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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.	No. 340, 2021 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2021-0010-MTZ PUBLIC VERSION FILED JANUARY 6, 2022

T-MOBILE US, INC.'S APPEAL ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This case grows out of a settlement agreement (the "Settlement") in which appellant Cox Communications, Inc. promised that if it chose to begin providing service as a Mobile Virtual Network Operator ("MVNO"), it would exclusively partner with Sprint.[1] In January 2021, Cox willfully breached the Settlement by entering into an MVNO agreement with Verizon. Evidence presented at a five-day trial showed that Cox had decided to "gamble with its eyes wide open, modeling the cost of litigation and settlement," and breached the Settlement "knowingly and intentionally." Cox Brief (hereafter "Br.") at Ex. B (Post-Trial Ruling, hereafter "R.") 76-77. Because Cox's breach irreparably harmed T-Mobile (which merged with Sprint in 2020) and the equities decidedly favored the irreparably-injured T-Mobile over the deliberately-breaching Cox, the Court of Chancery properly enjoined Cox from pursuing its MVNO partnership with Verizon.

On appeal, Cox asks this Court to: (1) adopt an interpretation of the Settlement that is inconsistent with its unambiguous language and that a Cox witness admitted was not the parties' intent at the time of settlement but rather something Cox invented long afterwards; (2) declare that T-Mobile is not the successor to

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[1] An MVNO provides wireless service to retail customers. The MVNO purchases wireless services at wholesale from a mobile network operator like Sprint, via an MVNO agreement.

Sprint's interests under the Settlement, even though Cox admitted T-Mobile was in its verified complaint; and (3) find injunctive relief unavailable, notwithstanding the express settlement term that injunctive relief was appropriate to remedy any breach.

None of Cox's arguments has merit. The Court of Chancery's injunction was reasoned and an entirely appropriate response to Cox's deliberate breach. The judgment should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery's interpretation of the Settlement was correct. The Settlement provides that, "***[b]efore*** Cox…begins providing" service as an MVNO, Cox "***will*** enter into a definitive MVNO agreement with Sprint on terms to be mutually agreed." The court appropriately found that language means what it says: that while Cox is not obligated to begin providing services as an MVNO, if it wishes to do so, it must enter an MVNO agreement with Sprint. R.53. The court also found that the extrinsic evidence, including Cox's contemporaneous documents, confirmed that Cox understood the Settlement "to mean ***exactly*** how I have construed it today." R.76-77.

In contrast, Cox's interpretation—that it could partner with whomever it wished, so long as it negotiated with Sprint in good faith—cannot be squared with the Settlement's plain language and was not supported by contemporaneous documents or witness recollection. The Cox lawyer who coordinated the settlement negotiations conceded both that: (a) Sprint had specifically rejected that proposal during the negotiations; and (b) the interpretation Cox advances today was *not* Cox's understanding at the time of settlement: Cox's lawyers developed this interpretation "more than a year" later. A403[TTr.99]; *see* R.17.

2. Denied. The Court of Chancery correctly ruled that T-Mobile was entitled to enforce the Settlement. The Settlement recites that it inures to the benefit of the parties' "successors," and Cox pled that T-Mobile was Sprint's successor by virtue of their merger. Cox's course of conduct and internal correspondence, both at the time of the merger and during the MVNO negotiations, confirm Cox understood T-Mobile would stand in Sprint's shoes. Cox's contrary argument—raised for the first time on the eve of trial—is that the merger constituted an unauthorized assignment in violation of Section 19 of the Settlement. But Cox's judicial admissions as to T-Mobile's status as Sprint's successor are binding. Moreover, the merger was a "reverse triangular merger," which by law did not cause an assignment. *See Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62, 82-83 (Del. Ch. 2013). Also, the Settlement specifically bestowed rights on future *affiliates* of Sprint, which T-Mobile—the 100% owner of Sprint—unquestionably became.

3. Denied. The Court of Chancery acted well within its discretion in issuing an injunction. An injunction was the contractually agreed upon remedy for a breach and the only way to remedy the irreparable harm to T-Mobile from Cox's willful breach. Cox's *laches* defense is frivolous, given that T-Mobile brought its

claims against Cox just *days* after Cox breached the Settlement by entering into an MVNO partnership with Verizon.

STATEMENT OF FACTS

A. The Settlement

The Settlement resolved a patent lawsuit in which Cox faced potential exposure of more than $500 million. R.5; A404[TTr.103]. Sprint agreed to dismiss that suit in return for non-cash business concessions, including the MVNO provision in Section 9(e) of the Settlement. R.7-8; B372.

During early settlement negotiations, Cox proposed language minimizing its MVNO obligations, including that (i) it only be required to "engage in good faith negotiations," B341, or that (ii) Sprint would get "first priority" if Sprint's pricing was "substantially similar to a competitive, commercial offering." R.10-11; B349; B353. Sprint rejected those proposals. R.11; A405-406[TTr.108-111].

In November 2017, Sprint issued a "best and final" settlement demand. R.11; B354-364. It insisted on a commitment that "[b]efore Cox begins reselling Wireless Mobile Service," it "will enter into a definitive MVNO agreement with Sprint," and "will exclusively purchase Wireless Mobile Service from Sprint...for an initial period of 36-months." R.11; B362. Sprint would retain exclusivity through that term "in each of the Cox markets" provided "Sprint's network performance is within 5% of the market leader" under a specified metric. B362. Afterwards, Sprint would

retain exclusivity as long as it matched a better price from a qualifying provider. B362.

Sprint explained to Cox that these terms gave Sprint "36-month head-start exclusivity" if Cox decided to sell wireless mobile services. R.11; B364. Sprint's lead negotiator, Tarek Robbiati, its then-CFO who has no ties to T-Mobile, testified to the deal Sprint demanded: "when Cox decides to resell wireless mobile services, it would enter in a definitive MVNO agreement with Sprint and give Sprint preferred provider status, and the preferred provider status was involving a 3-year/36-month exclusivity period during which Cox had to exclusively purchase the services from Sprint." A815-817[TTr.1236-1237, 1240-1241].

The terms of those purchases would be set through good faith negotiations in which Sprint had to give "a reasonable price" aligned to what it "offered to similar players." A817[TTr.1242]. But Cox could not reject such a price and then "go with another…MNO" because that would "defeat [] exclusivity." *Id.* Robbiati stressed that this commitment was critical to the deal: If Cox had said no, Sprint would have "[g]one to trial." A818[TTr.1246]; A631[TTr.757-758].

Cox responded to Sprint's MVNO proposal with a small change that raised the network performance metric. R.12; B372.

On November 30, 2017, Sprint made "one last modified demand," explaining that it was otherwise "fully prepared to go to trial." B374. In that demand, Sprint rejected Cox's change to the metric. B381. Sprint proposed a call between Robbiati and Cox's lead negotiator, its CFO, Mark Bowser. B374.

During that call, they agreed to Sprint's MVNO demand with the exception of a small adjustment to the performance metric. R.12.

Over the next few days, the parties worked to draft the agreements. A630[TTr.753]. Lawyers from each side understood their mission was to implement, but not change, the deal Robbiati and Bowser struck. A409[TTr.124]; A631[TTr.758].

The parties executed the Settlement the day before trial was set to begin. A1209. Section 9 documents the business concessions Cox gave in return for Sprint's dismissal. It begins with a preamble listing the elements of "consideration for the Settlement," including "Cox's MVNO Preferred Provider commitment agreement." A1220. The other business concessions in Section 9 were implemented by amending existing agreements between the parties. A1220-1221.

The MVNO commitment agreement could not be implemented that way, as Cox had not yet decided whether to offer wireless service. Both sides agreed that because the wireless industry is so dynamic, it was better to negotiate things like

price when Cox decided to enter the market. R.12-13. Accordingly, they set forth Cox's commitment in Section 9(e). It states in relevant part:

> ***Before Cox*** or one of its Affiliates (the "Cox Wireless Affiliate"), ***begins providing Wireless Mobile Service*** (as defined below), ***the Cox Wireless Affiliate will enter into a definitive MVNO agreement with a Sprint Affiliate (the "Sprint MVNO Affiliate") identifying the Sprint MVNO Affiliate as a "Preferred Provider"*** of the Wireless Mobile Service for the Cox Wireless Affiliate, on terms to be mutually agreed upon between the parties ***for an initial period of 36 months*** (the "Initial Term"). ***As a Preferred Provider, the Cox Wireless Affiliate will exclusively purchase Wireless Mobile Service from the Sprint MVNO Affiliate*** within the coverage area of the Sprint Network for resale in the Cox Wireless Affiliate's Markets….

A1221 (emphases added).

As the Court of Chancery found, "[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." R.10. For example, on December 12, 2017, Robbiati prepared a presentation for Sprint's leadership team, which states: "Before reselling Wireless service, Cox will enter into an MVNO agreement with Sprint (36 month head start exclusivity)" and "Cox will exclusively purchase Wireless service from Sprint." B385; A819[TTr.1250-1251]. Similarly, a Cox presentation from that month summarized the financial impact of the settlement and stated that "MVNO–Sprint to

be Preferred Partner" if "Cox enters wireless market" and Sprint continues to meet the network performance metric. R.14; A1501.

B. Cox's Subsequent Reinvention of Section 9(e)

In February 2019, Cox began considering launching an MVNO business to reduce churn from customers "cut[ting] the cord" with their cable provider. R.15; A766[TTr.1181]. At the start, Cox Executive Vice President Kevin Hart told another Cox executive, "we have the Sprint MVNO obligation" and recommended he "remind [the Cox team] of our legal situation." R.15; B1120. Hart also instructed Cox Vice President Tony Krueck to model the business using Sprint as Cox's MNO partner "due to the Settlement agreement." R.16; B1122; B1119; A497-498[TTr.359-361]. Cox's modeling concluded that Sprint's lower quality network would limit subscriber growth. R.16; A444[TTr.262-264]. Cox referred to this as the "Sprint factor," and valued its cost at more than $300 million over ten years. R.16; B1124-1125; B1133; A444, A498[TTr.262-264, 361-362].

In April 2019, Krueck raised the possibility of "forc[ing] the situation and go[ing] [with] Verizon." R.16; B1126. He noted that doing so would "introduce[] other risks," namely, that Sprint would sue. R.16; B250; A498[TTr.362-363]. The Cox team later sent its CFO an estimate that it would cost Cox more than $100 million to settle with Sprint. R.17 ("Cox modeled the cost of partnering with

Verizon to be $133 million: $32 million for ordinary start-up expenses, and the balance for the anticipated cost of settling litigation with Sprint"); B1224; A498-499[TTr.364-367].

Meanwhile, Cox's legal team spent months working with outside counsel to invent a better option. R.17; A1737-1745; A1542; A415-417[TTr.147-156]. On cross examination, Marcus Delgado, the lawyer who coordinated Cox's negotiation with Sprint, agreed that the team's work resulted in "Cox's litigation interpretation of 9(e)," which is that "at most it requires Cox to negotiate in good faith." R.17; A417[TTr.156]. Delgado also made damning admissions that it was not Cox's understanding at the time of settlement:

> Q. Mr. Delgado, do you recall when Cox formed this interpretation of Section 9(e)?
>
> A. I believe we formed this interpretation in 2019 sometime.
>
> Q. And, indeed, it was only after consulting with outside counsel more than a year after this agreement was signed that Cox developed the interpretation of Section 9(e) that it's offering in this litigation. Correct?
>
> A. That's correct.

A403[TTr.99]. Delgado also conceded Sprint had "rejected" a proposal aligned with Cox's litigation interpretation during the settlement negotiations. R.17; A405-406[TTr.108-110].

C. The Sprint/T-Mobile Merger

In April 2018, Sprint and T-Mobile announced an agreement to merge. B387. Cox looked favorably upon the news as T-Mobile's superior network would eliminate the $300 million "Sprint factor." B1083; A495-496[TTr.352-354]. After the merger closed on April 1, 2020, Cox and T-Mobile began to engage with one another under the shared understanding that T-Mobile had taken over Sprint's rights and obligations under the Settlement. R.42; *see, e.g.*, B1273 (Cox in April 2020: "[t]he Sprint/TMO merger is closed. We do believe the settlement agreement we have with Sprint will transfer to TMO.").

D. T-Mobile's Good Faith Negotiation With Cox

In March 2020, Cox decided to enter the MVNO business. It estimated the opportunity was worth $2.2 billion in earnings before interest, taxes, depreciation, and amortization ("EBITDA") over 10 years. R.20-21; B1260.

On April 9, Cox issued a request for proposal to mobile network operators, including both T-Mobile and Verizon, and ran its RFP process "without regard to Section 9(e)." R.22; A432[TTr.215].

Between June and September, T-Mobile submitted three proposals, each of which was more favorable to Cox than the last. R.27-31. T-Mobile offered Cox better pricing than it gave larger, established MVNOs. R.29-31; B1323. Cox

estimated that T-Mobile's final proposal was modestly more expensive than an offer from Verizon.[2]

E. Cox's Selection of Verizon

On September 23, the day before Cox's senior team met to select one potential partner with which it would negotiate an agreement, Hart told Krueck he believed Cox had "[t]wo very good options," but he was "pushing for TMO." R.32; A540[TTr.531]; B1301. Hart also recommended T-Mobile to Len Barlik, Cox's COO, because of its "5G spectrum advantage, CB book of biz, [Section 9(e)], and numerous new biz possibilities based on several factors including relationships." R.32; B1306. Barlik responded that he was also "leaning toward TMO." B1305. Hart replied: "I like your style! We tried VZW already:)." *Id.*

At the selection meeting, Hart and Barlik each spoke in favor of T-Mobile. R.32; A541[TTr.536]. Cox nonetheless selected Verizon, primarily on price but also to align with two other cable companies that already partnered with Verizon. R.32-33; A542[TTr.538-539]. The Cox senior team discussed the likelihood of litigation with T-Mobile. R.33; A541-542[TTr.536-537].

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[2] Cox incorrectly estimated that T-Mobile's overall price was $90 million more than Verizon's proposal. A1663. Under a proper comparison, the difference was only $23.8 million. A764[TTr.1170].

On October 5, Hart informed Katz that Cox had selected another carrier for contract negotiations. R.33; A533[TTr.502-503]. Still pursuing an agreement, T-Mobile sent a fourth proposal on October 19, which reduced term length, as Cox had requested. R.33; B1314-1322. Cox never responded. R.33; A745[TTr.1097].

In the months that followed, Cox negotiated exclusively with Verizon. R.33; B1312. On January 6, Cox brought this action against T-Mobile as Sprint's successor, seeking a declaratory judgment that it was free to partner with Verizon. On January 20, Cox entered into an MVNO Agreement with Verizon. R.34. Days later, on February 1, T-Mobile filed counterclaims, alleging that Cox had breached the Settlement and seeking, among other things, an injunction. R.76. It also moved for expedited proceedings. B29.

F. The Court of Chancery's Ruling

The court held a five-day trial from August 16-20, 2021, during which it heard testimony from 23 witnesses and received 968 exhibits. R.6. Following post-trial briefing and argument, the court announced its decision on October 8, 2021.

The court began its analysis by rejecting Cox's argument that T-Mobile cannot enforce Section 9(e). It found that Section 18 of the Settlement specifies that the Settlement "shall inure to the benefit of the Parties as well as their respective successors and assigns." R.37-38. After considering Cox's prior statements,

including those in its Verified Complaint recognizing that T-Mobile was the successor-in-interest to Sprint's rights and obligations under the Settlement, the court held that T-Mobile was entitled to enforce the Settlement under the inurement clause. R.38. For "good measure," the court went on to address Cox's argument about Section 19, which requires consent for assignments. The court held that: (a) no assignment had occurred, since Sprint remained an existing entity post-merger; and (b) if there were a conflict between Section 18 and Section 19, extrinsic evidence supported T-Mobile's ability to enforce the Settlement. R.38-45.

The court then construed Section 9(e), noting the importance of its "placement within the broader Settlement Agreement" and Section 9's preamble identifying the "Preferred Provider commitment agreement" as additional settlement consideration. R.45. That made the court's "mandate to give [Section 9(e)'s] language effect…particularly acute." *Id.*

The court then found that Section 9(e) includes two promises. R.46. The first is an unambiguous, freestanding prohibition that "Cox cannot provide Wireless Mobile Service without entering into an MVNO agreement with Sprint." *Id.* The interpretation Cox offered—that it was free to partner with another MNO instead of Sprint—was inconsistent with Section 9(e)'s direction that "before" Cox provides such services it will enter into a definitive agreement with Sprint. *Id.* The court

added that its interpretation was the only reading that gives Section 9(e) "any significant meaning," and is thus consistent with its status as "one of four components of consideration Cox gave to Sprint in exchange for Sprint dropping its patent infringement suit." R.52.

The second promise is that, if Cox decides to become an MVNO, a definitive agreement with Sprint will include "certain terms" and the parties would "negotiate the remaining terms in good faith." R.46. The court added that, while Section 9(e) did not include a price term, that omission made sense. "As witnesses from both parties explained, it was not logical or desirable to set the MVNO price at the time of the Settlement." R.50; A412[TTr.135]; A817[TTr.1241]. That said, T-Mobile could not command any price; it was "still bounded by good faith." R.51-52 (also noting that T-Mobile could in good faith seek "slightly better than market pricing" after Cox gave it leverage in return "for freedom from patent infringement liability").

The court also addressed the parties' intent in considering the remedy for Cox's breach, and found that:

> ***[Cox] understood Section 9(e) to mean exactly how I have construed it today, at the time of contracting*** and when it decided to abandon the Sprint MVNO and pursue other options. Cox's legal team developed its litigation interpretation of Section 9(e) and took a gamble with its eyes wide open, modeling the cost of litigation and settlement. ***The equities of holding Cox to the bargain it knowingly and intentionally breached support specific performance.***

R.76-77 (emphases added). The court then enjoined Cox from "offering Wireless Mobile Service…by partnering with any mobile network operator other than T-Mobile to provide Wireless Mobile Service before entering into an MVNO agreement with T-Mobile." Br. at Ex. A (hereinafter "Jdgmt.") ¶4.

ARGUMENT

I. THE COURT OF CHANCERY APPROPRIATELY CONSTRUED SECTION 9(E) CONSISTENTLY WITH THE SETTLEMENT AS A WHOLE AND ITS COMMERCIAL CONTEXT.

A. Question Presented

Whether the Court of Chancery correctly interpreted Section 9(e)'s plain language—which expressly states that, "before" Cox begins providing Wireless Mobile Service, it "will enter into" an MVNO agreement with Sprint—to mean that "Cox cannot provide Wireless Mobile Service without entering into an MVNO agreement with Sprint." R.46.

B. Scope of Review

This Court "review[s] questions of law and interpret contracts *de novo*." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010). When contract interpretation "involves a review of the intent of the parties," it is reviewed "as a mixed question of law and fact" because "[d]etermining the intent of the parties is a question of fact." *Delaware Bay Surgical Servs., P.A. v. Swier*, 900 A.2d 646, 650 (Del. 2006). Factual findings are not disturbed unless "clearly erroneous," which is a highly "deferential" standard requiring the appellant to show both they are "clearly wrong and the doing of justice requires their overturn." *Bäcker v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 94 (Del. 2021); *see also Bank of N.Y. Mellon Tr. Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011) ("When there are two

permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

C. Merits of Argument

"[D]elaware courts interpreting a contract will give priority to the parties' intentions as reflected in the four corners of the agreement, construing the agreement as a whole and giving effect to all its provisions." *In re Viking Pump, Inc.*, 148 A.3d 633, 648 (Del. 2016) (quotations omitted).

"In giving sensible life to a real-world contract, courts must read the specific provisions of the contract in light of the entire contract…situated in the commercial context between the parties." *Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co.*, 166 A.3d 912, 913-914, 926-928, 932 (Del. 2017) (holding that one contractual requirement could not be read in a way to "largely render" a second requirement "meaningless," particularly where the second was part of the contract's "consideration").

1. The Court's Interpretation Reflects the Plain Language of Section 9(e)

The Court of Chancery's interpretation of Section 9(e) as prohibiting Cox from partnering with another MNO before entering into an agreement with T-Mobile, R.46-47, was correct. Indeed, it is the ***only*** interpretation consistent with Section 9(e)'s plain language:

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

A1221 (emphases added).

That language is unambiguous and straightforward: if Cox wants to start providing wireless mobile service, it "***will enter into***" a contract with a Sprint Affiliate "***before***" doing so. *Id.*. As the court explained, this meant that the moment the Settlement was executed, Cox was "immediately" subject to a "present obligation" to either refrain from providing such service or enter into a contract with a Sprint Affiliate. R.47. This is the only interpretation that gives meaning to the words "before" and "will enter into a definitive MVNO agreement."

Nevertheless, Cox urges this Court to find that Section 9(e) is merely "an agreement to negotiate terms for a future MVNO agreement in good faith before providing wireless mobile service." Br.6. In so arguing, Cox reads the words "before" and "will enter into a definitive MVNO agreement" out of Section 9(e). Specifically, Cox replaces its express obligation to "enter into" a contract "before" providing Wireless Mobile Service, with the lesser obligation to "negotiate in good faith" before providing such service. *Id.* This is impermissible. *See Rhone-Poulenc Basic Chems. Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992)

("Clear and unambiguous language…should be given its ordinary and usual meaning."); *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-397 (Del. 2010) ("we will give each provision and term effect"); *Osborn*, 991 A.2d at 1159 ("We will not read a contract to render a provision or term 'meaningless or illusory.'"). No reasonable party would understand a promise to "enter into" a contract "before" providing Wireless Mobile Service, to mean only "negotiate in good faith" before providing that service. *See Osborn*, 991 A.2d at 1159 ("[A] contract's construction should be that which would be understood by an objective, reasonable third party.").

The Court of Chancery correctly found that Section 9(e) does not merely reflect an aspiration that Cox could ignore if the parties did not reach agreement. R.46 (Cox's construction that it "is free to partner with a different MNO, is inconsistent with the plain use of the word 'before'"); R.52 ("Cox bargained for freedom from patent infringement liability and gave T-Mobile leverage" in exchange).

Section 9(e) thus stands in contrast to the contract provisions at issue in the decisions Cox cites, where a party had not committed to more than negotiating in good faith. In *Liquor Exchange, Inc. v. Tsaganos*, for example, the contract provided a tenant merely the "first ***chance and opportunity*** to rent" a new property in the mall

if "leasable space becomes available. 2004 WL 5383907, at *1 (Del. Ch. Nov. 16, 2004) (emphasis added). It did not state that the owner "will enter into" an agreement with that tenant. Similarly, *SIGA Techs., Inc. v. PharmAthene, Inc.* concerned an unsigned term-sheet setting forth the parties' "***inten[t] to 'establish a partnership***'" based on a future contract. 67 A.3d 330, 335-336 (Del. 2013) (emphasis added).

Cox likewise relies heavily on *Heritage Homes of De La Warr, Inc. v. Alexander*, inaccurately suggesting it involved a contract analogous to Section 9(e). 2005 WL 2173992 (Del. Ch. Sept. 1, 2005). But the *Heritage Homes* contract stated that one party "***shall*** build and construct" a home for another party "in accordance with non-existent construction plans," which would be provided at some "later time." *Id.* at *1, *3 n.18 (emphasis added). The court held the contract was unenforceable, not because it contemplated a future agreement, but because it affirmatively obligated a party to build a home "in accordance with non-existent construction plans." *Id.* at *3 & n.18. Without those plans, the court had neither a "reasonable standard for determining whether a breach [of those plans] has occurred" nor a "reasonably reliable method of calculating damages" for such a hypothetical breach. *Id.* The contract thus reflected "nothing more than a bare agreement to agree." *Id.* at *3.

By contrast, Section 9(e) (i) requires Cox to take ***no*** affirmative action, R.53, (ii) provides an easy standard to determine breach (whether Cox contracted with another provider), and (iii) details the appropriate remedy for such a breach, A1229 (under Section 30 of the Settlement, an injunction or specific performance).

2. The Court's Interpretation is Reinforced by the Commercial Context

The Court of Chancery's interpretation is the only reading consistent with the Settlement's commercial context. As reflected in Section 9's preamble, Section 9(e) was one of four elements of non-cash compensation to resolve a major patent infringement suit. A1220. The only way for Section 9(e) to provide meaningful consideration is to operate as an enforceable prohibition against Cox becoming an MVNO of another MNO before reaching agreement with Sprint. R.52.

Cox responds with two meritless arguments.

First, Cox argues that the court's reference to "meaningful consideration," R.52, somehow suggests that the court "substituted its view of what the parties should have agreed" to and "suffuse[d] 9(e) with sufficient value to support the court's own view of its importance." Br.25-26. But Cox conflates contractual "***meaning***" with "***monetary value***." *Id.* The court's statement does not reflect any effort to imbue 9(e) with "value," *id.*, a term the court ***never*** used. Rather, it reflects the long-established principle that courts should give each contractual term "effect,"

i.e., meaning. *Kuhn*, 990 A.2d at 396-397, which is particularly important when the term reflects "consideration." *Chicago Bridge*, 166 A.3d at 927, 932. As noted above, the court's interpretation is the ***only*** one that gives meaning to all of Section 9(e)'s terms.

Second, Cox misleadingly argues that "there is no evidence that [the parties] ever attributed any monetary value" to Section 9(e). Br.26. But as Cox admits, "[a]t the time of the [Settlement], Cox neither offered nor planned to offer wireless mobile services," Br.2, and Section 9(e) imposed no obligation on Cox to ***ever*** begin to do so, R.53. Thus, there was no way to assign a monetary value to an arrangement related to a service Cox might never offer.

That does not mean that the parties considered Section 9(e) unimportant. The unrebutted testimonial and documentary evidence confirms that Sprint considered Section 9(e) extremely important and would not have settled without it. For example, Sprint's then-CFO testified that Sprint would have "gone to trial" unless Cox agreed to give Sprint 36 months of "head start exclusivity." A818[TTr.1246]. Contemporaneous negotiation documents, including Sprint's "best and final" settlement demand, show the same thing. B364.

3. The Court's Interpretation Is Internally Consistent

The Court of Chancery's ruling that Section 9(e) "involves two promises" is also commercially "sensible" and internally consistent. R.46, 50. As the court explained, Section 9(e) contains both (a) an immediately "enforceable prohibition" against partnering with any MNO besides T-Mobile, and (b) a contingent agreement to "negotiate…in good faith" the remaining terms of an MVNO agreement if Cox decides to provide wireless service. R.46. This is the only interpretation that gives meaning to both the terms detailing the prohibition (*e.g.*, Cox "will enter into a definitive MVNO agreement" with T-Mobile "before" providing wireless mobile service), and the terms requiring good faith negotiations (*e.g.*, any definitive MVNO agreement will contain "mutually agreed upon" terms). A1221.

Contrary to Cox's assertions, the two promises are not contradictory. Rather, they are ***complementary*** and work together to give meaning to the whole agreement. The first reflects the commercial reality that, although Cox had no plans in 2017 to become an MVNO, Sprint expected that Cox would need to do so in the future (*e.g.*, to protect its core internet customer base). R.21; A500[TTr.369]. The first promise thus guaranteed Sprint a "36-month head-start" with Cox's future MVNO business once Cox decided to enter the market. B364.

The second promise reflects the commercial reality that the wireless industry is a constantly evolving one in which pricing rapidly changes. R.13; A412[TTr.135]; A817[TTr.1241]. Thus, negotiation on price would need to be deferred until Cox decided to become an MVNO. R.50 ("As witnesses from both parties explained, it was not logical or desirable to set the MVNO price at the time of the Settlement.").

Interpreting contracts in this manner is not novel. For example, the Third Circuit, applying Delaware law, reached the same conclusion in *Echols v. Pelullo*, 377 F.3d 272 (3d Cir. 2004). In *Echols*, a promoter paid a boxer $30,000 for the exclusive right to promote his fights, guaranteeing the boxer at least three fight offers each year. *Id.* at 273. The specific terms for those fights, including price, were left for future negotiations, enabling the parties to adjust things like price based on the boxer's success. Eventually, the boxer, wishing to work with another promoter, argued that he was not bound to exclusivity because the contract did not provide key terms for his future fights, including price. *Id.* at 274-75.

The Third Circuit found in favor of the promoter, holding that the "essential subject matter" of the contract was the boxer's agreement to fight exclusively in bouts secured by the promoter. 377 F.3d at 278. The contract established an exclusive relationship and "the price left indefinite was not the price of the exclusive

relationship, but the price of a transaction occurring within that relationship." *Id.* at 280. The court explained that the agreement was enforceable because it provided a basis to determine whether there was a breach, and if so, to fashion relief. *Id.* at 277; *see* Restatement (Second) of Contracts § 33(2). If the boxer agreed to participate in another promoter's fight, the court could find a breach of exclusivity and issue an injunction. *Echols*, 377 F.3d at 277. If the promoter failed to make the minimum number of offers, the boxer might be entitled to recission or damages. *Id.*

So too here. When Cox entered into an MVNO agreement with Verizon, it breached the Settlement. The court below remedied that breach with an injunction. Jdgmt.¶4. To be sure, Section 9(e) is not a "fully baked" exclusive supplier agreement, R.50, in the sense that Cox remained free to forgo entering the MVNO market altogether, R.53. But to enter that market, Cox needed to reach agreement with T-Mobile.

Further, the fact that Section 9(e) refers to "mutually agreed" upon terms in the eventual MVNO agreement, does not negate Cox's separate promise not to partner with anyone besides T-Mobile. Many courts have reached the same conclusion as the Third Circuit did in *Echols*. *See, e.g.*, *Juster Acq. Co. v. North Hudson Sewerage Auth.*, 2014 WL 268652, at *27 (D.N.J. Jan. 23, 2014) (enforcing "exclusivity provision" even though contract required the parties to "work diligently

and in good faith to conclude this financing"); *Teledyne Risi, Inc. v. Martin-Baker Aircraft Co.*, 2016 WL 8857029, at *4 (C.D. Cal. Feb. 2, 2016) (denying motion to dismiss where contract both provided exclusivity and obligated parties to "negotiate [an agreeable] price"); *Marcor Mgmt., Inc. v. IWT Corp.*, 1998 WL 809011, at *4 & 6 nn.15-16 (N.D.N.Y. Nov. 17, 1998) (enforcing "exclusive marketing rights" over future third-party contracts even though parties were required to "consult…as to the terms of [those] contract[s]").

4. Cox's Remaining Arguments Fail

a. Section 9(e) Is Not a Preliminary MVNO Agreement

Cox argues that Section 9(e)'s "first promise" is "unenforceable" because it "articulates no terms of the prospective [MVNO] agreement nor any guidance on what it would entail." Br.21. That argument misses the mark. As the court found, the first promise is *not* an agreement to reach an MVNO agreement in the future. R.50. It is a "prohibition" against Cox entering an MVNO Agreement with another MNO before entering into one with T-Mobile. R.46. There is no need to articulate any terms of a prospective MVNO agreement, because the prohibition provides a clear basis for "determining the existence of a breach" (*e.g.*, Cox entering into an agreement with Verizon) and an "appropriate remedy" (*e.g.*, an injunction). *Eagle Force Hldgs., LLC v. Campbell*, 187 A.3d 1209, 1232 (Del. 2018).

b. Delaware Courts Enforce Restrictive Covenants

Next, Cox argues that Section 9(e) was not intended as a restrictive covenant and that, even if it was, the Court of Chancery interpreted it too broadly. Cox is wrong on each argument.

Cox first asserts if the parties had intended Section 9(e) to include a restrictive covenant, they "could and would have said so." Br.23. But as the court held, that was precisely what the parties intended to do, and unambiguously did do, through Section 9(e). R.46 ("The plain language of this sentence is unambiguous: Cox cannot provide Wireless Mobile Service without entering into an MVNO agreement with Sprint."). Those findings are well supported by the evidence. *See supra* pp.6-10.

Contrary to Cox's argument that the court enforced Section 9(e) "too broadly," Br.24, the injunction at issue is well-tailored to the unambiguous contract language. *See Allied Cap. Corp. v. GC-Sun Hldgs., L.P.*, 910 A.2d 1020, 1024 (Del. Ch. 2006) ("Restrictive covenants are carefully negotiated and our law requires that their unambiguous terms be given effect."). For example, although Cox complains about being subject to a purported "perpetual" limitation, Br.24, the injunction only enjoins Cox from partnering with another MNO "***before***" entering into an MVNO agreement with T-Mobile. Jdgmt.¶4. What happens *after* that agreement is entered

into is controlled by the parties' existing contract and any future agreements they enter—not the court's injunction. Cox's complaints about supposedly uncertain geography and coverage areas are also misplaced. Trial evidence confirmed that T-Mobile's geography and coverage area is nationwide. B1290; A725-726[TTr.1017-1018].

c. Section 9(e)'s Obligations Are Express, Not Implied

Cox also argues that the Court of Chancery improperly inferred a contractual protection where the contract could have been drafted to provide one. But the court did not infer anything—it held that the "plain language" of Section 9(e) "unambiguous[ly]" prohibits Cox from entering into an MVNO agreement with another MNO before entering into one with T-Mobile. R.46; *see* R.66 ("Cox[] breach[ed]…its ***explicit*** promise in Section 9(e)" (emphasis added)).

That fact distinguishes the cases Cox cites. In *Julius v. Accurus Aerospace Corp.*, 2019 WL 5681610, at *15 (Del. Ch. Oct. 31, 2019), the court addressed a buyer's attempt to use a catchall provision about the truthfulness of the seller's representations to obtain an indemnification right not set forth in the agreement. Similarly, *Nationwide Emerging Managers, Inc. v. Northpointe Hldgs.*, 112 A.3d 878, 897 (Del. 2015), and *Allied Capital Corp.*, 910 A.2d at 1024, each concerned a plaintiff's attempt to use the covenant of good faith and fair dealing to imply a

contract term that was not part of an express term. Here, the court simply applied the express contract language.

5. The Court's Interpretation Is Supported By Extrinsic Evidence

While not necessary to affirm the decision below, the extrinsic evidence overwhelmingly supported the Court of Chancery's interpretation. *See, e.g.*, R.14-17 (citing many "[c]ontemporaneous documents reflect[ing] that at the time of contracting, Cox understood Section 9(e) to require it to partner with Sprint in order to offer wireless mobile service"). Although the court examined that evidence in the context of balancing the equities, its factual findings are directly transferrable if the Court finds Section 9(e) ambiguous. *See, e.g.*, *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 68 A.3d 1208, 1219 (Del. 2012) (using factual findings made to balance equities to assess parties' intent after finding contract term ambiguous).

Cox's does not address the substantial evidence of intent the court cited and instead argues that the court should have made a different finding based on a Cox proposal to move the phrase "on terms to be mutually agreed" to the first sentence of Section 9(e) and a Cox "comment bubble" in a draft of Section 9(e). That meager evidence does not outweigh the substantial evidence cited by the court, particularly given the testimony of Cox's own witness that both of the things it now relies on were in the context of trying to implement, but not change the deal Robbiati and

Bowser struck. A409[TTr.124]; A631[TTr.757]. In particular, as the court found, the comment bubble pertained solely to the "placement" of Section 9(e) in the Settlement; it "did not change [its] meaning." R.14; A412[TTr.135-136].[3]

[3] Cox's argument about the forthright negotiator principle is therefore inapplicable. It also fails because the principal only applies where, unlike here, an ambiguity "is not easily resolvable by extrinsic evidence." *U.S. West, Inc. v. Time Warner Inc.,* 1996 WL 307455, *10 (Del. Ch. June 6, 1996). Also, Sprint never understood these comments in the way Cox now characterizes them. A631[TTr.757-758]. If anything, the principle favors T-Mobile given the extensive negotiating history making clear Sprint understood Section 9(e) as restrictive. *See supra* pp.6-10.

II. THE COURT PROPERLY FOUND THAT T-MOBILE CAN ENFORCE SECTION 9(E).

A. Question Presented

Whether the Court of Chancery erred in finding that T-Mobile was Sprint's successor-in-interest for purposes of Section 9(e) based on, among other things, Cox's admissions that T-Mobile succeeded to Sprint's rights under the Settlement and the fact that no assignment occurred as a matter of law.

B. Scope of Review

The Court reviews findings of fact for clear error, deferring to the Court of Chancery unless its findings are both "clearly wrong and the doing of justice requires their overturn." *Bäcker*, 246 A.3d at 94-95. The Court "review[s] questions of law and interpret contracts de novo." *Osborn*, 991 A.2d at 1158.

C. Merits of Argument

1. Cox Admitted That, As Sprint's Successor, T-Mobile Has Sprint's Rights Under The Settlement.

The Court of Chancery's assessment of Cox's argument that T-Mobile cannot enforce the Settlement began with Cox's admissions and Section 18 of the Settlement, which provides that the Settlement "shall inure to the benefit of the Parties as well as their respective successors and assigns." R.37-38. As the court found, Cox repeatedly admitted both that T-Mobile is Sprint's successor-in-interest ***and*** stands in Sprint's shoes for purposes of Section 9(e). As examples, the court

cited Cox's Verified Complaint, which identifies T-Mobile as Sprint's successor in the caption and in paragraphs 3 and 15 of the complaint. R.38.

In its Opening Brief, Cox tries to recant these critical admissions, asserting that it merely admitted T-Mobile was Sprint's successor, not that T-Mobile could enforce the Settlement. Br.31 & n.10. That is not so. Paragraph 15 of Cox's Verified Complaint, which the court cited, admits that "T-Mobile is now the owner of Sprint ***and the successor-in-interest to Sprint's obligations under the Settlement Agreement***." B6. The complaint contains may other admissions to the same effect. *See, e.g.*, B17 (alleging Section 9(e) requires "Cox and ***T-Mobile***" to negotiate in good faith), B23 ("Section 9(e) provides that Cox and ***T-Mobile*** will enter into a definitive MVNO agreement 'on terms to be mutually agreed upon by the parties.'"). In fact, to backstop its argument that Section 9(e) was an unenforceable agreement-to-agree, Cox, as an alternative relief, sought a declaration Cox had complied with its obligations by negotiating with T-Mobile. B24.

"Voluntary and knowing concessions of fact made by a party," such as "statements contained in pleadings," are "conclusive and binding [] upon the party against whom they operate." *Merritt v. United Parcel Serv.*, 956 A.2d 1196, 1201-1202 (Del. 2008). Cox's statements are predicate factual matters upon which legal conclusions about the parties' entitlement to relief under the contract are based and

treated as judicial admissions. *See BE & K Eng'g Co. v. RockTenn CP, LLC*, 2014 WL 186835, at *12 (Del. Ch. Jan. 15, 2014) (statements concerning whether a contract governs the parties' relationship); *Schott Motorcycle Supply, Inc. v. Am. Honda Motor Co.*, 976 F.2d 58, 61 (1st Cir. 1992) (allegation in complaint that plaintiff was a party to the contract at issue was a judicial admission); *H.E. Contracting v. Franklin Pierce Coll.*, 360 F. Supp.2d 289, 293 (D.N.H. 2005) (allegation in complaint identifying the applicable contract between the parties was a judicial admission).

2. Section 19's Assignment Clause Does Not Apply

Although the court could have stopped at Cox's admissions, it went further. "[F]or good measure," it addressed Cox's argument that T-Mobile could not enforce the Settlement due to Section 19, which provides that the Settlement may not be assigned without consent. R.38; A1225-1226. The court properly rejected this argument, finding that the Sprint/T-Mobile merger did not result in an assignment by operation of law. R.40.

The court found that the transaction was a reverse triangular merger in which a T-Mobile subsidiary merged into Sprint, which survived as a wholly owned subsidiary of T-Mobile. R.40; *see Meso Scale*, 62 A.3d at 73 (describing similar transaction structure). The diagram in JX-957.0015 (B1339) shows T-Mobile's

post-merger corporate structure with Sprint as a surviving subsidiary, and Mike Katz testified that Sprint is "wholly owned by T-Mobile." A641[TTr.799]. Similarly, JX-154.0013-17 (B404-408) likewise depicts the various steps involved in the merger. *Compare Meso Scale*, 62 A.3d at 68-70 (showing similar series of transactions).

The court then held that reverse triangular mergers do not result in an assignment by operation of law. R.40. That holding is consistent with "[t]he vast majority of commentary" and long-standing Court of Chancery precedent holding that transactions "do not result in an assignment by operation of law of assets that began as property of the surviving entity and continued to be such after." *Meso Scale*, 62 A.3d at 82-83; *Lewis v. Ward*, 2003 WL 22461894, at *4 n.18 (Del. Ch. Oct. 29, 2003); *Baxter Pharm. Prods., Inc. v. ESI Lederle Inc.*, 1999 WL 160148, at *5 (Del. Ch. Mar. 11, 1999); *see also MTA Can. Royalty Corp. v. Compania Minera Pangea, S.V. de C.V.*, 2020 WL 5554161, at *3-5 (Del. Super. Sept. 16, 2020) ("A reverse triangular merger…would not have triggered the anti-assignment clause.").

Cox responds with two unavailing arguments.

First, Cox claims T-Mobile waived this argument by failing to introduce evidence that the transaction was a reverse triangular merger and by purportedly waiting to raise the issue until post-trial argument. Neither is true.

T-Mobile (and Cox) ***did*** introduce such evidence at trial—JX-154 jointly through the Pre-Trial Order, and JX-957 through the testimony of Mr. Katz. A641[TTr.800]. Mr. Katz also discussed the transaction diagram that the court cited in its Ruling during his direct examination. A641[TTr.799-800]. But even without his testimony, the documentary evidence would be a sufficient basis for the court's finding. *See, e.g.*, *Transcent Mgmt. Consulting, LLC v. Bouri*, 2018 WL 4293359, at *1 (Del. Ch. Sept. 10, 2018) (findings based on "trial exhibits").[4]

T-Mobile also raised this issue in its post-trial brief. Though it did not use the term "reverse triangular merger," the brief described the mechanics of the merger as just such a transaction and cited *Meso Scale* for the proposition that the merger did not work an assignment by operation of law. A959.

Cox cites no authority even suggesting that the court was required to find waiver under these circumstances, particularly where Cox first raised this issue in simultaneously-exchanged pre-trial briefing and T-Mobile responded at the first opportunity, through trial evidence and post-trial briefing and argument. The decisions Cox cites all are distinguishable because they concern a plaintiff's delay

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[4] As the court recognized, A641[TTr.799], it was also entitled to take judicial notice of JX-957, which is an SEC filing, *e.g.*, *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 170 (Del. 2006). Moreover, this Court can take judicial notice of that document. *E.g.*, *DFC Glob. Corp. v. Muirfield Value P'rs, LP*, 172 A.3d 346, 351 n.7 (Del. 2017).

in raising an issue until post-trial briefing that deprived the defendant a reasonable opportunity to respond at trial. *See, e.g.*, *In re Genelux Corp.*, 126 A.3d 644, 672 (Del. Ch. 2015), *vacated in part by Genelux Corp. v. Roeder*, 143 A.3d 20 (Del. 2016); *Barrett v. American Country Hldgs, Inc.*, 951 A.2d 735, 745 (Del. Ch. 2008). Here, Cox waited to introduce this issue until its pre-trial brief, and T-Mobile responded at the next opportunity.[5]

Second, Cox argues that even if the T-Mobile/Sprint transaction were a reverse triangular merger, T-Mobile's enforcement of Section 9(e)—rather than Sprint's—is "itself[] an unauthorized assignment." Br.34. This argument defies logic. Because of its structure, the merger did not implicate Section 19. *See Meso Scale*, 62 A.3d at 82. Cox cites no authority holding that a parent corporation's enforcement of its subsidiary's contractual rights constitutes an assignment. To the contrary, *Tenneco Automotive Inc. v. El Paso Corp.*, which Cox references, explains

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[5] Moreover, waiver findings are discretionary, *see Alexander v. Cahill*, 829 A.2d 117, 128-129 (Del. 2003), and Cox cites no decision holding that a trial court abused its discretion by declining to find waiver. The only decisions Cox cites are those in which a trial court exercised its discretion to find waiver in far different circumstances. *Compare Emerald P'rs v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003) (plaintiff raised new theory of liability after 15 years of litigation, an appeal, a remand, and post-trial briefing following remand); *Zaman v. Amedeo Hldgs., Inc.*, 2008 WL 2168397, at *16 (Del. Ch. May 23, 2008) (alternate theory of liability raised in post-trial briefs).

that an inurement clause like Section 18 permits a successor to assert the rights of the predecessor company. 2002 WL 453930, at *3 (Del. Ch. Mar. 20, 2002).

Cox's objections also fail because Section 9(e) obligated Cox to enter a definitive MVNO agreement with a Sprint "Affiliate," A1221, and the Settlement defined an Affiliate as an entity with "direct[] or indirect[] control" over Sprint, "whether now or in the future." A1209-1210. As Cox recognized, T-Mobile is unquestionably Sprint's Affiliate. B6 ("T-Mobile is now the owner of Sprint"); A641[TTr.799-800].

3. The Court Appropriately Resolved Any Conflict Between Sections 18 And 19

As the Court of Chancery held, even if the merger caused an assignment by operation of law, T-Mobile would still have the right to enforce the Settlement. R.41. In that counter-factual world, there would be a conflict between Section 18, which provides for the inurement of rights to both "successors" and "assigns," and Section 19, which bars assignments without consent. A1225-1226.[6]

[6] Cox's citation to *MTA* and suggestion that the Court resolve this conflict by counter-textually narrowing Section 18 "to extend only to successors who ***validly*** succeed…under the anti-assignment clause" is not well-taken. *MTA* involved a successor clause that was explicitly subordinated to the anti-assignment clause, justifying that result. 2020 WL 5554161, at *2 ("Subject to the preceding sentence, this Agreement will…inure to the benefit of, and be enforceable by, the parties and their respective successors and assigns.").

Where there is conflict between two contractual provisions, courts look to the extrinsic evidence of the parties' intent. Extrinsic evidence comes in many forms, including "overt statements and acts of the parties, the business context, prior dealings between the parties, and business custom and usage in the industry." *United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 834-835 (Del. Ch. 2007). It also includes evidence of the parties' course of dealing or performance. *See GMG Cap. Invs., LLC v. Athenian Venture P'rs I, L.P.*, 36 A.3d 776, 783-784 (Del. 2012) (remanding for consideration of extrinsic evidence, including parties' "course of dealing"); *In re Mobilactive Media, LLC*, 2013 WL 297950, at *16 (Del. Ch. Jan. 25, 2013) (course of performance has been described as "the most persuasive evidence of the meaning of the parties' agreement").

As the court correctly held, the extrinsic evidence here was "clear" that after the merger, "Cox believed Sprint's rights under Section 9(e) passed to T-Mobile." R.42. Cox admitted as much in the Verified Complaint. *See supra* p. 34. Also, Cox executives recognized this reality in internal meetings and in lawyer-drafted letters to T-Mobile. R.42-44 (citing, *e.g.*, B1273 ("We do believe that the settlement agreement we have with Sprint will transfer to TMO."); B1299 ("It is Cox's view that Section 9(e) requires Cox and T-Mobile to conduct business discussions in good

faith…"); B1310 ("Cox has met the requirements of the Settlement Agreement" by negotiating with T-Mobile in good faith)).

Without any response, Cox argues that the court should have ignored all of this evidence because it post-dated the Settlement. According to Cox, the only extrinsic evidence that can be considered in connection with an assignment clause is evidence created at contract formation. But none of the cases Cox cites rejected extrinsic evidence on that basis. *See Star Cellular Tel. Co., Inc. v. Baton Rouge CGSA, Inc.*, 1993 WL 294847, at *7 (Del. Ch. Aug. 2, 1993) (evidence not considered because although it "may evidence what the parties to the Merger contemplated," it did not "not shed light upon what the parties to the" agreement at issue (who were not parties to the merger) intended seven years earlier); *ClubCorp, Inc. v. Pinehurst, LLC*, 2011 WL 5554944, at *9 (Del. Ch. Nov. 15, 2011) (stating only that the court would "prefer…to consider" extrinsic evidence "pertaining to, or []the context of, the contract's formation"). Moreover, there is no reason course of conduct evidence should be accorded less weight when applied to assignment clauses than other clauses.

In any case, Cox fares no better if the court ignored extrinsic evidence and went to *Star Cellular*'s framework of last resort in which courts presume parties did not intend to prohibit a rights transfer if "performance by the original contracting

party is not a material condition and the transfer itself creates no unreasonable risks for the other" party. 1993 WL 294847, at *8. The evidence favored T-Mobile on both elements. For example, Cox considered Sprint a "no go" because of its poor network, which Cox modeled as impairing Cox's growth by more than $300 million over ten years. R.16, 64. Cox conceded that T-Mobile's network eliminated that $300-million drag, A496[TTr.353-354], and that its network was "good enough," B1297. The court rejected Cox's argument that T-Mobile was hostile to cable companies in part because of record evidence confirming T-Mobile was eager to win Cox's business, even to the point of bidding against itself multiple times. R.74-75. While some lower-level employees felt differently, "Cox leadership ***wanted*** to partner with T-Mobile." R.75.

III. THE COURT OF CHANCERY APPROPRIATELY ISSUED AN INJUNCTION.

A. Question Presented

Whether the Court of Chancery abused its discretion by (i) rejecting Cox's laches defense where T-Mobile filed its claims days after Cox's breach, sought an injunction, and moved for expedited proceedings; or (ii) balancing the equities to prevent Cox from continuing to "knowingly and intentionally" breach Section 9(e) and irreparably harming T-Mobile by bestowing a competitive advantage on T-Mobile's competitor where the only harm to Cox is the potential loss of an investment made mostly after the litigation began.

B. Scope of Review

This Court reviews awards of injunctive relief and specific performance for abuse of discretion. *See Osborn*, 991 A.2d at 1158. Accordingly, the Court's function "is not to substitute [its] judgment for the trial court's," but to assess whether "the judgment reached was directed by conscience and reason, as opposed to capricious or arbitrary action." *North River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 381-382 (Del. 2014). The Court defers to "factual findings 'unless they are clearly wrong and the doing of justice requires their overturn.'" *Bäcker*, 246 A.3d at 94-95.

C. Merits of Argument

1. The Court Appropriately Rejected Cox's Laches Defense.

The Court of Chancery did not abuse its discretion by rejecting Cox's laches defense, which required Cox to prove that: (a) T-Mobile waited an unreasonable length of time before bringing suit; and (b) the delay unfairly prejudiced Cox. See *Hudak v. Procek*, 806 A.2d 140, 153 (Del. 2002). Cox did neither.

"Cox's argument that T-Mobile dragged its feet in negotiations and in bringing its counterclaims to delay Cox's launch is unsupported in the record." R.76. For example, T-Mobile filed its counterclaims just days "after Cox breached [Section 9(e)] by signing an agreement" with Verizon. *Id.* T-Mobile also simultaneously moved for expedited proceedings, which Cox had not done. B29.

This case is nothing like the cases Cox cites. *Compare Whittington v. Dragon Gp.*, 991 A.2d 1, 7-8 (Del. 2009) ("An unreasonable delay can range from as long as several years to as little as one month."); *AQSR India Priv., Ltd. v. Bureau Veritas Hldgs., Inc.*, 2009 WL 1707910, at *10 (Del. Ch. June 16, 2009) (finding laches where plaintiff took a "languid, nap-filled approach" to filing suit, waiting nearly ten months to file suit and made "no effort to expedite the proceedings").

Recognizing the absurdity of a laches argument based on such a short period of time, Cox attempts to start the clock much earlier, arguing that its issuance of an

RFP in April 2020 was a breach under T-Mobile's interpretation of Section 9(e). That is incorrect. Cox still could have honored its promise by partnering with T-Mobile or not offering wireless mobile service at all. And the same is true of Cox's decision in October 2020 to narrow the field and negotiate with Verizon alone. If those negotiations had not resulted in an agreement, there would have been no breach.

Simply put, T-Mobile had no obligation to rush to court at the first sign Cox might breach. As the cases Cox cites make clear, that is so even if T-Mobile could have claimed an anticipatory breach. *See Meso Scale*, 62 A.3d at 79 (while injured party has the option to treat repudiation as a breach or await performance, the choice "should not work prejudice to the injured party in the calculation of the Statute of Limitations" (emphasis added) (quoting Restatement (First) of Contracts § 322 cmt. a (1932))); *Franconia Assocs. v. United States*, 536 U.S. 129, 144 (2002) ("[I]f the injured party…opts to await performance, 'the cause of action accrues…from the time fixed for performance rather than from the earlier date of repudiation.'").[7]

Also, Cox cannot reasonably complain of prejudice. T-Mobile reminded Cox at every turn that Section 9(e) prevented Cox from entering into an MVNO

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[7] This Court's laches analyses "traditionally have taken into account the legal statute of limitations when assessing whether the party unreasonably delayed in bringing suit." *Osborn,* 991 A.2d at 1162.

agreement with another partner. *E.g.*, B1292 (May 2020); A1682 (September 2020); A1689 (October 2020). As the court found, Cox made the decision to contract with Verizon and to spend money preparing to launch the MVNO business with its eyes wide open to the risk of litigation. R.76-77. In fact, Cox began spending in October 2020—after having notice T-Mobile would enforce its rights if Cox breached—and continued spending after the litigation began in January 2021 and through trial in August 2021. Br.41 (Cox spent $99 million between October 2020 and August 2021). Also, while Cox has the right to stay out of the wireless mobile business altogether, if it chooses to partner with T-Mobile, Cox can recoup all but $12-15 million of its investment. R.76; A848[TTr.1367].

2. The Court Appropriately Balanced The Equities.

Cox fares no better in arguing that the court abused its discretion in balancing the equities. When the party seeking a permanent injunction "has both succeeded on the merits and shown a threat of irreparable harm," the balancing "assumes a different tenor" than on a motion for a preliminary injunction. *BE & K Eng'g*, 2014 WL 186835, at *23. In such situations, a court "*has no option* but to protect the [prevailing party's] established legal rights by the award of injunctive process, except in the rare case" when the prevailing party has engaged in inequitable conduct. *Id.* (quoting *Tull v. Turek*, 147 A.2d 658, 663 (Del. 1958)) (emphasis

added). The court found no inequitable conduct by T-Mobile. R.74. Other than its unavailing laches argument, Cox has failed to identify any purportedly inequitable conduct on appeal.

Cox's argument about the court's balancing mischaracterizes the evidence. In particular, Cox wrongly asserts that the only evidence of irreparable harm to T-Mobile was the parties' agreement in Section 30 of the Settlement that a breach would cause the non-breaching party irreparable harm and entitle it to an injunction and specific performance. As the court noted, that would suffice by itself. R.69-70 (citing *Williams Cos. v. Energy Transfer Equity, L.P.*, 2016 WL 3576682, at *2 (Del Ch. June 24, 2016)). There was more. For example, "synergies from contracted-for partnerships are unique and unquantifiable." R.73 (citing *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14 (Del. Ch. 2001) and *True N. Commc'ns Inc. v. Publicis S.A.*, 711 A.2d 34 (Del. Ch. 1997)). "By partnering with Verizon instead of T-Mobile, Cox shifted those benefits and their competitive advantage to Verizon." R.73; *see* R.72-73 (major partnerships have a "halo effect" on other businesses).

Cox tries to re-balance the scale with the possibility it will lose its investment in its MVNO business. But, as the court found, Cox made that investment with its "eyes wide open" to the likelihood of litigation. R.76-77. That Cox chose to invest millions in its MVNO business as part of that gamble is an "incremental sunk cost

from Cox's own breach," R.76, not a justification to allow Cox to continue breaching, *see In re BankAtlantic Bancorp, Inc. Litig.*, 39 A.3d 824, 845-847 (Del. Ch. 2012) (balance of harms "decidedly favor[ed]" injunction even though it could result in defendant's "failure as an entity," because "a party cannot 'abrogate a contract, unilaterally, merely upon a showing that it would be financially disadvantageous to perform it; were the rules otherwise, they would place in jeopardy all commercial contracts").

The remainder of Cox's argument is not about its purported harm from an injunction, but its disagreement with the court's factual finding that Cox understood at the time of contracting that Section 9(e) meant that if Cox wanted to become an MVNO, it had to reach an exclusive agreement with Sprint. As discussed above, *supra* pp.6-10, that finding is well supported by the evidence. Cox offers nothing to suggest that the court's findings were "clearly wrong and the doing of justice requires their overturn." *Bäcker*, 246 A.3d at 94-95.

On appeal, Cox raises the flawed argument that the court based its findings about Cox's contemporaneous understanding of Section 9(e) on Cox's privilege log and a privilege objection to an interrogatory. Not so. The court relied upon extensive evidence, including the parties' settlement negotiations in 2017, Delgado's testimony that Cox did not develop its current interpretation of Section 9(e) until

2019, and that Sprint had rejected that interpretation during settlement negotiations. R.10-17; A403[TTr.97-99], A405-406[TTr.108-110].

The court's citation to a privilege log is hardly significant, much less evidence of clear error. Although trial courts cannot draw *inferences* about the content of documents from privilege logs, they may make findings about what topics were under discussion based on the non-privileged statements in the logs themselves. *See, e.g.*, *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, 2020 WL 7024929, at *11 (Del. Ch. Nov. 30, 2020) (relying on privilege log to find that attorney and client were communicating about facts in December 2018 they later attempted to "downplay" in litigation), *aff'd*, 2021 WL 5832875 (Del. Dec. 8, 2021). That is all the Court of Chancery did.

CONCLUSION

For the foregoing reasons stated, T-Mobile respectfully requests that the Court affirm the judgment.

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2022, my firm served true and correct copies of the forgoing *Public Version of T-Mobile US, Inc.'s Appeal Answering Brief* upon the following counsel of record by File & Serve*Xpress*:

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