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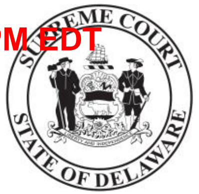

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IDT CORPORATION, HOWARD JONAS, and THE PATRICK HENRY TRUST,	)	
Defendants Below, Appellants,	)	No. 388, 2018
v.	)	Court Below: The Court of Chancery of the State of Delaware, C.A. No. 2017-0486-SG
JDS1, LLC and THE ARBITRAGE FUND,	)	
Plaintiffs Below, Appellees.	)	

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NATURE OF PROCEEDINGS

This is an interlocutory appeal from the Court of Chancery's denial of Defendants' motions to dismiss Plaintiffs' claims challenging the sale of Straight Path Communications Inc. ("Straight Path") as unfair (the "Opinion" or "Op.").

On August 29, 2017, Plaintiffs filed their operative complaint (the "Complaint"). As alleged in the Complaint, through super-voting stock, defendant Howard Jonas controlled both Straight Path and IDT Corporation ("IDT"), from which Straight Path was spun off in 2013 (the "Spin-Off"). Before the Spin-Off, Howard Jonas and IDT defrauded the Federal Communications Commission ("FCC") in connection with the renewal of wireless spectrum licenses that would become Straight Path's primary assets (the "Spectrum Assets"). As part of the Spin-Off, IDT contractually indemnified Straight Path for all harm resulting from any fraud pre-dating the Spin-Off (the "Indemnification Claim").

Upon discovering the fraud, the FCC punished the Company severely, effectively requiring Straight Path to sell itself immediately and pay the FCC 20% of the sale proceeds. The Company commenced a sales process. As the Company's sale process became a heated bidding war, a special committee (the "Special Committee") of Straight Path's board of directors (the "Board") recognized the Indemnification Claim's enormous and growing value. The Special Committee, however, did not believe that the ultimate buyer of the Company

would appropriately value the Indemnification Claim, and therefore decided to place the Indemnification Claim in a litigation trust and give Straight Path's minority stockholders a contingent value right ("CVR") in the trust. After learning of the Special Committee's efforts on behalf of minority stockholders, Howard Jonas actively inserted himself into the sale process by forcing the Special Committee to "settle" the Indemnification Claim for a pittance as a precondition to moving ahead with the sale of Straight Path, even though a sale was the Company's only viable option given the FCC penalties. He did so to prevent IDT from being bankrupted by the Indemnification Claim, which would have wiped out his family's considerable stake in IDT and given rise to a potential derivative claim against Howard Jonas in bankruptcy relating to his role as CEO of IDT at the time of the fraud on the FCC. In addition, Howard Jonas pressured the Special Committee to sell IDT Straight Path's intellectual property assets ("IP Assets") for a song as part of the same transaction.

Thus, the question presented below and here is whether a plaintiff states a direct claim where a controlling stockholder intervenes in a board's corporate sale process and conditions his support for a merger on the disposition of certain corporate assets for his own benefit rather than the benefit of all stockholders.[1]

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[1] Even assuming, *arguendo*, that Plaintiffs' claims are derivative, which they are not, Defendants admit that the Complaint would survive if Plaintiffs alleged a claim pursuant to the three-part test found in *In re Primedia, Inc. Shareholders*

Faced with an unfavorable pleading and finding no support under Delaware law, Defendants premise their appeal on demonstrably incorrect characterizations of the Complaint, black-letter Delaware law, and the Court of Chancery's detailed and well-reasoned decision below.

As an initial matter, the Complaint expressly challenges (multiple times) the fairness of the "sale process" and "merger consideration," including allegations that: (i) Howard Jonas and his son, Straight Path CEO Davidi Jonas, "manipulated the Straight Path sale process" and thereby "render[ed] the consideration [stockholders] will receive in the Proposed Transaction ***unfair***"[2] (A622); (ii) the FCC penalty "necessarily render[ed] the price stockholders will receive in any sale ***unfair*** unless they are also appropriately compensated for the value of the Indemnification Claim" – *i.e.*, receive the lost CVR in the litigation trust (A641); (iii) "the Special Committee had no choice but to cave to Jonas's demands and his abuse of his control if it wanted stockholders to receive at least some consideration, albeit an ***unfair*** amount, for their shares" (A653); (iv) "[d]ue to

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Litigation, 67 A.3d 455 (Del. Ch. 2013). (OB at 41.) Defendants ignore that such a claim has been alleged. (A663-665.) Plaintiffs asserted a *Primedia* claim and briefed the issue below. (A788-790.) The Court of Chancery simply held that the Complaint stated straightforward direct claims. (Op. 2, 54.) Thus, even if the claims are found to be derivative (which they should not), this Court should affirm the Chancery Court's ruling on the alternative ground that Plaintiffs adequately alleged a claim pursuant to *Primedia*.

[2] Unless otherwise indicated, emphasis herein is added.

Howard Jonas's insistence that the Indemnification Claim not travel with Straight Path's other assets to Verizon . . . stockholders will receive an ***unfair*** amount in the Proposed Transaction" (A655); and (v) "Howard Jonas used and abused his control over Straight Path, and the exigency of the Company's sale process, to force the Company to trade away its enormously valuable Indemnification Claim for well less than 2% of its face value, ***unfairly*** depressing the consideration Straight Path stockholders received in the Proposed Transaction." (A655.)

During the lengthy oral argument, the Court of Chancery accurately summarized the crux of the question at issue here:

> Because of the strange nature of this indemnification claim and the way the fine was set up, the board determined that it could not find a buyer who would adequately value that asset and it needed to be spun off on behalf of the stockholders, and the controller used his controlling status because he had a personal interest in that indemnification claim to nix that and cause the what would have been a stockholder asset to be transferred to him.
>
> ***So why can't I look at this as, if not under Parnes, as equitably equivalent to Parnes?***

(A846.) The Court of Chancery plainly understood the relevant legal question, further noting that if "the decision is whether to distribute [the Indemnification Claim and IP Assets] to all stockholders ratably or to concede to a demand by the controller to distribute it to him individually[,] [t]hat's not a derivative claim. That's a direct claim. It's got to be. There's no harm to the corporate entity." (A953.)

On June 25, 2018, the Court of Chancery denied Defendants' motions to dismiss in a well-reasoned Opinion that—contrary to Defendants' assertions—addressed each and every argument raised by Defendants here on appeal. The court held that Howard Jonas, "explicitly conditioned his support for a sale of the company on the elimination" of the Indemnification Claim that the Special Committee had determined to place into a litigation trust for the benefit of Straight Path stockholders as part of an effective corporate breakup) of Straight Path. (Op. at 36.) When Howard Jonas learned of the Special Committee's plan, "he threatened to blow up any sale unless the Special Committee dropped its plan to preserve the claim." (*Id.*) As the Court found, "[t]his is not a situation in which, before merger talks began, a company's fiduciaries made poor business decisions that ultimately led to a reduction in the merger consideration paid to the stockholders." (*Id.*) Rather, Defendant Howard Jonas "manipulated the sales process to secure significant benefits for IDT and himself at the expense of Straight Path's other stockholders." (*Id.*) Applying longstanding Delaware Supreme Court precedent—including *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004) and *Parnes v. Bally Entertainment Corp.*, 722 A.2d 1243 (Del. 1999)—the trial court correctly held that Plaintiffs stated direct claims challenging the sale of Straight Path. (Op. at 2, 30, 35-36.)

Plaintiffs acknowledge that there is judicial efficiency in resolving this appeal now instead of following a potentially massive judgment against this egregiously overreaching controller. Considering the actual allegations of the Complaint, the Court's observations at argument and its rulings in the Opinion, deciding this appeal should not be particularly difficult.

A fair reading of the Complaint and the Court of Chancery's Opinion should put an immediate end to this appeal. Plaintiffs surmise that the Court of Chancery granted interlocutory appeal for efficiency purposes. Faced with serious allegations of misconduct, the Court of Chancery merely wanted to dispose of the threshold issues raised by Defendants to avoid unnecessary discovery and trial in the event this Court subsequently decided to overturn nearly a century of case law holding that a direct claim arises when a controller extracts non-ratable benefits while negotiating a merger transaction. This Court should not accept Defendants' invitation to create such a massive loophole in Delaware law.

SUMMARY OF ARGUMENT

1. Denied. The trial court correctly found Plaintiffs' claims are direct. Plaintiffs' claims are direct under a straightforward *Tooley* analysis. As part of the sale of Straight Path, the Special Committee intended to transfer the Indemnification Claim from Straight Path to a litigation trust and grant the beneficial interest to Straight Path stockholders as a CVR. Howard Jonas's extortive conduct prevented stockholders from receiving the CVR, as well as fair value for the IP Assets. Straight Path stockholders suffered harm and would directly benefit from any recovery.

Parnes compels the same conclusion. Howard Jonas conditioned his approval of any sale of Straight Path on the Special Committee agreeing to settle the Indemnification Claim and sell him the IP Assets. Straight Path signed the first merger agreement and binding Term Sheet the same day. The intertwined merger, settlement, and asset sale extinguished Straight Path stockholders' ability to pursue their lost consideration upon the sale and breakup of the Company, representing nearly 20% of the merger consideration.

Even assuming, *arguendo*, Plaintiffs' claims are derivative, Plaintiffs have asserted a valid direct claim under the three-part *Primedia* test. Plaintiffs' "derivative" claims: (i) are subject to entire fairness and would survive a motion to dismiss; (ii) are clearly material, as they are worth at least 20% of the total merger

consideration; and (iii) were not paid for by Verizon and will not be pursued by Verizon.

STATEMENT OF FACTS

In reviewing the Court of Chancery's Opinion denying Defendants' motion to dismiss, this Court must "view the complaint in the light most favorable to [Plaintiffs], accepting as true its well-pled allegations and drawing all reasonable inferences that logically flow from those allegations." *Gantler v. Stephens*, 965 A.2d 695, 703 (Del. 2009).[3]

I. FACTUAL ALLEGATIONS

A. Howard Jonas Controlled Both IDT and Straight Path

Howard Jonas owns more than 20% of IDT and holds approximately 70% of its voting power.[4] (A624, 629-630.) He was CEO of IDT during the fraudulent conduct that led to the FCC Consent Decree. (A625.) In January 2014, Howard installed his son Shmuel Jonas as CEO of IDT. (*Id.*) Howard's children beneficially own at least 10% of IDT's stock. (*Id.*)

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[3] Defendants suggest that this Court should not take allegations as true "to the extent that they are contradicted by documentary evidence." (Appellants' Opening Brief "OB" at 6.) But Defendants nowhere identify *any* fact in the Complaint that is contradicted by *any* document, even assuming, *arguendo*, that Defendants' extrinsic documents meet the standard to properly be considered here. *See*, *e.g.*, *Vanderbilt Income and Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996) ("The exceptions to the general Rule 12(b)(6) prohibition against considering documents outside of the pleadings are usually limited to . . . when the document is integral to a plaintiff's claim and incorporated into the complaint[]" or "when the document is not being relied upon to prove the truth of its contents.").

[4] Two days after the Term Sheet was executed, Howard Jonas increased his stake in IDT from approximately 11% to 20.4%. (A889-890.)

On July 31, 2013, IDT completed the Spin-Off of Straight Path to IDT's stockholders. (A360.) In connection with the Spin-Off, Straight Path and IDT signed a separation agreement that required IDT to indemnify and reimburse Straight Path for any liabilities arising from pre-Spin-Off conduct. (A630-631.) The purpose of the Spin-Off and indemnity was to give Straight Path a clean slate as it became a publicly-traded company. (A633.)

At all relevant times, Howard Jonas also owned 17.6% of Straight Path and controlled 71% of Straight Path's voting power. (A632.) In April 2013, Howard installed another son, Davidi Jonas, as CEO and Chairman of Straight Path. (A625.) At all relevant times, Straight Path's assets primarily consisted of: (i) valuable Spectrum Assets consisting of the country's largest portfolio of millimeter bandwidth licenses necessary to create new generation wireless networks; and (ii) IP Assets that the FCC Consent Decree valued at $50 million. (A621-622, 637.) Until 2013, Straight Path was the subsidiary of IDT that held these assets. (A624, 630.)

B. IDT's Pre-Spin-Off Fraud Becomes Public

On November 5, 2015, an investor analysis accused IDT of defrauding the FCC when it renewed the Spectrum Assets in 2011 and 2012. (A633-634.) Without such renewals, IDT, and in turn Straight Path, would have lost the Spectrum Assets. (A634.) The report claimed that IDT falsified its compliance

with FCC requirements that license-holders buildout the infrastructure necessary to use the bandwidth to provide services, rather than to merely hoard licenses for the sake of speculation. (A635.) An internal investigation by Straight Path's lawyers confirmed certain allegations in the investor's analysis. (A635-636.) This conduct triggered an investigation by the FCC and a potential indemnification claim against IDT if it resulted in any harm to Straight Path. (A636.) IDT publicly acknowledged the risk of having to potentially indemnify Straight Path in its SEC filings. (A640.)

C. The FCC Consent Decree Forces the Sale of Straight Path

On January 11, 2017, Straight Path entered into the FCC Consent Decree with the FCC to resolve the investigation. (A641.) The FCC Consent Decree required the Company to: (i) forfeit 196 spectrum licenses (or approximately 20% of the Spectrum Assets) for no consideration; (ii) sell the remaining Spectrum Assets within a year and forfeit 20% of the proceeds from the sale to the FCC; and (iii) pay a $100 million fine, with the first $15 million due in installments. (A637-638.)[5]

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[5] Defendants assert that Straight Path could have paid an additional $85 million fine and kept the Spectrum Assets instead of selling them. (OB at 8.) This statement is extremely misleading for at least two reasons. *First*, the Company struggled to pay the initial installment of $15 million towards the $100 million fine and could only do so after agreeing to an exceptionally lender-friendly loan—it could not afford to pay the $85 million fine. (A637-638.) *Second*, if Straight Path did not promptly sell the licenses and instead paid the $85 million fine, the FCC

Because the FCC Consent Decree's penalties related to IDT's pre-Spin-Off fraud, it triggered Straight Path's Indemnification Claim against IDT for, *inter alia*, the forfeiture of 20% of its licenses for no consideration, the payment to the FCC of 20% of the sale price of the remaining Spectrum Assets, and the $15 million fine. (A639.)

D. The Special Committee Attempts to Create a Litigation Trust

Immediately following the entry into the Consent Decree, Straight Path instructed its financial advisor to contact twenty potential bidders and instruct them to factor into any bid the 20% penalty the successful bidder would pay to the FCC separate from the consideration paid to Straight Path stockholders. (A642.) Accordingly, from the outset, the Board recognized Straight Path's stockholders would receive less than the Company was worth in an auction, unless stockholders could receive that value through the Indemnification Claim. (A641-642.)

On February 6, 2017, the Board formed a Special Committee comprised of all directors, except for Howard's son Davidi Jonas, to maximize value for the Company's IP Assets, which were not being sold as part of the sales process.

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reserved the right to still take further action including terminating those licenses. (A637-638.) Straight Path had no real choice other than a sale of the Spectrum Assets or the whole Company. Moreover, Plaintiffs note that if Straight Path sold the Spectrum Assets and then dividended the proceeds to stockholders, those proceeds would be taxed twice, once at the entity level and once at the stockholder level, making a sale of only the Spectrum Assets as opposed to the whole company economically irrational.

(A643-644.) The Special Committee concluded that potential bidders for Straight Path would not be interested in pursuing the Indemnification Claim post-closing and would not ascribe appropriate value to it when bidding. (A645.) Given that 20% of the Company's value would go to the FCC instead of stockholders, shortly after its formation, the Special Committee unanimously determined to preserve and pursue the growing Indemnification Claim against IDT for the post-sale benefit of Straight Path's stockholders. (A643-644.)

Accordingly, on February 28, 2017, the Special Committee's attorneys informed Straight Path's attorneys that the Special Committee intended to preserve the Indemnification Claim. (A645-646.) In early March 2017, the Special Committee instructed its lawyers to begin drafting litigation trust documents that would provide stockholders a contingent value right in the trust as merger consideration. (*Id.*). Pursuant to this plan, if the Company was eventually sold, Straight Path stockholders would receive two forms of consideration: (i) a CVR representing each stockholders' proportional share of any recovery on the Indemnification Claim secured by the litigation trust, and (ii) whatever the buyer paid to all stockholders. (A645-646, A905; *see also* Op. at 32.)

On March 14, 2017, the full Board, including Davidi Jonas, instructed the Company's financial advisors to inform second-round bidders that they should not even consider the value of the Indemnification Claim in formulating their bids,

since the Indemnification Claim would be excluded from the assets the eventual buyer would acquire when it bought the whole Company. (A646.) Thus, Davidi Jonas, and in turn Howard Jonas, became aware that the Special Committee intended to preserve the Indemnification Claim against IDT. (A646-648.)

Straight Path's prosecution of the Indemnification Claim threatened to bankrupt IDT—the Jonas family business. (A647-648.) Howard Jonas founded IDT and was its chairman and controlling stockholder and had been its CEO during the alleged fraud. (A624-625.) Shmuel Jonas took over as CEO of IDT. (A625, 647.) The Jonas family owned more than 20% of IDT's stock. (A624, 647.) Moreover, if IDT was forced into bankruptcy through the successful prosecution of the Indemnification Claim, the bankruptcy trustee could pursue claims against Howard and Shmuel Jonas relating to their roles in the fraud triggering the Indemnification Claim. (Op. at 32.)

E. Howard Jonas Conditions Any Sale of Straight Path on Straight Path Selling the IP Assets and Settling the Indemnification Claim

Upon learning from Davidi Jonas that the Special Committee intended to preserve the Indemnification Claim for the benefit of Straight Path's stockholders, Howard Jonas immediately took steps to prevent that possibility. (A647-649.) He personally contacted each Special Committee member to propose a meeting to discuss settling the Indemnification Claim and, by March 20, affirmatively stated that he would oppose any sale of Straight Path that left the Indemnification Claim

to be asserted post-closing. (A649.)[6] During these conversations, Howard personally threatened each Special Committee member in order to coerce them into agreeing to settle the Indemnification Claim and to sell the IP Assets to IDT, both for unfair consideration. (A648-649.)

The Special Committee had no rational choice but to sell the IP Assets to IDT for a song and settle the Indemnification Claim for a pittance, as Howard Jonas demanded. (A649-650.) If Straight Path did not sell the Spectrum Assets, the Company would face a fine it could not pay and forfeiture of the Spectrum Assets, and public stockholders could see their shares driven to zero. (A649.) If

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[6] Defendants assert that "Plaintiffs' do not allege that Jonas rejected any offer for Straight Path on the basis of any precondition" and "Plaintiffs do not allege that Straight Path ever declined a bid on the basis of any precondition set by Jonas." (OB at 13.) This is pure sophistry. The crux of the Complaint is that Howard Jonas *said he would do just that*. The Complaint alleges that Howard Jonas threatened to reject any transaction that allowed the Indemnification Claim to be asserted against IDT post-transaction. (*See*, *e.g.*, A649 ("On March 20, Howard Jonas's attorneys informed the Special Committee's attorneys that he would not support any sale of Straight Path that would allow the Indemnification Claims to be pursued against IDT post-closing.")). Howard Jonas's counsel repeatedly conceded this fact during oral argument, but they now mischaracterize Plaintiffs' allegations as simply challenging Howard's right to vote. (*See*, *e.g.*, A680 ("Plaintiffs bring their claims on the theory that Howard Jonas was not entitled to vote 'no' – nor say he would vote 'no' – to a merger or Straight Path that would be structured to leave only the Indemnification Claim unliquidated . . . stockholders (even controlling stockholders) are free to vote their stock as they chose")). Plaintiffs' entire claim is premised on the simple fact that a controlling stockholder cannot condition his "yes" vote on the receipt of non-ratable side benefits worth over a half a billion dollars, as Howard Jonas did in connection with the sale of Straight Path.

the Special Committee acquiesced to Howard Jonas's threats, at least the Company would be sold, and stockholders would receive some consideration, albeit an inherently unfair amount because they would not be compensated for the fair value of the IP Assets and the Indemnification Claim. (A649-650.)

F. As the Bidding War Escalates, Howard Jonas Forces Straight Path to Make the Term Sheet Binding

On April 6, 2018, the Special Committee was forced to execute the Term Sheet with IDT, which was non-binding. (A650.) The Term Sheet provided that Straight Path would: (i) sell the Company's IP Assets to IDT for $6 million, and (ii) settle the Indemnification Claim for $10 million and a portion of potential proceeds from speculative future use of the IP Assets. (A650-651.) Through the Term Sheet, Howard appropriated for himself a portion of the merger consideration the Special Committee intended to provide to Straight Path public stockholders—a CVR in a litigation trust dedicated to prosecuting the Indemnification Claim, as well as the full value of the IP Assets.

This consideration was demonstrably unfair. The Consent Decree stipulated a value of $50 million to Straight Path's non-Spectrum Assets, which primarily consisted of the IP Assets, and the Company reported $18.25 million in net proceeds from the IP Assets in the two prior years. (A651.) Moreover, even based on the then-leading offer for the Company as of April 6, the Indemnification Claim

was worth more than $160 million and was only growing, as the bidding war was nowhere near conclusion. (A651-652.)

As the bidding war for Straight Path between Verizon and AT&T escalated, IDT's exposure grew. (A653.) Within days, the high bid was raised to $1.4 billion, escalating IDT's exposure to the Indemnification Claim to over $280 million. (A652.) Then, on April 9, 2017, AT&T increased its offer to acquire Straight Path (***excluding*** the Indemnification Claim and IP Assets) to $1.6 billion (A653), increasing IDT's exposure to over $320 billion.

At this point, the Special Committee realized the already shockingly inadequate consideration in the Term Sheet had become absurdly low. Thus, as the bidding for Straight Path escalated, the Special Committee sought additional consideration in connection with making the Term Sheet binding, Howard Jonas, through his attorneys, threatened litigation against both the Special Committee personally and its counsel if the Special Committee tried to renegotiate. (A652-653.)

The Board accepted AT&T's offer, ensuring that Verizon could readily submit topping bids, and the parties entered into a merger agreement. (A653-654.) *The same day*, to gain Howard's acquiescence, Straight Path and IDT executed the Amended Term Sheet, which made the terms binding on the parties without the need for further documentation, effectively extinguishing the Indemnification

Claim and the threat it posed to IDT and the Jonas family's interests. (A648, 654-655.)

In sum, it is uncontroverted that: (i) the Special Committee intended to directly provide stockholders with a contingent interest in the Indemnification Claim as a portion of the merger consideration (A646); (ii) the Indemnification Claim created by any sale of Straight Path would imperil IDT and the Jonas family personally (A647-648); (iii) Howard Jonas conditioned his approval of any sale of Straight Path on the Special Committee settling the Indemnification Claim with IDT, removing this element of the corporate sale consideration (A648-649); and (iv) Straight Path and IDT entered into the original Term Sheet in the midst of a bidding war for Straight Path and made it binding contemporaneously with the Company executing a merger agreement with AT&T, thus transferring to Howard Jonas and IDT a portion of the intended merger consideration the Special Committee intended to provide to the public stockholders (A650-651).[7]

G. Verizon Acquires Straight Path for $3.1 Billion

The bidding war between AT&T and Verizon continued until May 11, 2017, when Verizon won, purchasing Straight Path (less the IP Assets and

[7] Based on these uncontested facts, Defendants' assertion that the settlement of the Indemnification Claim and sale of Straight Path were unrelated (OB at 31-32) requires an impermissibly unreasonable inference that does not logically flow from the facts and has already been rejected by the Court of Chancery (Op. at 36).

Indemnification Claim) for a total value of $3.1 billion. (A654.)[8] At this valuation, the Indemnification Claim was worth more than $600 million, not even taking into account the 196 already-forfeited licenses and the $15 million installment payment in fines already paid to the FCC. (A622.)

Because Howard Jonas forced the Special Committee to settle the Indemnification Claim as a condition to achieving the sale of Straight Path, Straight Path stockholders did not receive the CVR in a litigation trust, or the fair value for the IP Assets, that they otherwise would have received absent Howard's disloyal conduct.

II. PROCEDURAL HISTORY

A. Plaintiffs' Complaint Challenging the Fairness of the Merger

On August 29, 2017, Plaintiffs filed the operative Complaint. (A618.) The Complaint alleges direct claims for breach of fiduciary duty against: (i) Howard Jonas (Count I) for using his status as controller of Straight Path to extract from the Company's sale process unique benefits for himself and his family (A660-661); and (ii) Davidi Jonas (Count II) for elevating his and his family's personal interests over that of Straight Path's minority stockholders during the sale process (A661). These claims expressly allege direct harm to Straight Path public stockholders

[8] Although Verizon agreed to pay $3.1 billion to acquire Straight Path, after accounting for the 20% fine, Straight Path stockholders only received roughly $2.45 billion in total consideration. (A1042.)

independent of any harm to Straight Path and challenge the "unfair consideration" received by stockholders in the sale process. (A660, 661.) The Complaint likewise alleges a direct claim against IDT (Count III) for aiding and abetting these breaches. (A662-663.)

The Complaint also asserts, in the alternative, a derivative claim against all Defendants for declaratory judgment and constructive trust over the IP Assets and Indemnification Claim (Count IV) (but only alternatively in the event the Court of Chancery determined Plaintiffs' claims are derivative); which also expressly challenges the fairness of the consideration stockholders would receive in the sale process: "The Term Sheet has the present effect of diminishing the value of the consideration received in the sale transaction, rendering that transaction unfair to Straight Path stockholders." (A663-664.)[9]

[9] Plaintiffs only brought this alternative derivative claim because they correctly anticipated Defendants would argue that all of Plaintiffs' claims are derivative and sought to avail themselves of all potential options to hold Howard Jonas accountable for his disloyalty. Plaintiffs should not be punished for clearly pleading claims or allegations in the alternative. (*See* A663 at Count IV (stating clearly that the derivative claim is alleged "[i]n the alternative").) Parties are permitted in litigation to take alternative positions in litigation to fully protect their rights. *Halliburton Co. v. Highlands Ins. Grp., Inc.*, 811 A.2d 277, 280 (Del. 2002) ("There is no doubt that alternative pleading, if clearly set forth as such, is permissible."); *see also* Ch. Ct. R. 8(e)(2) (authorizing pleading in the alternative).

On September 24, 2017, Defendants filed their motions to dismiss arguing, as they do here, that Plaintiffs' claims are derivative because they do not challenge the merger with Verizon. (A705-709.)

B. Completion of the Merger Triggers Payment of the FCC Fine and Quantifies the Indemnification Claim

On February 28, 2018, the Verizon merger closed. (Op. at 20.) That day, the FCC announced that Verizon and Straight Path paid more than $614 million in penalties to satisfy the Consent Decree. (A1042.) The FCC described the payment as the result of Straight Path's May 11, 2017 agreement to sell itself to Verizon. (A1024.)

C. The Court of Chancery's Denial of Defendants' Motions to Dismiss

On June 25, 2018, the Court of Chancery denied Defendants' motion to dismiss Plaintiffs' direct claims and dismissing as moot Plaintiffs' provisional claim for a declaratory judgment and constructive trust. (Op. at 54.)

Acknowledging the "unique factual scenario" present here, the court credited Plaintiffs' well-pleaded facts[10] to correctly determine that Plaintiffs' claims are direct. (Op. at 2.) In so doing, the court recognized that: (i) "any sale of Straight Path that did not preserve the indemnification claim could have the effect

[10] The Court of Chancery correctly noted that "the facts, drawn from the Complaint and other material [the court] may consider on a motion to dismiss, are presumed true for purposes of evaluating the Defendants' Motions to Dismiss." (Op. at 3, n.1.)

of depriving stockholders of *one-fifth* of the merger consideration" (Op. at 31); (ii) "[t]he trust . . . would exist for the benefit of the Straight Path stockholders, and not Straight Path itself" (*id.* at 32); (iii) the trust ensured that "upon sale of the company . . . stockholders would receive two forms of consideration–a beneficial interest in the trust and a proportionate share of consideration paid by the buyer" (*id.*); (iv) "Howard used his leverage as Straight Path's controlling stockholder to force the company to settle IDT's debt at an amount manifestly below fair value" (*id.*) (v) the Special Committee "could capitulate to Howard's demands and deprive stockholders of the value represented by the indemnification claim, or it could stick to its plan and risk blowing up . . . a large premium for the stockholders" (*id.* at 33); and (vi) "Howard extracted significant, non-ratable benefits from this settlement: forgiveness of IDT's enormous debt, and the assurance that IDT would not face bankruptcy as a result of its obligations to Straight Path" (*id.* at 34).

Accordingly, the trial court found that:

- "[Plaintiffs'] Complaint here alleges that, when [Howard Jonas] caught wind of the proposed litigation trust, he used his control to purchase the indemnification asset instead, for ***a price manifestly unfair***" (Op. at 1-2); and

- "The indemnification right did not fully ripen until the sale, and the leverage used by [Howard Jonas] included a threat to nix the transaction unless corporate assets were first transferred to his affiliates for ***a manifestly unfair price***, but for which the

> consideration received by the stockholders upon sale would have included both the price paid by the purchaser and the beneficial ownership of the litigation trust" (*id.* at 2).

Notably, the trial court specifically rejected Defendants' argument (made again here) that the sale of the IP Assets and Indemnification Claim "could have easily occurred in a non-merger context" and "the Term Sheet transaction was not contingent on the acceptance of any merger offer" (OB at 31):

> Howard suggests that the settlement agreement—in which Straight Path gave up assets for less than they were worth—*could have* occurred in a non-merger context. To the extent that is correct, it does not make the Plaintiffs' claims, under the facts pled, derivative. Howard Jonas explicitly conditioned his support for a sale of the company on the elimination of the indemnification claim. Indeed, he threatened to blow up any sale unless the Special Committee dropped its plan to preserve the claim. Howard thus manipulated the sales process to secure significant benefits for IDT and himself at the expense of Straight Path's other stockholders.

(Op. at 35-36.) On this basis, the trial court correctly determined that "the side benefits Howard Jonas extracted from the sales process were directly related to the Verizon merger." (*Id.*)

Defendants thereafter requested that the Court of Chancery certify its Order for interlocutory appeal. (A1043.) Perhaps reflecting a desire to avoid wasting time on what would be a lengthy trial and potentially significant post-trial judgment against a flagrantly overreaching controlling stockholder, the Court of Chancery certified the Order for appeal, which this Court accepted for review. (A1052.)

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THAT PLAINTIFFS' CLAIMS ARE DIRECT UNDER *TOOLEY* AND *PARNES*

A. Question Presented

Whether the trial court correctly held that Plaintiffs stated a direct claim for breach of fiduciary duty where the Complaint alleged that the Company's controlling stockholder actively intervened in the Board's sale process and conditioned his support for any sale of the Company on the Board disposing of valuable corporate claims against the controller's other controlled company and selling him other assets at below fair value, thus providing unique benefits to the controller and his family at the expense of minority stockholders.

B. Scope of Review

The parties agree the question of whether Plaintiffs allege a direct or derivative claim is a matter of law reviewed *de novo*. (OB at 24; *see also Gatz v. Ponsoldt*, 925 A.2d 1265, 1274-75 (Del. 2007).)

C. Merits of the Argument

1. Plaintiffs' Claims are Direct Under a Straightforward *Tooley* Analysis Because They Allege Direct Harm to Stockholders

Under *Tooley*, a claim is direct if stockholders, rather than the company, "suffered the alleged harm" and would "receive the benefit of the recovery. . . ." 845 A.2d at 1035. Here, in effecting a sale of Straight Path, the Special Committee

determined to maximize stockholder value by pursuing a three-part breakup of the corporation, consisting of: (i) placing the Indemnification Claim in a litigation trust where beneficial ownership would be issued to the Company's stockholders as a CVR; (ii) selling the Spectrum Assets to the highest bidder for those types of assets; and (iii) selling the IP Assets to the highest bidder for those types of assets. Howard Jonas, however, refused to permit any sale of the Company unless the Board sold him the IP Assets and released the Indemnification Claim for a pittance.

In *In re Gaylord Container Corp. Shareholders Litigation*, 747 A.2d 71, 80 (Del. Ch. 1999), then-Vice Chancellor Strine explained that a "derivative characterization" is misplaced where, as here, "the injury suffered results . . . not from actions . . . directly impairing the value of the enterprise itself to the indirect detriment of all stockholders," but rather from "action impeding the stockholders from" receiving consideration.

Defendants' assertion that Plaintiffs' claims involve conduct that occurred "prior to the Merger" and that it was "Straight Path that was harmed" by receiving "too low a price," (OB at 25), ignores the well-pleaded facts demonstrating that the Board—in the context of a company sale process—determined that to maximize Straight Path's value, the Indemnification Claim would be placed in a litigation trust for all stockholders' direct and personal benefit and the IP Assets sold

independently of the merger transaction, with the remaining assets being sold to Verizon through a merger. (*See* Op. at 25 ("*Tooley* requires this Court to look beyond the labels used to describe the claim, evaluating instead the nature of the wrong alleged.") (citation omitted).)

Because the Special Committee decided to preserve the value of the Indemnification Claim and IP Assets for the direct benefit of stockholders, there exists no credible argument that the Company, rather than minority Straight Path stockholders, "suffered the alleged harm" and should "receive the benefit of the recovery . . . ." *Tooley*, 845 A.2d at 1035.

2. The Trial Court Correctly Held That Plaintiffs' Claims are Direct Under *Parnes* Because Plaintiffs Alleged Self-Dealing in Connection with a Corporate Sale Process

Parnes and its progeny also compel the conclusion that Plaintiffs' claims are direct. As those decisions make clear, "unfair acts of self-dealing ***throughout the course of*** a merger transaction" are subject to "***direct[] challenge***" by stockholders where the self-dealing "wrongfully take[s] consideration off the table that otherwise would have been shared by stockholders on a pro rata basis." *Houseman v. Sagerman*, 2014 WL 1600724, at *12 (Del. Ch. Apr. 16, 2014) (citing *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348 (Del. 1988); *Parnes*, 722 A.2d 1243; and *Golaine v. Edwards*, 1999 WL 1271882 (Del. Ch. Dec. 21, 1999)).

Contrary to Defendants' claim that "the Chancery Court misapprehended the seminal precedent and misapplied *Parnes* to this case," (OB at 26), the court faithfully applied those decisions and correctly found that Plaintiffs' claims are direct. Indeed, the facts of this case present a more compelling application of the *Parnes* principle than the facts of *Parnes* itself. There, Bally Entertainment Corporation ("Bally") chairman and CEO, Arthur M. Goldberg, "informed all potential acquirors that his consent would be required for any business combination with Bally and that, to obtain his consent, the acquiror would be required to pay [him] substantial sums of money and transfer to him valuable Bally assets." *Parnes*, 722 A.2d at 1245. Hilton Hotels acceded to his demands, agreeing to make a cash payment to Goldberg and divert to him other Bally assets in connection with the sale. *Id.* at 1246. As this Court held, by alleging that Goldberg conditioned his support for the sale of Bally on the receipt of benefits he "had no legal authority to demand," and by alleging that stockholders "might have" received more in connection with a sale but for Goldberg's conduct, the plaintiff had "***directly challenge[d]*** the fairness of the process and the price in the Bally/Hilton merger . . . ." *Id*. 1245-46.

Here, as in *Parnes*, Howard Jonas "tainted the entire [sale] process" by "demanding a bribe." *Id*. at 1247. The key difference here is that Howard Jonas demanded the Special Committee pay the bribe (in the form of debt forgiveness

and the transfer of IP Assets) as the price of soliciting third party bids, whereas in *Parnes*, Goldberg demanded the bribe from the acquiror. In each case, a fiduciary acted disloyally by conditioning his support for an otherwise attractive sale of the company on the receipt of improper personal benefits. Here, however, Howard Jonas truly held the entire sales process hostage by focusing his threat on the Special Committee itself, which had to accede to his demands in order to deliver a premium to the public stockholders.[11]

As the Chancery Court found here, "[t]his is not a situation in which, before merger talks began, a company's fiduciaries made poor business decisions that ultimately led to a reduction in the merger consideration paid to the stockholders." (Op. at 36 (citation omitted).) Rather, "Howard Jonas explicitly conditioned his support for a sale of the company on the elimination of the indemnification claim," and "threatened to blow up any sale unless the Special Committee dropped its plan to preserve the claim." (Op. at 36.)

Contrary to the Defendants' misleading assertions that Plaintiffs do not challenge the fairness of the merger consideration, as set forth above in the Nature of the Proceedings, the Complaint is replete with allegations that stockholders

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[11] Notably, unlike Jonas, Goldberg was not a controlling stockholder, so potential bidders had the theoretical ability to go around him by presenting an offer directly to the Bally board. *Parnes*, 722 A.2d at 1245-56. Howard nullified the Special Committee's ability to act through his extortive demands.

received an unfair amount of merger consideration. (A622, 641, 653, 655, 663-664.) Although Plaintiffs admittedly do not allege Verizon paid an unfair amount, Plaintiffs do allege that the total amount they received is unfair because of Defendants' disloyal actions.[12]

Howard Jonas's conduct plainly caused minority stockholders to receive an "unfair price" for their equity in the Company. *Parnes*, 722 A.2d at 1245. Plaintiffs alleged that minority stockholders ***would have*** received at least 20%— or in excess of $600 million—more following the sale of the Company had Howard Jonas not disloyally intervened in the Special Committee process and blocked the formation (and distribution of proceeds directly to stockholders) of the litigation trust. In that regard, Plaintiffs' unfair price allegations are even stronger than the allegations in *Parnes*, where the plaintiff merely alleged that "[o]ther interested acquirors . . . '***might have*** paid a higher price for Bally ..., but were discouraged from bidding because they were unwilling to participate in illegal transactions." 722 A.2d at 1245.

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[12] Defendants also misconstrue this distinction by arguing that Plaintiffs were "in favor of the merger itself" and thus should not be able to receive the merger consideration from Verizon at a premium to Straight Path's stock price and then recover damages. (OB at 28.) Putting aside the routine nature of post-closing damages actions, the mere fact that a large premium was paid does not exculpate Defendants' disloyal conduct. *See, e.g., In re Delphi Fin. Grp. S'holder Litig.*, 2012 WL 729232, at *6, 7, 13 (Del. Ch. Mar. 6, 2012) (holding that payment of a 100% premium does not excuse controller's abuse of control by extracting non-ratable benefits at the expense of minority stockholders).

Defendants nevertheless make the incredible claim that "Jonas's alleged conduct did not divert any 'consideration' from Plaintiffs," because it did not "result[] in ***Verizon*** promising to pay, or paying, less money for Straight Path than Verizon otherwise would have paid." (OB at 33.) According to Defendants, to state a direct claim under *Parnes*, plaintiff must allege that fiduciary misconduct reduced the "*the consideration paid by the acquiror in the merger*." (OB at 34 (emphasis in original).) This is plainly wrong.

"[T]he real question underlying the teaching of *Parnes* [is] whether the complaint states a claim that the side transactions caused legally compensable harm to the target's stockholders by improperly diverting ***consideration*** from them to their fiduciaries[.]" *Golaine*, 1999 WL 1271882, at *7. "Consideration" in the sale context does not mean only the cash or stock paid or not paid by the ultimate acquiror.[13]

It is irrelevant whether Verizon—or any other buyer of the Spectrum Assets—was willing to pay for the Indemnification Claim and IP Assets.[14] What matters is that the Special Committee determined that to "[get] the best price for

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[13] *Cf. La. Mun. Police Emps.' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1191-92 (Del. Ch. 2007) (rejecting argument that special cash dividend paid by seller did not constitute "merger consideration," and characterizing dividend as merger consideration "dressed up in a none-too-convincing disguise").

[14] To be clear, the Special Committee determined that bidders would not pay fair value for the assets, and therefore instructed bidders to exclude those assets from their offers.

the stockholders at a sale of the company," the Indemnification Claim should be placed in trust for the direct benefit of minority stockholders post-closing and the IP Assets should be sold independently of the merger transaction. *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 182 (Del. 1986). By issuing threats and conditioning his support for a sale of the Company on the disposition of the Indemnification Claim and IP Assets for his personal benefit, Howard Jonas "directly harmed Straight Path's other stockholders, who ended up receiving hundreds of millions of dollars less in merger consideration than they would have but for Howard's disloyalty." (Op. at 34-35.)

Reliance on *Kramer v. Western Pacific Industries, Inc.*, 546 A.2d 348, is misplaced. Defendants distort the facts and holding of *Kramer* (as they did below), and incorrectly assert that "the Chancery Court did not distinguish . . . *Kramer*" from the facts alleged in this case. (*Compare* OB at 30 *with* Op. at 36 n.192 ("This case is therefore distinguishable from *Kramer*, in which the Supreme Court noted that the plaintiff's claims were 'largely unrelated' to the merger.") (citation omitted).) *Kramer* simply holds that asserting a derivative claim "in the context of a merger does not change its fundamental nature." *Parnes*, 722 A.2d at 1245 (citing *Kramer*, 546 A.2d at 354). In *Kramer*, the plaintiff transparently sought to bootstrap executive compensation claims—including one claim challenging an option grant that occurred approximately one year before a sale of the company

was even contemplated—to a merger challenge in order to salvage his standing. *Id.* at 349.

Here, Howard Jonas conditioning his support for the merger on his receipt of non-ratable, personal benefits is the very reason for the suit and is inherently a direct claim. The Court should thus reject Defendants' assertion that the release of the Indemnification Claim and sale of the IP Assets were not "intertwined" with the merger. (OB at 31.)

Nor does this Court's decision in *El Paso Pipeline GP Co., LLC v. Brinckerhoff*, 152 A.3d 1248 (Del. 2016) change the analysis. (OB at 25-26, 30.) There, the plaintiff challenged two dropdown transactions, in which the "harm alleged . . . solely affected the" company." *El Paso*, 152 A.3d at 1260. Post-trial, the company was sold. To preserve the judgment, the plaintiff sought to re-characterize the claims as direct, even though they were "always treated by him as derivative before the merger . . . ." *Id.* at 1251. This Court rejected that plaintiff's position, holding that the "derivative plaintiff's claims were and remain[ed] derivative in nature." *Id.* Here, Plaintiffs have always alleged that Howard Jonas harmed Straight Path stockholders individually by conditioning his support for a sale of the Company on the receipt of unique, personal benefits. In other words, Plaintiffs in this case "challenge[d] the merger itself as a breach of the duties they are owed." *Id.* (citing *Parnes*, 722 A.2d at 1245).

Defendants also seek to sow confusion by asserting that "the Term Sheet transaction was not contingent on the acceptance of any merger offer." (OB at 31.) This point is irrelevant, as it reverses cause and effect. The Special Committee's "acceptance of any merger offer" ***was contingent*** on acceptance of the unfair Term Sheet. That is, unless the Special Committee agreed to release the Indemnification Claim and sell the IP Assets to Howard Jonas for grossly inadequate consideration, he was going to block a sale of the rest of the company regardless of how much consideration a third party offered.

Similarly irrelevant is Defendants' assertion that "the Term Sheet was negotiated, agreed to, and signed before the Verizon merger offer was even made, before any merger offer was accepted, and before the Merger Agreement was signed." (OB at 31-32.) Howard Jonas demanded a Term Sheet during an active bidding war, and before he would agree to a sale to anybody. That exercise of power for his benefit thereafter tainted the balance of the sale process. Indeed, the Term Sheet was signed the same day as the first merger agreement with AT&T. The fact that Straight Path later received a better offer from Verizon does not magically separate Howard Jonas's disloyal act of conditioning his ultimate approval of the merger on the Term Sheet.

3. Defendants' Public Policy Arguments Are Misplaced

A controlling stockholder breaches his duty of loyalty when he uses his power to extract benefits "to the exclusion of the Company's other stockholders, thereby receiving a non-ratable benefit." *Fredrick Hsu Living Tr. v. ODN Hldg. Corp.,* 2017 WL 1437308, at *40 (Del. Ch. Apr. 14, 2017) (citing *Sinclair Oil Corp. v. Levien,* 280 A.2d 717, 720 (Del. 1971)) (additional citation omitted).[15] This rule of law should hardly instigate controversy.

Defendants nevertheless present a "chicken-little" policy argument, suggesting that holding Howard Jonas liable for his threats and extortion somehow opens the floodgates to all sorts of hypothetical litigation claims. Plaintiffs do not dispute that Howard Jonas had a right to say "no." But that is simply not what happened here. Howard Jonas extorted a side-benefit at the expense of Straight Path's stockholders. Contrary to Defendants' parade of horribles, accepting their

[15] *See also, e.g., In re John Q. Hammons Hotels Inc. S'holder Litig.,* 2009 WL 3165613, at *12 (Del. Ch. Oct. 2, 2009) (because a stockholder with a controlling interest "could effectively veto any transaction," the court should subject a transaction to entire fairness review where the controlling stockholder and the minority stockholders are "competing" for the consideration of the acquiror); *Frank v. Elgamal,* 2014 WL 957550, at *30 (Del. Ch. Mar. 10, 2014) (finding an "issue of material fact as to whether the [controlling group] was 'competing' with the minority stockholders for consideration from [the acquiror]" "requir[ing] a comparative valuation of the consideration to be received by the two sets of stockholders"); *N.J. Carpenters Pension Fund v. Infogroup, Inc.,* 2011 WL 4825888, at *11 (Del. Ch. Sept. 30, 2011) (applying entire fairness review where fiduciary received unique benefit after threatening board into "capitulat[ing] to his demands to sell the Company").

position, not Plaintiffs', would effectively overturn nearly a century of Delaware law holding that a controlling stockholder does not have the right, as Howard Jonas has done here, to say "no, ***unless*** you pay me disparate consideration."[16]

In fact, even the cases relied upon by Defendants recognize that a controlling stockholder's voting rights are limited by the "fiduciary duty owed to other stockholders," *Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 845 (Del. 1987), and that the controller breaches his fiduciary duty where he causes the diversion of transaction "proceeds that should have been shared ratably with all stockholders . . . ." *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1033 (Del. Ch. 2012).[17]

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[16] *See Tanzer v. Int'l Gen. Indus., Inc.,* 379 A.2d 1121, 1124 (Del. 1977) ("[F]or more than fifty years our Courts have held, consistent with the general law on the subject, that a stockholder in a Delaware corporation has a right to vote his shares in his own interest, including the expectation of personal profit, ***limited, of course, by any duty he owes to other stockholders.***"); *Heil v. Standard Gas & Elec. Co.,* 151 A. 303, 304 (Del. Ch. 1930) ("[S]tockholders have the right to exercise wide liberality of judgment in the matter of voting and may admit personal profit or even whims and caprice into the motives which determine their choice, ***so long as no advantage is obtained at the expense of their fellow stockholders.***"); *Allied Chem. & Dye Corp. v. Steel & Tube Co. of Am.,* 120 A. 486, 491 (Del. Ch. 1923) ("[I]f the majority stockholders so use their power to advantage themselves at the expense of the minority, their conduct in that regard will be denounced as fraudulent and the minority may obtain appropriate relief therefrom upon application to a court of equity.");

[17] *See also Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Ringling*, 53 A.2d 441, 447 (Del. 1947) ("Generally speaking, a shareholder may exercise wide liberality of judgment in the matter of voting, and it is not objectionable that his motives may be for personal profit, or determined by whims or caprice, ***so long as he violates no duty owed his fellow shareholders***."); *Thorpe v. CERBCO, Inc.*, 1993 WL 443406, at *7 (Del. Ch. Oct. 29, 1993) ("Controlling shareholders . . .

Likewise, Defendants' argument that "Plaintiffs' attempt to effectively impose through post-merger litigation a transaction structure to which they had no right, and which they otherwise could not have realized," (OB at 38), simply assumes the permissibility of Howard Jonas's actions. The Special Committee (*i.e.*, the independent fiduciaries of Straight Path) concluded that the best way to maximize value for Straight Path stockholders was to create a litigation trust, the benefit of which stockholders would have realized ***but for*** Howard Jonas's disloyal conduct. "A stereotypical approach to the sale and acquisition of corporate control is not to be expected,"[18] because directors face "a unique combination of circumstances, many of which will be outside their control."[19] Plaintiffs here are merely seeking to recover what the Special Committee determined rightfully belonged to stockholders, until Howard Jonas acted disloyally.

Nor will a decision in favor of Plaintiffs create uncertainty as to what constitutes a derivative or direct claim. (OB at 39-40.) In fact, the unique fact pattern of this case is precisely why a ruling for investors will hardly open any floodgates. It is not every day that a special committee attempts to create a litigation trust and distribute, in addition to merger consideration, contingent value

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not allowed to use their control over corporate property or processes to exploit the minority. . . .").

[18] *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989)

[19] *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 242 (Del. 2009).

rights in that trust to the stockholders. Ruling in favor of Plaintiffs would, at most, represent a modest, fact-oriented, and simple application of Delaware precedent—a far cry from Defendants' *argumentum in terrorem*.

In truth, adopting Defendants' view of the world will create a massive loophole permitting controlling stockholders to condition their support of a transaction on receiving non-ratable benefits. For example, as the Court of Chancery correctly noted at the hearing, under Defendants' reading of Delaware law, a controller/CEO could condition their support for a sale transaction on the receipt of a special dividend declared by the board shortly before signing as long as that payment did not affect the amount the buyer was willing to pay, even though the same funds would have been distributed to all stockholders in connection with the merger. (A953.) Plaintiffs are not aware of any case where a Delaware court has upheld or blessed a controllers' extraction of a personal benefit in exchange for their support of a merger. Nor would rewarding wrongdoing controllers make good law or support the public policy of the State of Delaware.

Defendants' assertion that a decision here could lead the FCC to unwind or harm the Verizon transaction (OB at 40), is utterly baseless. Defendants ignore the fact that Verizon has taken no steps to intervene. And rightly so. Verizon neither bid on nor succeeded to the Indemnification Claim. More importantly, Plaintiffs' are not seeking equitable relief to unwind the Term Sheet, but rather assert a claim

for breach of fiduciary duty against Howard Jonas, Davidi Jonas, and IDT for which damages are recoverable. If this action poses a danger to anyone, it is to the Defendants who acted disloyally. This Court should not hesitate to hold these wrongdoers accountable.

Equally absurd is Defendants' argument that it would be unfair for Plaintiffs to recover damages here because they already received the benefit of the merger consideration. (OB at 40-41.) In making this argument, Defendants take the Court of Chancery's statement that Plaintiffs were "in favor of the merger itself" completely out of context. (OB at 28 (citing A987).) The Vice Chancellor's opinion referred to the simple fact that Plaintiffs did not seek to enjoin the sale of Straight Path, ***not*** that Plaintiffs believed—contrary to the allegations detailed above—that Straight Path was sold for a "beyond fair" price.

Further, Plaintiffs challenged the transaction prior to closing, and at no time did Plaintiffs acquiesce or accept Howard Jonas's disloyal conduct. At a minimum, where a stockholder challenges a transaction prior to closing, receipt of consideration is not a bar to recovery of what is rightfully owed to the stockholder in the absence of breaches of fiduciary duty. *See In re Best Lock Corp. S'holder Litig.*, 845 A.2d 1057, 1081 (Del. Ch. 2001) ("[D]efendants could not reasonably think that the plaintiffs approved of the mergers simply because they tendered their shares 'under protest' while maintaining this suit.") (citation omitted). Taking

Defendants' argument at face value, no stockholder who receives any consideration in a merger transaction should ever be allowed to challenge the unfairness of the merger, even if they voiced their challenge to the fairness of the transaction prior to closing. That is not the law.

II. EVEN IF DEFENDANTS' MISCONDUCT IS VIEWED AS HAVING HARMED THE COMPANY RATHER THAN STOCKHOLDERS, PLAINTIFFS' CLAIMS ARE STILL DIRECT UNDER *PRIMEDIA*

A. Question Presented

Alternatively, if Plaintiffs' claims are held to be derivative under *Tooley* and *Parnes*, does Plaintiff maintain standing to pursue its claims under the reasoning set forth in *In re Primedia, Inc. Shareholders Litigation*, 67 A.3d 455, 477 (Del. Ch. 2013). Preserved at A663-65, A788-90.

B. Scope of Review

This Court has authority to affirm the trial court's denial of Defendants' motion to dismiss on any alternative ground. *West v. State*, 143 A.3d 712, 715 n.12 (Del. 2016) ("Although the Court of Common Pleas did not decide the motion to suppress on this basis, the Superior Court and this Court can affirm on an alternative argument raised in the court below."); *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 67 (Del. 1995) (holding no cross-appeal required or appropriate for the Supreme Court to affirm the Court of Chancery's ruling on an alternative ground, fairly raised below).

Whether Plaintiff stated a claim under *Primedia*, is a question of law reviewed *de novo* by the Delaware Supreme Court. *Gatz*, 925 A.2d at 1274-75.

C. Merits of the Argument

Even if the Court were to agree with Defendants and find that Plaintiffs' claims are somehow derivative in the first instance, Plaintiffs have standing to

pursue them directly after the closing of the merger, under the principles explained in *Primedia*. Contrary to Defendants' assertions (OB at 41), Plaintiffs expressly pled a *Primedia* claim in the alternative and briefed this very issue below. (A612-A615, A788-A790.) Defendants admission that a *Primedia* claim would survive post-closing (OB at 41) means that, in the event this Court does not find the claims stated to be direct, it should affirm the Chancery Court's decision on this separate ground.

In *Primedia*, the Court of Chancery held that a stockholder can maintain a direct challenge to a merger post-closing for failure to obtain value for an underlying derivative claim where: (1) the plaintiff pleads "an underlying derivative claim that . . . could state a claim on which relief could be granted"; (2) "the value of the derivative claim [is] material in the context of the merger"; and (3) the complaint "support[s] a pleadings-stage inference that the acquiror would not assert the underlying derivative claim and did not provide value for it." *Primedia*, 67 A.3d at 477. Plaintiffs' claims are plainly not derivative, but even if they were, Plaintiffs easily satisfy all three elements.

First, Plaintiffs' claims are subject to entire fairness review, and when that standard is "invoked at the pleading stage, the plaintiffs will be able to survive a motion to dismiss . . . ." *In re Cornerstone Therapeutics Inc., S'holder Litig.*, 115 A.3d 1173, 1180 (Del. 2015).

Second, Plaintiffs' claims are plainly material in relation to the merger and the consideration paid. In *In re Riverstone National Inc., Stockholder Litigation*, the Court of Chancery found material a claim comprising only 5% of a merger's value. 2016 WL 4045411, at *15 (Del. Ch. July 28, 2016). Here, claims challenging the release of the Indemnification Claim are, alone, worth over 20% of the merger's value.

Third, Verizon plainly did not provide value for, and will not pursue, Plaintiffs' claims. *Primedia*, 67 A.3d at 477. Verizon—and all other potential bidders for Straight Path—were told they could not buy the IP Assets and Indemnification Claim even if they wanted to, so they necessarily determined the price they were willing to pay for Straight Path, excluding the Indemnification Claim and the IP Assets. (A646.)

Indeed, Verizon is blocked from pursuing Plaintiffs' claims post-closing under the principles set forth by the United States Supreme Court in *Bangor Punta Operations, Inc. v. Bangor & Aroostook Railroad Co.*, 417 U.S. 703 (1974), and later embraced by the Court of Chancery in *Courtland Manor, Inc. v. Leeds*, 347 A.2d 144 (Del. Ch. 1975). Under those cases, Verizon could not prosecute Plaintiffs' underlying claims, because that would allow Verizon to "recoup a large part of the price [it] agreed to pay . . . notwithstanding the fact that [it] received all

[it] had bargained for." *Bangor Punta*, 417 U.S. at 711; *Courtland Manor*, 347 A.2d at 147.

Accordingly, were the Court to view Plaintiffs' claims as derivative in the first instance, they more than satisfy *Primedia*'s three-part test.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that the Court should affirm the Order of the Court of Chancery or, in the alternative, deny Defendants' motion to dismiss under *Primedia*.

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CERTIFICATE OF SERVICE

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