

12 That's the last case on our argument calendar.  
13 So, I will ask the Clerk to adjourn court.

14 THE COURT CLERK: Court stands adjourned.

15 (Time noted: 1:20 p.m.)

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CERTIFICATE

I, JUNE ACCORNERO, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, to the best of my ability.

*June Accornero*

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August 8, 2010

June Accornero