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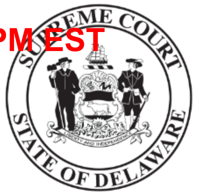

IN THE SUPREME COURT OF THE STATE OF DELAWARE

COX COMMUNICATIONS, INC.,

Plaintiff and Counterclaim Defendant-Below/Appellant,

v.

T-MOBILE US, INC.,

Defendant and Counterclaim Plaintiff-Below/Appellee.

PUBLIC VERSION
EFILED: December 7, 2021

No. 340, 2021

Court below: Court of Chancery of the State of Delaware

C.A. No. 2021-0010-MTZ

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NATURE OF PROCEEDINGS

This appeal turns on a single sentence of a 289-page litigation settlement agreement between Appellant Cox Communications, Inc. ("Cox") and Sprint Corporation ("Sprint"), which later merged with Appellee T-Mobile US, Inc. ("T-Mobile"). In that sentence, Cox agreed that before it offered mobile wireless services to its customers, it would enter into a provider agreement with Sprint "on terms to be mutually agreed." Under established Delaware law, an agreement to agree in the future imposes no obligation on the parties beyond—at most—a duty to negotiate in good faith. The Court of Chancery acknowledged as much, but still interpreted the sentence to bar Cox from ***ever*** entering a critical market unless it does so with T-Mobile, on whatever terms T-Mobile may demand. Cox appeals to this Court to reverse that erroneous interpretation and free Cox from the sweeping injunction that issued as a result.

* * *

After receiving a $100 million demand from Sprint in late 2017, Cox, a broadband communications and entertainment company, and Sprint, a mobile network operator ("MNO") and wireless service provider, settled sprawling intellectual property litigation in a complex settlement agreement. The agreement reflected an intricate series of business arrangements by which Cox would provide

services to Sprint to improve Sprint's network—consideration valued at approximately $195 million.

At the time of the agreement, Cox neither offered nor planned to offer wireless mobile services. But because MNOs like Sprint offer wireless services not only to retail customers but to other telecommunications companies like Cox for resale under their own brand—referred to as "Mobile Virtual Network Operators" or "MVNOs"—the parties also included in the agreement a provision to account for the possibility that Cox would later enter the space and need to partner with an MNO. That provision, Section 9(e) of the agreement, provides in part that:

> Before Cox … begins providing Wireless Mobile Service … [Cox] will enter into a definitive MVNO agreement with a Sprint Affiliate … ***on terms to be mutually agreed upon between the parties*** for an initial period of 36 months …."

A1221 (emphasis added).

Fast-forwarding two-plus years, favorable economic developments in the wireless market made entry potentially attractive to Cox. After conducting due diligence through a request for proposal ("RFP") process, Cox negotiated extensively with T-Mobile (which had by then merged with Sprint) over the course of several months on the terms of a prospective MVNO agreement. It continued to do so even though T-Mobile repeatedly ignored negotiating deadlines and refused to improve pricing terms that Cox's advisors concluded were "incompatible with

Cox's MVNO business case." Ex. B, Transcript Ruling ("Tr.") 71:19-20. Cox also negotiated with Verizon, who timely responded to the RFP and offered a superior proposal that would save Cox more than $90 million relative to T-Mobile's offer. In early October 2020, Cox informed T-Mobile it had opted to partner with Verizon.

In response, T-Mobile sent a letter asserting that Cox's selection of Verizon constituted a breach of 9(e), but otherwise took no legal action. Cox ultimately filed the action below on January 6, 2021 seeking a declaratory judgment that the Verizon MVNO agreement did not violate the settlement agreement. Only then, after Cox had negotiated a definitive agreement with Verizon and made substantial investments in the venture, did T-Mobile file counterclaims asserting breach of contract and seeking injunctive relief.

After an expedited five-day trial from August 16-20, 2021, the Court of Chancery found for T-Mobile. Departing from both parties' interpretations of 9(e), the court construed the first sentence to "unambiguously" contain two separate and independent "promises": the first a restrictive covenant ***perpetually*** barring Cox from providing wireless mobile services—anywhere, ever—with any partner but T-Mobile; and the second an agreement to subsequently negotiate certain terms of an eventual MVNO agreement in good faith.

In other words, the court ***agreed with Cox*** that the substantive portion of the sentence required only that Cox negotiate with T-Mobile in good faith, but split the sentence into pieces and found a freestanding "prohibitory promise" nested in the first half. Under its interpretation, Cox is not required to enter an MVNO agreement with T-Mobile, but it "cannot provide Wireless Mobile Service" unless it does.

To reach that conclusion, the court had to interpret the phrase "will enter into a definitive MVNO agreement with [Sprint] … on terms to be mutually agreed upon between the parties" in two different and contradictory ways. For purposes of Cox's supposed first obligation—to "enter into a definitive MVNO agreement with Sprint" before it "begins providing Wireless Mobile Service"—the court interpreted it to mean that Cox must ***actually enter into*** such an agreement before entering the wireless market. But for purposes of the rest of the sentence the court interpreted the phrase to require only good-faith negotiations that the parties may "abandon" without a deal. Tr. 50:18-51:10.

This interpretation is wrong as a matter of Delaware law, which requires that contractual language be construed as a whole, in the context of the provision in which it appears. An internally inconsistent interpretation that vitiates the contract's plain language is presumptively erroneous. Here, the interpretation seems to have been driven not by the text, but by the court's view that affording the language its

natural meaning would make the provision "nearly worthless" to T-Mobile. Tr. 52:16. That is both mistaken and irrelevant. The court's sense of what Sprint ***should*** have received in settlement consideration is not a proper basis for rewriting the plain language signifying what it ***did*** receive.

The court's elevation of its own view of the equities over the plain text of 9(e) and the evidence ultimately drove the outcome below, resulting not only in the twisting of 9(e) but a raft of other errors. In particular, the court found that T-Mobile had proved its standing to enforce Sprint's rights under the settlement agreement, despite (i) an anti-assignment provision to the contrary and (ii) expressly acknowledging that T-Mobile had presented ***no evidence*** to carry that burden. And its entry of a sweeping and perpetual injunction was predicated on an analysis that systematically overstated T-Mobile's thin claims of irreparable harm; ignored extensive and undisputed evidence of countervailing harms to Cox; and attributed to Cox knowledge about the meaning of 9(e) that finds no support in the record.

For the reasons articulated herein, the Court of Chancery's decision was in error. Cox respectfully requests that this Court reverse.

SUMMARY OF ARGUMENT

The court improperly entered judgment for T-Mobile on the parties' contract claims and abused its discretion in awarding T-Mobile injunctive relief.

1. Read as a whole, 9(e) of the settlement agreement is an agreement to negotiate terms for a future MVNO agreement in good faith before providing wireless mobile service. Although the court recognized the provision as such—and acknowledged that 9(e) did not require Cox to actually enter an agreement with Sprint—it inexplicably excised the first half of the provision to impose a freestanding restriction prohibiting Cox from ***ever*** entering the market with a Sprint rival. This contortion of 9(e)'s first sentence into two independent "promises" renders the provision internally inconsistent, leads to absurd results, superimposes a restrictive covenant where none exists, and conflicts with the only contemporaneous evidence of the parties' understanding of the provision's effect.

2. The court erred by concluding that T-Mobile could enforce the settlement agreement as Sprint's successor-in-interest despite an anti-assignment provision in Section 19 precluding assignment via merger for at least three reasons. ***First***, the court misinterpreted and ascribed undue weight to the inurement clause in Section 18 of the agreement, allowing it to trump the anti-assignment clause rather than reconciling the two provisions. Read correctly, the inurement clause extends

only to successors who ***validly*** succeed to contract rights under the anti-assignment clause, which T-Mobile did not. ***Second***, the court's basis for subverting Section 19—that the T-Mobile/Sprint merger was a reverse triangular merger—was (i) unsupported by trial evidence and waived, having been raised only in post-trial oral argument, and (ii) beside the point, since T-Mobile, and not Sprint, is seeking to enforce the rights. ***Third***, to the extent Sections 18 and 19 are in tension, the court erred in resolving the ambiguity by (a) improperly considering post-formation extrinsic evidence and (b) ignoring the parties' presumptive intent.

3. The court's entry of an unbridled, perpetual injunction against Cox's entry into the mobile wireless market was an abuse of its discretion. Its rejection of Cox's laches defense was rooted in an erroneous determination that T-Mobile's breach claims accrued in late January 2021—***four months*** after T-Mobile accused Cox of breach and threatened legal action, during which Cox invested heavily in its Verizon venture. Because a four-month delay in filing suit in these circumstances is patently unreasonable, T-Mobile's claim is barred by laches.

The court also erred in balancing the equities by attributing injury to T-Mobile that is unrelated to the claimed breach and improperly discounting the harm to Cox from its massive investment in the Verizon relationship. The court found that the equities favored T-Mobile because it believed Cox understood from inception that

9(e) was an absolute bar to entering the market with anyone but T-Mobile, rendering its breach "knowing" and "intentional." But there is ***no evidence at all*** to support that conclusion; all of the contemporaneous evidence suggests the opposite: that Cox believed in 2017 what it believes today—9(e) is an agreement to negotiate in good faith.

STATEMENT OF FACTS

A. The Parties and the MVNO Market

Cox is a broadband communications and entertainment company providing advanced digital video, Internet, telephone, home security, and automation services over its own nationwide IP network.

T-Mobile is a mobile network operator (MNO) that provides wireless voice and data services nationwide. T-Mobile merged with Sprint, another major MNO, in April 2020. Tr. 5:22-23.

Although MNOs like T-Mobile are best known for their retail offerings, they also operate in the wholesale market, offering wireless services to other telecommunications companies for resale under their own brand. Tr. 5:1-6; A322. Those wholesale customers are known as Mobile Virtual Network Operators (MVNOs). Tr. 5:4-5.

As of 2017, while Cox had explored MVNO agreements previously, it did not then have plans to offer branded wireless service. Tr. 12:22-23. Today, Cox is the only major cable company that does not offer wireless mobile service.[1] A321.

[1] Cox does maintain other kinds of wireless operations, including WiFi hotspots and a wireless network used to facilitate off-loading traffic from its cable network. *See* A521 (455:10-20); A637 (781:18-23); A751 (1121:3-6); A1073-74 (50:22-55:24). It is uncontested that these services are outside the scope of the parties' dispute.

B. Cox, Sprint, and the Settlement Agreement

Cox and legacy Sprint had a longstanding business relationship. Since at least 2007, Cox had provided Sprint with services to facilitate connectivity between Sprint's enterprise locations and its network. A302. But in 2011, Sprint sued Cox (and most of the cable industry) alleging patent infringement. Cox subsequently filed its own infringement claims against Sprint.

On December 6, 2017, after five years of litigation, Cox and Sprint entered into a Settlement and License Agreement (the "Settlement Agreement" or the "Agreement"). Tr. 6:17-20; A1209-1497. The negotiations preceding the Agreement began in June 2017 and lasted six months. From the beginning, the discussions focused not on cash consideration but on business opportunities Cox could provide to improve Sprint's network, including "Cell Site Backhaul and Wireline Enterprise Customer Access Solutions," "[h]anging rights for small cells," and "WiFi public venue hot spots." A1126. Sprint's initial demands to Cox said nothing about an MVNO agreement; that demand did not appear in the parties' term sheets until late September, about halfway through the negotiation process. A1138; A303.

Section 9, paragraphs (a) through (e) set forth the business deal components of the Agreement. A1220-22. The bulk of the in-kind consideration from Cox

resides in paragraphs (a) through (d), each of which incorporates a fully executed agreement by reference. A1220-21; A316-17. Shortly before settlement, Sprint valued paragraphs (a) through (d) at $195 million—nearly twice the quantum in Sprint's most recent settlement demand. A1144.

By contrast, neither party ever assigned ***any*** monetary value to the MVNO agreement, which appears in 9(e). A1140; A1144. The first sentence of 9(e), which is the focus of the parties' dispute, addresses the parties' obligations prior to execution of a "definitive MVNO agreement":

> Before Cox … begins providing Wireless Mobile Service … [Cox] will enter into a definitive MVNO agreement with [Sprint] … identifying [Sprint] as a "Preferred Provider" of the Wireless Mobile Service for [Cox], ***on terms to be mutually agreed upon between the parties*** for an initial period of 36 months ….

A1221 (emphasis added). The balance of the provision identifies certain terms of the proposed "definitive MVNO agreement" should the parties agree on one. A1221-22.

C. Cox's Post-Settlement Exploration of Mobile Wireless

After signing the Agreement, Sprint and Cox periodically discussed future MVNO opportunities throughout 2018. In March 2019, Cox issued a request for information ("RFI") from the four major MNOs regarding potential entry into the mobile wireless market. Cox advised Sprint in advance, noting that Cox was "fully

aware of the Settlement and License Agreement … [and], in particular, section 9(e)." A341. Sprint neither objected to Cox's initiation of an RFI process nor asserted that it was inconsistent with 9(e).[2] Neither party at the time characterized 9(e) as a restrictive covenant, but instead as a right of first refusal.[3] In July 2019, after receiving RFI responses from Sprint, T-Mobile, and Verizon, Cox elected not to pursue the mobile wireless business.

Over the next year, however, the economics of mobile wireless changed in ways favorable to Cox, and Sprint submitted a lower price proposal. A1595-98; A343. Accordingly, on April 9, 2020, Cox launched a formal RFP process seeking proposals for an MVNO arrangement. A1600-29. Verizon and T-Mobile—which had completed its merger with Sprint on April 1, 2020—both submitted proposals.

Over the next several months, Cox negotiated extensively with both parties. From the beginning, T-Mobile's proposal was problematic, with Cox personnel

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[2] The court found that Sprint's RFI response "included a reminder of Cox's three-year exclusivity obligations." Tr. 18:21-23 (citing A1591). This finding is clear error: Sprint's RFI response at no point mentions an exclusivity commitment or any aspect of the Settlement Agreement. *See* A1589-94.

[3] A1510 (Sprint presentation describing 9(e) as a "first-right-of-refusal on MVNO opportunity"); A1560 (Sprint email describing a "new understanding" of the "ROFR terms"); A1542 (Cox presentation referring to the "Sprint ROFR"); A1547, A1553 (minutes from Cox meeting referring the "Sprint right of first refusal clause" and accompanying deck mentioning "Sprint ROFR").

describing the pricing component as "outrageous." A1648; *see also* A1650. Cox's consultants at Ernst & Young advised that T-Mobile's initial pricing was "significantly higher than Verizon and will break the business case easily." A1647. When Cox informed T-Mobile in July 2020 that its pricing was not competitive, T-Mobile said it would consider other modifications but was "pretty set on pricing." A1657.

In mid-August, Cox reiterated that T-Mobile's pricing "was not commercially viable" and would "prevent[] Cox from launching [its] wireless business product." A1661. As such, Cox requested that T-Mobile either revise its pricing "or confirm[] that pricing is not going to change" by August 30. *Id.* Now faced with the prospect of losing the Cox account, T-Mobile responded on September 14, 2020 by asserting that 9(e) "require[d] Cox to utilize T-Mobile should Cox choose to provide a wireless service offering" and threatening that "T-Mobile is fully prepared to enforce its rights" under the provision. A1683.

Cox, meanwhile, continued to carefully evaluate proposals, including a final proposal that T-Mobile submitted in September. Cox's analysis showed that the total cost of Verizon's proposal was $90 million less than T-Mobile's ($203 million versus $293 million) and 9% below Cox's business case, while T-Mobile's proposal

was 32% above it. A1666. After extensive internal deliberation, Cox's executive team selected Verizon as its MVNO partner on September 24, 2020. A356.

Cox informed T-Mobile of the decision on October 7, reconfirming that "there is a significant percentage difference between T-Mobile's per-Gigabyte pricing" and rival proposals. A1686. T-Mobile responded on October 14 by asserting that Cox was "in direct breach of Cox's MVNO Preferred Provider Commitment in Section 9(e)" of the Agreement and that "T-Mobile is fully prepared to enforce its rights …, including filing a lawsuit seeking monetary damages and any available equitable relief." A1691-92; *see also* A356.

Cox signed an MVNO agreement with Verizon on January 16, 2021 and planned to launch its new wireless services in three markets on October 15, 2021.

D. This Litigation

On January 6, 2021, Cox filed an action seeking a declaration that 9(e) is an unenforceable agreement to agree or a preliminary agreement to negotiate in good faith. On February 1, after waiting the full 20 days to respond, T-Mobile answered and counterclaimed for breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, and unjust enrichment. T-Mobile sought an injunction or, in the alternative, lost-profit damages.

Trial was held from August 16-20, 2021. On October 8, 2021—one week

before the scheduled launch of Cox's wireless offering with Verizon—the court found for T-Mobile, ruling that 9(e) "unambiguously" contained not one, but "two promises": the first "an enforceable prohibition" that "Cox cannot provide Wireless Mobile Service without entering into an MVNO agreement with Sprint" (Tr. 46:1-17) and the second "an agreement to try to come to a future agreement," such that Cox and T-Mobile's "only obligation" was to "present and discuss terms" of an MVNO agreement in good faith. Tr. 50:18-51:5.

Because the court viewed the opening clause of 9(e)—"Before Cox … begins providing Wireless Mobile Service"—as a freestanding, absolute bar to Cox entering the wireless market with anyone but T-Mobile, it deemed Cox's MVNO agreement with Verizon a breach of 9(e). Tr. 10:5-12, 65:15-22. In addition, the court found that T-Mobile had standing to enforce the Agreement as Sprint's successor-in-interest and entered a permanent injunction forever prohibiting Cox from entering the wireless market with any partner but T-Mobile. Tr. 37:1-12, 78:2-11.

Ten days after the bench ruling, the court entered final judgment. This expedited appeal followed.

ARGUMENT

I. The Trial Court Erred By Artificially Bifurcating A One-Sentence Contractual Commitment Into Two Independent "Promises."

A. Question Presented

Whether the Court of Chancery erred when it interpreted a straightforward contractual framework for future good-faith negotiations into an immediately enforceable, perpetual prohibition against Cox from entering the wireless market if those negotiations ultimately failed.[4]

B. Scope of Review

This Court "interpret[s] contracts *de novo*." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010). Here, the trial court made its fact findings "***not*** to inform the unambiguous contract language," but only to "inform the equities." Tr. 10:9-12 (emphasis added).

C. Merits of Argument

Under Delaware contract law, the plain text, the broader context of the provision and the Agreement as a whole, and (if relevant) the contemporaneous parol evidence all require the conclusion that the Court of Chancery itself effectively reached but stopped short of fully implementing: that 9(e) as a whole is a "Type II" preliminary agreement to negotiate in good faith toward a final MVNO agreement.

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[4] Issue preserved below at A219-32, A1034-36.

If those good faith negotiations fail, Cox is free to enter the market with another partner.

To reach the contrary conclusion, the court split the unified first sentence of 9(e) into two pieces with radically different meanings. But "[a] single clause or paragraph of a contract cannot be read in isolation, but must be read in context." *Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d 1254, 1260 (Del. 2010) (quotations omitted). The court's myopic focus on the first half of the first sentence of 9(e), to the exclusion of the broader context of the provision, violated this and other principles of Delaware contract law and led it to an untenable result.

1. Read as a whole, 9(e) is (at most) a Type II preliminary agreement requiring the parties to negotiate toward an agreement in good faith.

On its face, 9(e) is straightforward. It requires that before Cox can offer wireless mobile services, it must do something—specifically, "enter into a definitive MVNO agreement with [Sprint] … on terms to be mutually agreed." This entire dispute is about what, exactly, that language requires Cox to do.

As a matter of Delaware law, the answer is equally straightforward: an agreement to do something in the future on terms to be "mutually agreed" requires the parties, at most, to negotiate those terms with one another in good faith. "[T]o be enforceable, a contract to enter into a future contract must specify all its material

and essential terms, and leave none to be agreed upon as a result of future negotiations." *Heritage Homes of De La Warr, Inc. v. Alexander*, 2005 WL 2173992, at *3 (Del. Ch. Sept. 1, 2005) (quotations omitted), *aff'd*, 900 A.2d 100 (Del. 2006) (Table). Such an "agreement to try to come to a future agreement" merely gives the parties "an opportunity to negotiate … to come to agreeable terms." *The Liquor Exch., Inc. v. Tsaganos*, 2004 WL5383907, at *3 (Del. Ch. Nov. 16, 2004). Their "only obligation" is "to present and discuss terms … in good faith." *Id*.

This Court has dubbed such an agreement a "Type II preliminary agreement," which "does not commit the parties to their ultimate contractual objective but rather to the obligation to negotiate the open issues in good faith in an attempt to reach the alternate objective within the agreed framework." *SIGA Techs., Inc. v. PharmAthene, Inc*., 67 A.3d 330, 349 (Del. 2013) (quotations omitted).

The court below largely agreed, concluding that 9(e) "is an agreement to try to come to a future agreement," in which "[t]he parties have agreed on certain major terms but are not committed to the ultimate contractual objective and may abandon negotiations." Tr. 50:19-51:2. Citing *Liquor Exchange* and *SIGA Techs*., the court concluded that the parties' only obligation was "to present and discuss terms in good

faith."[5] Tr. 51:3-15. That should have been the end of the analysis. For if (a) Cox's ability to offer wireless services was contingent on "enter[ing] a definitive MVNO agreement with [Sprint] … on terms to be mutually agreed" and (b) (as the court found) the obligation to "enter a definitive MVNO agreement with [Sprint] … on terms to be mutually agreed" (A1221) required only good faith negotiations, then, by the transitive properties, Cox's ability to offer wireless services required only that it first negotiate with T-Mobile in good faith.

2. The court erred by severing 9(e) into two contradictory "promises."

Rather than apply its reasoning to ***all*** of 9(e), the court chose to bifurcate the provision into two distinct "promises," as follows:

(1) Before Cox begins providing wireless mobile services, it will ***enter into*** a definitive MVNO agreement with Sprint; and

(2) Cox and Sprint will ***negotiate the terms of*** a definitive MVNO agreement in good faith but are not obligated to execute one.

See Tr. 46:1-10, 50:19-51:5.

In so doing, the court construed the words "will enter into a definitive MVNO agreement with [Sprint] … on terms to be mutually agreed" in two contradictory

[5] Because T-Mobile has not appealed the court's determination that the so-called "second promise" is a Type II preliminary agreement, and because a successful argument to that effect would expand T-Mobile's rights under the agreement, it cannot challenge that determination here. *Cf. In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 67 (Del. 1995).

ways. For the "first promise," the court ignored the "mutually agreed" language and read it to bar Cox from offering wireless mobile services unless it ***actually*** enters into a definitive agreement with Sprint. Tr. 47:3-6 (interpreting the "first promise" as "an enforceable freestanding promise that if the parties do not come to a definitive MVNO agreement, Cox cannot provide Wireless Mobile Services"). For the "second promise," by contrast, the court read the same language to mean that Cox must "present and discuss terms" of a potential MVNO agreement "in good faith." Tr. 51:3-5.

But the same text cannot mean both things. Once the court (correctly) interpreted the clause to mean "will negotiate terms of an MVNO agreement in good faith," that construction must apply to the entire sentence. Through that lens, the first sentence of 9(e), read ***as a whole***, provides that Cox ***must negotiate in good faith with Sprint on the terms of a definitive MVNO agreement before it can provide wireless mobile service***. The entire provision—not just the "second promise"—is at most a Type II preliminary agreement.[6]

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[6] In fact, long-standing Delaware case law suggests that 9(e), read as a whole, is unenforceable in ***any*** capacity given its lack of any price term. *See Heritage Homes*, 2005 WL 2173992, at *3. A common denominator across Delaware "preliminary agreement" jurisprudence is that no case has enforced a preliminary agreement in which the parties have, as here, failed to include a price component or an objective framework to agree to price. Under that authority, 9(e) on its face is an unenforceable "agreement to agree."

3. The court's interpretation also violated numerous other canons of Delaware contract interpretation.

Leaving aside its incompatibility with the text, the court's severance of the "before" clause is wrong for a host of other reasons, including that the so-called "first promise," treated as a "freestanding" prohibition, would be unenforceable under Delaware law and would constitute an impermissibly broad restrictive covenant. And the court's apparent justification for its approach—to ensure that the provision was sufficiently valuable to T-Mobile—is not a valid basis for the interpretation.

a) The court's interpretation would render the "first promise" unenforceable.

The court effectively construed the "first promise" to require that before Cox begins providing wireless mobile services, it must enter into a definitive MVNO agreement with Sprint—full stop. So construed, the "promise" articulates no terms of the prospective agreement nor any guidance on what it would entail. Under Delaware law, a preliminary agreement to agree in the future that lacks material terms or a framework for future agreement is unenforceable. *See Heritage Homes,* 2005 WL 2173992, at *3; *see also Ramone v. Lang*, 2006 WL 905347, at *13 & n.56 (Del. Ch. Apr. 3, 2006); *Grunstein v. Silva*, 2014 WL 4473641, at *24-25 (Del. Ch. Sept. 5, 2014), *aff'd*, 113 A.3d 1080 (Del. 2015).

The *Heritage Homes* court rejected a provision much like the dismembered "before" clause, reasoning that it "does no more than merely memorialize the parties' intent to come to an agreement …, leaving negotiations of all material terms for a later date." 2005 WL 2173992, at *3. The same would be true here were the first clause of 9(e) viewed in isolation. The court erred by interpreting the provision in a way that renders it unenforceable. *See Ray Beyond Corp. v. Trimaran Fund Mgmt., L.L.C.*, 2019 WL 366614, at *8 (Del. Ch. Jan. 29, 2019).

b) The court's treatment of the first clause of 9(e) as a restrictive covenant of exclusivity contradicts Delaware law.

The trial court's construction makes the first clause of 9(e) a freestanding restrictive covenant of exclusivity prohibiting Cox from ***ever*** providing wireless mobile service through ***any*** non-Sprint party, irrespective of network, geography, or coverage area. Tr. 69:7-9. That construction conflicts with Delaware law, which "construe[s] restrictive covenants narrowly." *Concord Steel, Inc. v. Wilm. Steel Processing Co., Inc.,* 2008 WL 902406, at *6 (Del. Ch. Apr. 3, 2008). It is also undermined by the text of the provision.

The first sentence of 9(e) contains no mention of a restrictive covenant or even exclusivity, which appears only later in the provision as one of the terms to be included in a final agreement should the parties successfully negotiate one. Even

then, the exclusivity term envisioned by the parties was not to be an eternal, unbridled restrictive covenant, but a temporally limited commitment ***after*** the execution of a definitive MVNO agreement during which Cox would purchase exclusively from Sprint ***in Sprint coverage areas***. A1221 (MVNO agreement will make Sprint "***a***" – not "***the***" – "Preferred Provider" "***within the coverage area of the Sprint Network for resale in the Cox Wireless Affiliate's Markets***" (emphasis added)).

Had the parties intended to restrict Cox from providing wireless mobile services through any non-Sprint party—let alone impose a perpetual restriction—the provision could and would have said so. *See Julius v. Accurus Aerospace Corp.*, 2019 WL 5681610, at *15 (Del. Ch. Oct. 31, 2019), *aff'd*, 241 A.3d 220 (Del. 2020); *Allied Cap. Corp. v. GC–Sun Hldgs., L.P.,* 910 A.2d 1020, 1024 (Del. Ch. 2006). The parties could have easily drafted language unequivocally restricting Cox's right to enter an MVNO agreement with any other party, as they did in other parts of the Agreement.[7] They did not. In fact, they affirmatively disclaimed any restrictions beyond those "expressly provided in th[e] Settlement Agreement." A1222. A court "should be most chary about implying a contractual protection when the contract

[7] *See, e.g.*, A1416 (providing that "for [a] period of 5 years … [Cox] will provide Sprint with exclusive access to [Cox's] Outdoor HFC Network for IP backhaul service to the exclusion of all third parties").

could easily have been drafted to expressly provide for it." *Nationwide Emerging Managers, LLC v. Northpointe Hldgs., LLC*, 112 A.3d 878, 897 (Del. 2015) (quotations omitted).

Finally, even if 9(e) constitutes a restrictive covenant (it does not), the Court of Chancery erred by construing the "before" clause far too broadly—*i.e.*, as an immediately enforceable and perpetual exclusivity obligation. Tr. 47:11-13. That construction far exceeds the boundaries of the exclusivity commitment contemplated by the parties for a future agreement, which was limited to (i) an initial term of 36 months (Tr. 49:13-14) and (ii) "***within the coverage area of the Sprint Network***." Tr. 65:8-14 (emphasis added).[8]

Inferring a broad and abiding restriction absent explicit language to that effect is incongruous with Delaware law. *Concord Steel,* 2008 WL 902406, at *6; *see also Allied Cap. Corp.*, 910 A.2d at 1024. At most, the first clause of 9(e) restricted Cox from providing wireless mobile service before negotiating with Sprint in good faith toward an MVNO agreement. *See supra* Pt. I.C.1.

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[8] In that regard, the court's own reasoning was inconsistent, at once prohibiting Cox from providing wireless mobile services to anyone while elsewhere conceding that "Section 9(e) requires Cox to buy wireless mobile service exclusively from T-Mobile's ***within T-Mobile's coverage area, whatever that is***." Tr. 65:8-10 (emphasis added). Those positions are irreconcilable.

c) The court improperly substituted its view of what the parties ***should*** have agreed for what they actually did.

The court apparently felt constrained to treat the initial clause of 9(e) as a separate "prohibitory promise not to enter" to imbue 9(e) with value for T-Mobile: "If I were to construe Section 9(e) as Cox urges—no prohibitory promise not to enter, and simply an agreement to negotiate in good faith—Section 9(e) would be nearly worthless to Sprint." Tr. 52:12-16. Put differently, making the "prohibitory promise" a "freestanding," enforceable prohibition was necessary to give Sprint "meaningful consideration for dropping its infringement suit." Tr. 52:21-24.

As a threshold matter, the suggestion that a Type II preliminary agreement provides no consideration is wrong. This Court has recognized the value in Type II agreements, finding that breach of such an agreement may entitle the non-breaching party to expectation damages. *See SIGA Techs., Inc.*, 67 A.3d at 350-51; *SIGA Techs. Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1131, 1138 (Del. 2015) (affirming award of expectation damages).

To the extent the court believed that the value provided by a Type II agreement did not provide ***sufficient*** consideration for the Settlement Agreement, it was wrong. Initially, as of December 2017, Cox was uncertain whether it would enter the wireless mobile market, making the value of 9(e) highly contingent at best. An obligation to negotiate in good faith was especially valuable to Sprint, which was at

the bottom in market share and had an inferior network to its competitors. A820-21 (1256:5-1257:3). It also provided Sprint with a right to match pricing after the expiration of the initial three-year term, assuming the parties reached mutually agreeable terms. A1221. And the value of the other services Sprint received from Cox under Sections 9(a)-(d)—which Sprint calculated at $195 million (A1144)—nearly doubled Sprint's last monetary settlement offer. In fact, there is no evidence that either party ever attributed ***any*** monetary value to the MVNO commitment.

In any event, the court's misguided effort to suffuse 9(e) with sufficient value to support the court's own view of its importance was improper. It "is not the job of a court to relieve sophisticated parties of the burdens of contracts they wish they had drafted differently but in fact did not." *DeLucca v. KKAT Mgmt., L.L.C.*, 2006 WL 224058, at *2 (Del. Ch. Jan. 23, 2006) (Strine, V.C.). Indeed, it is bedrock Delaware law that a court may not rewrite an agreement under the guise of interpreting it.

4. To the extent 9(e) is ambiguous, the contemporaneous parol evidence confirms that it is a preliminary agreement to negotiate in good faith.

Cox believes that 9(e) is unambiguously a Type II preliminary agreement. To the extent the Court concludes that the provision is ambiguous because there are two reasonable interpretations of 9(e), it should consider parol evidence. *Salamone v. Gorman*, 106 A.3d 354, 374 (Del. 2014). The most persuasive parol evidence "is

that which reveals the parties' intent ***at the time they entered into the contract***." *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1233 n.11 (Del. 1997) (emphasis added). Here, the contemporaneous evidence confirms that 9(e) is a Type II preliminary agreement to negotiate in good faith.

First, Sprint's initial proposal for 9(e) placed the key "on terms to be mutually agreed by the parties" language in the provision's second sentence, where it would have applied only to the terms on which Cox would "exclusively purchase Wireless Mobile Service from Sprint" after a definitive MVNO agreement was signed. A1173 (Sprint's December 1, 2017 proposal). Cox's counterproposal moved the mutual agreement language to its final location in the ***first*** sentence, where it applies to the threshold obligation to enter into a definitive MVNO agreement in the first place. A1190 (Cox's December 4, 2017 counterproposal). When Sprint countered again on December 5, it made no objection to Cox's placement of "on terms to be mutually agreed." A1208.

Second, Cox's December 4 counterproposal—just two days before final settlement—included two comments that directly reflect Cox's understanding of what its revision of 9(e) meant. Cox's redlined text included a comment bubble stating:

> There is not a separate MVNO agreement, so we believe that this language should be inserted in this agreement.

> ***We are, in essence, agreeing to agree***. So the Settlement Agreement seems like the right place to put this.

A1191 (emphasis added).

The cover email accompanying Cox's redline made the same point, stating that "we put back the MVNO language into this agreement because we don't think there is a separate MVNO agreement. ***It's basically an agreement to agree***, and I don't know where else we would put it." A1178 (emphasis added).

Sprint's response accepted Cox's revision and raised no objection to Cox's characterization. A1208. T-Mobile's December 5 counter-markup did not even delete Cox's comment bubble, leaving Cox's characterization of 9(e) as an agreement to agree in T-Mobile's own draft. *Id.*

Because Sprint never objected when Cox characterized 9(e) as an agreement to agree during negotiations, the Court should apply the forthright negotiator principle, under which courts may resolve contractual ambiguity by "resort[ing] to evidence of what one side in fact believed the obligation to be, coupled with evidence showing that the other party knew or should have known of such belief." *U.S. West v. Time Warner Inc.*, 1996 WL 307445, at *11 (Del. Ch. June 6, 1996); *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 13 (Del. Ch. 2003). Once Cox made clear to Sprint its view that the parties were merely "agreeing to agree," Sprint's failure to

object requires that any ambiguity in the final provision be resolved in favor of that interpretation.

The court dismissed Cox's contemporaneous characterizations of the agreement as relating solely to the "placement of [the] MVNO term," not its meaning. Tr. 14:2-10. This is a non sequitur: even if the ***purpose*** of Cox's characterizations related to the placement of the MVNO term in the Settlement Agreement, the ***fact*** of the characterization still carries significance. The margin comment and email placed Sprint on notice that Cox understood 9(e) to be a non-binding framework for a possible future agreement. If Sprint took a different view, it was incumbent upon its lawyers to speak up. They did not.

II. The Court Erred In Finding That T-Mobile Could Enforce 9(e).

A. Question Presented

Whether the court erred in finding that T-Mobile could enforce the Settlement Agreement notwithstanding Section 19's express prohibition on the assignment of Sprint's rights without Cox's prior written consent.[9]

B. Scope of Review

This Court "review[s] questions of law and interpret[s] contracts *de novo*." *Osborn*, 991 A.2d at 1158. Fact-findings are reviewed for clear error. *Id.*

C. Merits of Argument

The court's conclusion that T-Mobile could enforce the Settlement Agreement as Sprint's successor-in-interest, notwithstanding Section 19's prohibition on assignment by operation of law, was erroneous. T-Mobile lacked standing to enforce Sprint's rights under 9(e), and the judgment below must be reversed.

1. Section 19 precludes T-Mobile from enforcing the agreement even if it is a successor-in-interest under the inurement clause.

Section 19 of the Settlement Agreement is an anti-assignment clause prohibiting any transfer of rights, "whether voluntarily or by operation of Applicable Law," without prior consent. A1225-26. Under Delaware law, assignment "by

[9] Issue preserved below at A238-40, A1041-43.

operation of law" includes a transfer of rights effected by a merger. *See Tenneco Auto. Inc. v. El Paso Corp.*, 2002 WL 453930, at *2 (Del. Ch. Mar. 20, 2002). Because Sprint neither sought nor obtained Cox's consent, under the plain terms of Section 19, any transfer of Sprint's rights under 9(e) through the merger was void, and T-Mobile cannot enforce them. *See id.*

Nevertheless, the court began (and, in many respects, ended) its analysis not with Section 19 but with Section 18's standard "inurement" clause, which states that the Settlement Agreement "shall inure to the benefit of the Parties and their respective successors and assigns." A1225. The court found that "it appears T-Mobile is Sprint's successor in interest and may enforce the Settlement Agreement per Section 18." Tr. 37:12-16. That logic, however, erroneously assumes that an inurement clause gives ***any*** successor carte blanche to enforce a predecessor's contract rights ***irrespective of contractual anti-assignment restrictions***. That is incorrect under Delaware law.

To be sure, there is no serious dispute that T-Mobile is Sprint's successor-in-interest.[10] But that does not end the analysis. Where, as here, a contract contains both (i) an anti-assignment provision expressly barring assignment by operation of

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[10] Contrary to T-Mobile (A958-59) and the court (Tr. 38:6-15), Cox's acknowledgment that Sprint merged with T-Mobile is not an admission that T-Mobile could enforce the Settlement Agreement under Section 19.

law and (ii) an inurement clause bequeathing present-day contractual rights to future successors, the inurement clause should be read to extend only to successors who ***validly*** succeed to such contractual rights under the anti-assignment clause. *See MTA Can. Royalty Corp. v. Compania Minera Pangea, S.A. de C.V.*, 2020 WL 5554161, at *3-5 (Del. Super. Ct. Sept. 16, 2020) (finding that while MTA was a successor-in-interest, it could not enforce the agreement because the anti-assignment clause unambiguously prohibited assignment, including by operation of law, without prior written approval). That makes sense, since, as the *MTA* court indicated, it is the only construction that harmonizes and gives effect to both provisions.

So too here. Sections 18 and 19 can peacefully coexist by interpreting them such that the inurement clause permits parties who ***validly*** succeed to rights under the anti-assignment provision to enforce them. But rather than reconcile the provisions, the trial court marginalized the anti-assignment provision on the basis that the Sprint/T-Mobile merger was a reverse triangular merger. As described below, that decision was also erroneous.

2. T-Mobile's "reverse triangular merger" arguments were both waived and inapplicable.

Relying on *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62, 81-88 (Del. Ch. 2013), the court found that Section 19 did not alter its enforceability analysis because "it appears the merger between Sprint and T-Mobile

was, in fact, a reverse triangular merger," meaning the target (Sprint) survived. Tr. 39:24-40:8. That finding rests on (i) an argument that T-Mobile waived; and (ii) a misapplication of *Meso Scale*.

For starters, T-Mobile waived any argument that the Sprint transaction was a reverse triangular merger by failing to assert it until post-trial argument. A1092-93 (128:22-129:7). Under Delaware law, T-Mobile shoulders the burden to prove standing (*see In re WeWork Litig.*, 2020 WL 7343021, at *5 (Del. Ch. Dec. 14, 2020)) and was plainly on notice that Cox was challenging its standing to enforce the Settlement Agreement. *See* A238-40; A358. Yet T-Mobile offered ***no*** testimony or evidence at trial, or even in its post-trial brief, to prove that the Sprint merger was a reverse triangular merger. A959. By waiting until post-trial argument to raise the argument, T-Mobile waived it.[11]

The court acknowledged as much, conceding that the parties "did not present testimony about the Sprint/T-Mobile merger" (Tr. 39:24-40:2) and that "T-Mobile's argument … ***has been presented entirely through attorney argument and reference to documents in the extensive trial record***." Tr. 40:2-6 (emphasis added). That it nonetheless considered—and accepted—the argument was legal error and an abuse

[11] *See, e.g.*, *In re Genelux Corp.*, 126 A.3d 644, 672 (Del. Ch. 2015); *Barrett v. Am. Country Hldgs., Inc.*, 951 A.2d 735, 745 & n.33 (Del. Ch. 2008).

of discretion. *Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003), *aff'd*, 840 A.2d 641 (Del. 2003); *Zaman v. Amedeo Hldgs., Inc.*, 2008 WL 2168397, at *16 (Del. Ch. May 23, 2008).

And even if T-Mobile had demonstrated at trial that the merger was a reverse triangular merger, it still would not give T-Mobile standing. The court's assertion that *Meso Scale* "concluded that a reverse triangular merger is not an assignment by operation of law and that, instead, [the] acquirer after a reverse triangular merger is a successor" (Tr. 39:12-16), is only half right: *Meso Scale* ***nowhere*** found that the acquirer in a reverse triangular merger is a "successor." Instead, the animating principle in *Meso Scale* was that, since a target company survives a reverse triangular merger, it does not assign its rights but retains them, meaning a merger does not constitute a breach of the anti-assignment clause. *Meso Scale* has nothing to do with a ***successor's*** standing to enforce the target's contractual rights after a reverse triangular merger.

Here, it is not ***Sprint*** seeking to enforce its contractual rights but ***T-Mobile***. That substitution is, itself, an unauthorized assignment in direct contravention of Section 19. *See Tenneco Auto.*, 2002 WL 453930, at *2. In short, T-Mobile cannot have it both ways: either (i) Sprint survived a reverse triangular merger, in which case Sprint can enforce 9(e) under *Meso Scale*; or (ii) it was not a reverse triangular

merger and Section 19 barred a transfer of Sprint's rights to T-Mobile. Either way, ***T-Mobile*** has no standing to enforce 9(e).

While the court found that its conclusion would be the same even if the Sprint/T-Mobile merger was ***not*** a reverse triangular merger, its analysis, discussed immediately below, was equally flawed.

3. To the extent Sections 18 and 19 are in conflict, the court ignored or misapplied governing principles of construction and interpretation.

Rather than reconcile the anti-assignment and inurement clauses as in *MTA*, the court simply assumed, without deciding, that the provisions create an ambiguity. To that end, the court looked to (i) extrinsic evidence to interpret the parties' intent regarding the interplay of Sections 18 and 19 (Tr. 41:5-45:7) and (ii) prior cases "harmoniz[ing] an inurement clause with a conflicting anti-assignment clause in the context of a merger" (Tr. 41:8-11), both of which it found supportive of T-Mobile's ability to enforce the Agreement. But even if the provisions gave rise to an ambiguity (as discussed *supra* at Pt. II.C.1, they do not), the court's resolution of that ambiguity was flawed for two reasons.

First, the court erred by considering ***any*** extrinsic evidence to decipher the intent of Sections 18 and 19. As a threshold matter, T-Mobile waived any argument that the Court should consider extrinsic evidence to determine the intent of Sections

18 and 19. Despite having the burden of proof, T-Mobile failed to present any extrinsic evidence or even argument at trial establishing that it had standing to enforce 9(e). Indeed, the trial court expressly found that "[n]either party has identified any extrinsic evidence in the trial record from the time of contracting" relevant to this issue. Tr. 42:2-6. As such, any argument by T-Mobile that extrinsic evidence can inform Sections 18 and 19 has been waived because Cox was denied its constitutional right to dispute any such evidence.[12]

And even if extrinsic evidence were fair game, Delaware law is clear that the only extrinsic evidence relevant to the operation of an anti-assignment clause is that relating to the circumstances surrounding the formation of the contract. *ClubCorp, Inc. v. Pinehurst, LLC*, 2011 WL 5554944, at *8-9 (Del. Ch. Nov. 15, 2011). The court conceded that the trial record was devoid of extrinsic evidence related to the formation of those provisions. Tr. 42:2-6. Yet it doubled down on its error by pivoting to extrinsic evidence relating to Cox's conduct several years ***after*** the Agreement was consummated. Tr. 42:14-44:18. But post-formation evidence—let alone anecdotal evidence of individual employees' opinions years after execution—is irrelevant to the meaning of an anti-assignment clause. *See Star Cellular Tel. Co.,*

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[12] *See Oxbow Carbon & Minerals Hldgs., Inc. v. Crestview-Oxbow Acq., LLC*, 202 A.3d 482, 502 n.77 (Del. 2019) (explaining that "an issue not raised in post-trial briefing has been waived, even if it was properly raised pre-trial.").

Inc. v. Baton Rouge CGSA, Inc., 1993 WL 294847, at *7 (Del. Ch. Aug. 2, 1993) (finding that "the Court may consider extrinsic evidence, but only if it relates to the circumstances surrounding the drafting of the contract at issue"), *aff'd*, 647 A.2d 382 (Del. 1994).

Second, while the trial court alluded to prior case law evaluating ambiguous anti-assignment clauses, it ignored the analytical framework developed by those cases. In particular, where an anti-assignment clause is ambiguous regarding the effect of a merger and the parties offer no extrinsic evidence of their intent ***at the time of contracting***, Delaware courts resolve the ambiguity by employing a two-pronged test based on the parties' presumptive intent in negotiating an anti-assignment provision, asking: (1) whether "performance by the original contracting party is [] a material condition" of the agreement; and (2) whether the assignment at issue poses unreasonable risk to the other contracting party. *See Star Cellular*, 1993 WL 294847, at *8; *accord Tenneco Auto*., 2002 WL 453930, at *3.

The trial court failed to apply that test, which would have revealed unreasonable risk to Cox in allowing assignment to T-Mobile and forcing it to accept a new partner. Permitting T-Mobile to step into Sprint's shoes would dramatically change the nature and economic terms of the Settlement Agreement—a carefully calibrated arrangement predicated on Sprint's strategic profile and the particulars of

its mobile cellular network. Sprint was heavily supportive of cable MVNOs (A319) and focused on growing its cable MVNO wholesale business. A338. It had also taken steps to expand its unique coverage network at reduced cost—a critical input to Cox (A319)—and had signaled that it would offer a fair price to Cox in any MVNO agreement. Tr. 8:9-12, 18:23-19:6.

T-Mobile, by contrast, had ***zero*** cable MVNO contracts prior to the merger, having identified them as a competitive threat. A338. Against that backdrop, T-Mobile also failed to provide competitive pricing, which would have a dramatic economic impact on Cox should it be forced to accept T-Mobile as a partner. For these reasons, application of the *Star Cellular* test mandates against permitting T-Mobile to enforce the Agreement.

III. The Court Abused Its Discretion By Permanently Barring Cox From the Market.

A. Question Presented

Whether the court erred by permanently enjoining Cox from entering the wireless market where: T-Mobile waited months to seek relief, during which Cox made irreversible investments in its wireless launch; T-Mobile's only irreparable harm was unrelated to the claimed breach; and the court's balancing of the equities was rooted in key fact-findings unsupported by any evidence.[13]

B. Scope of Review

Claims of injunctive relief are reviewed for abuse of discretion. *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 68 A.3d 1208, 1218 (Del. 2012). Fact-findings are reviewed for clear error. *Osborn*, 991 A.2d at 1158.

C. Merits of Argument

Even if the court's other rulings were correct, the decision below would still have to be reversed because the court's injunctive remedy is marred by multiple serious errors.

1. The court erred in rejecting Cox's laches defense.

The doctrine of laches "bars claims where an unreasonable delay in bringing suit has materially prejudiced the defendant[]." *AQSR India Private, Ltd. v. Bureau*

[13] Issue preserved below at A256-65, A1054-59.

Veritas Hldgs., Inc., 2009 WL 1707910, at *10 (Del. Ch. June 16, 2009). "An unreasonable delay can range from as long as several years to as little as one month." *Whittington v. Dragon Grp., L.L.C.*, 991 A.2d 1, 7-8 (Del. 2009).

Here, the court found that T-Mobile had not unreasonably delayed because it "filed its counterclaims eight days after Cox breached by signing an agreement to offer wireless mobile service with a[n] MNO other than T-Mobile." Tr. 76:4-10.

But according to T-Mobile itself, its claim accrued long before Cox executed the Verizon MVNO agreement. T-Mobile's counterclaim asserts that "on May 19, 2020," T-Mobile "reminded [a] Cox executive that Cox was contractually required to use T-Mobile as its exclusive MVNO provider under Section 9(e)." A115. To the extent Cox was "contractually required to use T-Mobile" exclusively, Cox's RFP was squarely inconsistent with that requirement. But T-Mobile declined to assert its rights. Instead, it elected to participate in the RFP out of a professed "deep desire to develop a successful mutually beneficial Cox/T-Mobile mobile business." A1643. That is, T-Mobile chose to pursue Cox's MVNO business on commercial terms rather than assert its rights. *See* A115.

It was only in September 2020, when T-Mobile learned that Cox viewed its proposal as noncompetitive, that T-Mobile advised Cox that 9(e) "requires Cox to utilize T-Mobile should Cox choose to provide a wireless service offering," and that

"T-Mobile is fully prepared to enforce its rights." A1683. And on October 14, 2020, after Cox notified T-Mobile that it would partner with Verizon, T-Mobile informed Cox by letter that a "direct breach" of 9(e) had occurred. A1691.

Even if Cox's RFP or its selection of Verizon is considered only an anticipatory repudiation of 9(e) (which is breached only if Cox "begins providing Wireless Mobile Service," which Cox has not done), such a repudiation "ripens into a breach … if the promisee elects to treat it as such." *Franconia Assoc. v. U.S.*, 536 U.S. 129, 143 (2002) (quotations omitted). T-Mobile's notice of its purported exclusivity rights in May 2020 "objectively manifested an intent to treat" the decision "as a breach." *Meso Scale,* 62 A.3d at 79. At the very latest, T-Mobile manifested such an intent on October 14, 2020, by formally accusing Cox of a "direct breach." A1691.

Once T-Mobile's claim accrued, it was required to act with "alacrity" in seeking injunctive relief. *AQSR,* 2009 WL 1707910, at *10. Instead, it waited ten months—at a minimum, four—before suing, allowing Cox to make substantial, irreversible investments in its Verizon partnership. Between the selection of Verizon in October 2020 and August 2021, Cox spent approximately $99 million to prepare for its wireless launch, which was scheduled for October 15, 2021. A848 (1365:24-1368:21). It negotiated agreements with other vendors and hired 100 employees

specifically for its wireless venture. *Id.* (1368:10-14). This infusion of resources into the Verizon transaction was a direct result of T-Mobile's delay and has prejudiced Cox.

Because it concluded erroneously that T-Mobile's claim did not accrue until January 20, 2021, the court did not consider whether the company's four-to-ten-month delay in bringing suit was unreasonable and therefore committed legal error. As a result, the issuance of an injunction must be reversed.

2. The court abused its discretion by granting sweeping injunctive relief.

Even if T-Mobile's suit was timely, the court's decision granting the injunction was an abuse of discretion. "When balancing the equities" for purposes of awarding injunctive relief "[the court] must be convinced that specific enforcement of a validly formed contract would [not] cause even greater harm than it would prevent." *Osborn*, 991 A.2d at 1161 (quotations omitted). In considering that issue, the court must independently assess the harms to both parties. *N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 382 (Del. 2014). Here, the court's assessment of the parties' harms was rooted in factual errors.

Cognizable irreparable harm must result from the breach that injunctive relief would remedy. The court found that Cox breached 9(e) "by partnering with Verizon." Tr. 77:21-24. Cox did ***not*** breach 9(e) by failing to partner with T-Mobile,

because "Cox [was] not bound to" do so but was free "to not enter the wireless market at all." Tr. 71:6-9. But the only harm to T-Mobile identified by the court was T-Mobile's loss of the so-called "halo effect" that T-Mobile would receive from partnering with Cox—something the court held that Cox was "not bound" to do. Tr. 72:14-73:10. This mismatch between the claimed breach and the claimed harm renders the court's finding of irreparable harm for purposes of balancing the equities clearly erroneous.[14]

Second, the court clearly erred in assessing Cox's side of the equities scale. It wrongly dismissed undisputed evidence that Cox invested $99 million in its wireless launch because it found that the investment included $12 to $15 million of "costs unique to partnering with Verizon." Tr. 76:11-16. This was error: because Cox was "not bound to go to the dance with T-Mobile" but was "free to stay home" (Tr. 53:17-21), the entirety of Cox's $99 million investment is a total loss to Cox resulting directly from the injunction. And the court ignored undisputed evidence

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[14] The court's primary basis for finding that T-Mobile satisfied the irreparable harm requirement for equitable relief was the Settlement Agreement's stipulation that a breach would constitute irreparable harm. Tr. 69:14-24. The stipulation may be a sufficient basis for establishing irreparable harm, but not for purposes of balancing the equities. *AM. Gen. Hlgs. LLC v. The Renco Grp., Inc.*, 2016 WL 787929, at *2 (Del. Ch. Feb. 19, 2016).

that Cox hired 100 employees dedicated to the wireless launch that now may never occur. A848 (1367:5-1368:21).

The court's most consequential error, however, came in a finding that related not to either party's harm but to Cox's conduct. The court found that "[a]t the time of contracting, both Cox and Sprint understood that Section 9(e) meant that if Cox wanted to become an MVNO and offer wireless mobile service, it had to reach an exclusive agreement with Sprint." Tr. 10:5-9; *see also* Tr. 14:15-18. That one finding colored the court's entire equitable analysis, tilting it decisively toward T-Mobile. Tr. 10:9-11 ("I find these facts … because they inform the equities of remedying Cox's breach"); *see also* Tr. 76:17-24. But that finding is unsupported by the evidence.

The court's analysis completely ignores the best evidence of Cox's understanding of 9(e): the email and margin comment by Cox's negotiating team describing it without rebuttal as an "agreement to agree." *See supra* at I.C.4. The court similarly ignores a December 21, 2017 email from Cox's Mark Bowser to a colleague noting that "we have an out" from the MVNO commitment. A1506. Bowser's belief in December 2017 that Cox had an "out" cuts strongly against the conclusion that Cox believed it was locked into an exclusive agreement with Sprint.

The "contemporaneous documents" relied on by the court do not support its finding, either. Exhibits 136 and 401 (cited at Tr. 14:19-15:4) are Cox presentations from December 2017 summarizing the Settlement Agreement's financial impact. A1501; A1639. They are virtually identical and merely include the words "MVNO—Sprint to be Preferred Partner" on a list of "Other Items" and give a shorthand description of the terms of 9(e) with no further elaboration. While they may manifest a ***business expectation*** that any future MVNO agreement would be with Sprint, nothing about them betrays an understanding that 9(e) represents a ***legal requirement*** to do so. No contemporaneous document even arguably suggests that Cox understood 9(e) to permanently bar it from entering the wireless market with anyone but Sprint.

Neither did any Cox witness testify to that effect. Although the court found that Cox attorney Marcus Delgado "conceded [that Cox's current] position was not Cox's contemporaneous understanding of Section 9(e)" (Tr. 17:12-14), he did not. Mr. Delgado testified unequivocally that he ***did not recall*** what Cox's "interpretation was at the time the agreement was signed." A403 (97:9-15). The same was true of the other Cox witness who testified on this subject, Mark Bowser. *See* Tr. 10:15-17, 17:19-22 (citing A392 (54:15-56:2)). The only testimony the court cited for Cox's contemporaneous understanding of 9(e) was given by ***Sprint's*** negotiator, who

stated that "***in my mind***, there could not have been any possibility that Cox believed that this wasn't an enforceable agreement if they became a[n] MVNO." A636 (777:10-17) (emphasis added); *accord.* Tr. 15:5-9. But his self-serving speculation about what Cox believed cannot carry any weight, at least in the absence of supporting documents or testimony. There is none.

Finally, the court appears to have drawn its conclusion about Cox's understanding in 2017 by drawing improper inferences from Cox's privilege log. The only evidence cited by the court that Cox crafted a new "litigation interpretation" in 2019 was Cox's privilege log (A1718-1805) and an objection on privilege grounds to a T-Mobile interrogatory (A1693-1717). Tr. at 17:9-11 (citing A1693-1805).

That reliance was improper. Delaware Rule of Evidence 512 is unequivocal: "The claim of a privilege … is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom." Del. R. Evid. 512(a). The court's determination that in March 2019 Cox and its outside counsel concocted a new "litigation interpretation of 9(e)" is precisely such an inference, that is, "a conclusion reached by considering" entries in the privilege log "and deducing a logical consequence" from them. *Inference*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Indeed, the court recognized that such testimony was improper when it upheld counsel's objection at trial. A416 (150:1-151:16).

There was thus no valid evidence to support the court's finding that Cox knew in December 2017 that 9(e) barred it from entering the wireless market with any partner but Sprint, making that finding clearly erroneous. Because that error skewed the court's balancing of the equities, the court's order enjoining Cox constitutes an abuse of discretion and must be reversed.

CONCLUSION

For all the reasons given, Cox respectfully requests that the Court reverse the judgment below and vacate the permanent injunction.

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