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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: January 19, 2022** No. 340, 2021 Court below: Court of Chancery of the State of Delaware C.A. No. 2021-0010-MTZ

REPLY BRIEF OF DEFENDANT-BELOW, APPELLANT COX COMMUNICATIONS, INC.

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PRELIMINARY STATEMENT

According to T-Mobile, in 2017, Cox agreed to (1) stay out of the lucrative wireless market forever unless it entered an exclusive MVNO agreement on whatever terms Sprint demanded, and (2) allow Sprint to freely assign that extraordinary right to anyone it wanted. T-Mobile's arguments are contrary to the contract and governing Delaware law. The first is unsupported by the text of the single sentence where the trial court purported to find it. The second is rooted in arguments never made, inadequate evidence, and misapplication of governing precedent. Independent of those errors, the resulting injunction was an abuse of discretion. T-Mobile's claim accrued in October 2020 when it accused Cox of "direct breach," and its failure to seek equitable relief with the required "alacrity" bars its claim. And the court's equitable balancing is heavily based on determinations about Cox's purported "knowledge" of its breach that are unsupported by evidence and inferences drawn improperly from Cox's privilege logs.

T-Mobile's answering brief cannot cure the court's errors. The judgment below must be reversed and the injunction lifted.

ARGUMENT

I. Section 9(e) Is A Single Obligation Requiring Cox To Negotiate With Sprint In Good Faith Before Entering The Wireless Market.

A. T-Mobile does not dispute that its "two promises" interpretation contradicts the plain text of 9(e).

Section 9(e) requires that before Cox can offer wireless services, it must do something. The parties dispute what that something is, but on its face 9(e) is a ***single*** obligation, requiring that Cox do only one thing—specifically, "enter into a definitive MVNO agreement with [Sprint] … on terms to be mutually agreed." Cox maintains that 9(e) requires Cox to negotiate in good faith to achieve mutually agreeable terms before entering the market. T-Mobile maintains that it prohibits market entry unless Cox enters a definitive MVNO agreement, regardless of its terms—which means that T-Mobile has the power to dictate those terms. Neither party has ever argued that "will enter into a definitive MVNO agreement with [Sprint] … on terms to be mutually agreed" somehow means ***both*** things.

Yet that is what the trial court concluded—and that is the root of its error. The disputed term appears in 9(e) only once. Under Delaware law, it cannot mean one thing for the first half of the sentence and the opposite thing for the second half. The plain text of the provision conclusively precludes the "two promises" interpretation on which the judgment and injunction rest.

T-Mobile ignores this point. It neither acknowledges Cox's textual argument nor offers any textual interpretation that justifies splitting a single obligation into two independent "promises." T-Mobile's response confirms that there is no way to read the text of 9(e) to include both a standalone prohibition on market entry and a separate obligation to merely negotiate in good faith. The court's bifurcation of 9(e) was unprecedented and erroneous.

B. When correctly read as a single obligation, 9(e) is unambiguously a Type II preliminary agreement.

T-Mobile argues that it would be unreasonable to "understand a promise to 'enter into' a contract 'before' providing Wireless Mobile Service, to mean only 'negotiate in good faith' before providing that service." Answering Brief ("AB") 21. But that is what Delaware law requires when parties agree to contract in the future. Accordingly, the trial court ***agreed with Cox*** that 9(e) is a "Type II" preliminary agreement under this Court's decision in *SIGA Technologies Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 335-36 (Del. 2013), such that Cox's "only obligation … [was] to present and discuss terms in good faith." Tr. 50:10-51:5.

That part of the court's analysis was correct. As the court explained, "'to 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 ….'" Tr. 50:2-7 (quoting *Heritage*

Homes of De La Warr, Inc. v. Alexander, 2005 WL 2173992, at *3 (Del. Ch. Sept. 1, 2005)). The few terms specified in 9(e) did not constitute "all [the] material and essential terms" of an MVNO agreement; in particular, 9(e) is "critically missing the material term of price." Tr. 50:4-5, 13-14. T-Mobile has not challenged that conclusion on appeal.[1]

Instead, T-Mobile falls back on *Echols v. Pelullo*, 377 F.3d 272 (3d Cir. 2004), a Third Circuit decision never adopted by any Delaware court, which T-Mobile cited below to argue that, notwithstanding the absence of critical terms, 9(e), is an enforceable "exclusive supply agreement." A953. The court rightly concluded that, unlike the agreement in *Echols*, 9(e) is not a "fully baked exclusive supplier agreement" but merely a promise to negotiate a *future* exclusivity agreement "on terms to be mutually agreed." Tr. 50:11-51:5. *Echols* is inapposite here.

In short, 9(e)'s text includes a single obligation, not two. The court correctly determined that under Delaware law, that obligation is an agreement to agree in the

[1] T-Mobile could have cross-appealed that part of the ruling, but chose not to. To the extent T-Mobile's effort (at AB21-23) to distinguish *SIGA Technologies*, *Heritage Homes*, and *Liquor Exchange, Inc. v. Tsaganos*, 2004 WL 5383907 (Del. Ch. Nov. 16, 2004)—the cases on which the Court of Chancery relied in finding that the "second promise" is a Type II preliminary agreement—seeks to undermine the decision T-Mobile wants affirmed, it is both pointless and improper.

future requiring only that the parties negotiate terms in good faith. When 9(e) is correctly understood as a single obligation, there is no basis for the court's ruling. The judgment must be reversed, and the injunction vacated.

C. The court's "two promises" interpretation violated multiple other canons of Delaware contract law.

The trial court's finding of an independent "first promise" prohibiting Cox from offering wireless services before executing a definitive agreement with T-Mobile is also wrong for other reasons. *See* Opening Brief ("OB") 21-26.

First, by carving out a "first promise" requiring that before Cox begins providing wireless mobile services, it must enter a definitive MVNO agreement with Sprint—full stop—the court improperly read the "on terms to be mutually agreed" proviso out of the sentence. *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010) ("we will give each provision and term effect"). In any event, separating the first half of 9(e) from the rest of the provision does not help T-Mobile: a promise to enter into a future agreement stripped of all its details is not somehow more enforceable than one that includes a few terms and an agreement to mutually agree on the rest. OB21-22.

In addition, carving a standalone "first promise" out of half a sentence violates the interpretive principle that "single clauses cannot be construed by taking them out

of their context and giving them an interpretation apart from the contract of which they are a part." *USA Cable v. World Wrestling Fed'n Ent., Inc.*, 2000 WL 875682, at *8 (Del. Ch. June 27, 2000) (quotations and citation omitted). By splitting part of one sentence into a separate obligation, the court improperly assigned meaning to a single clause separate from the meaning of the full sentence and provision in which it appears. *See, e.g.*, *Brinckerhoff v. Enbridge Energy Co.*, 159 A.3d 242, 258 (Del. 2017) (interpreting specific contract language "in the context of [the contract] as a whole").

T-Mobile offers no explanation for how 9(e) can be interpreted ***as a whole*** to include a standalone "first promise." None of the cases it relies on performs a similar dissection of a single sentence. To the contrary, in *Eagle Force Holdings, LLC v. Campbell* (which did not involve an agreement to agree but a contract-formation dispute, and so is inapposite here), the court looked to the entire agreement and confirmed that "***all*** essential or material terms must be agreed upon before a court can find that the parties intended to be bound by it and, thus, enforce an agreement as a binding contract." 187 A.3d 1209, 1230 (Del. 2018) (emphasis added).

Second, the trial court's construction of 9(e) to include a freestanding "prohibitory promise" wrongly renders the provision a restrictive covenant that the court then improperly construed broadly as a perpetual, geographically unrestricted

prohibition. T-Mobile's claim that the "first promise" is proper fails to consider that (i) an interpretation prohibiting Cox from offering wireless mobile services with anyone but Sprint ***forever*** is flatly inconsistent with parts of 9(e) permitting Cox to escape any exclusivity agreement with T-Mobile after 36 months; and (ii) the coverage area of the Sprint Network at the time of contracting was significantly smaller than the coverage area of the T-Mobile today (A820-21 (1256:5-1257:3), AB30), meaning the original agreement was more geographically limited than the court's interpretation requires.

Third, the prohibitory "first promise" is a counter-textual product of the court's own belief about what 9(e) ***should*** have said to provide Sprint with "meaningful consideration" for settling its patent litigation with Cox. Tr. 52:21-24. This was clear error. It is bedrock law that "Delaware follows the well-established principle that in construing a contract a court cannot in effect rewrite it" merely because a party made a bad bargain. *Gertrude L.Q. v. Stephen P.Q.*, 466 A.2d 1213, 1217 (Del. 1983).

Unable to refute this principle, T-Mobile argues that Cox's position somehow "conflates contractual 'meaning' with 'monetary value,'" and that "the court's statement does not reflect any effort to imbue 9(e) with 'value,' a term the court never used." AB23 (emphasis omitted). This is, at best, misdirection. The court

explained that "through the Settlement Agreement, Cox was to give Sprint meaningful consideration in exchange for" the litigation settlement, that an interpretation creating a "prohibitory promise" was "the only one that gives Section 9(e) any significant meaning," and that without it, "Section 9(e) would be nearly worthless to Sprint." Tr. 7:2-5, 52:11-16. It was the apparent "worthlessness" to Sprint of the provision the parties actually drafted that led the court to create the wholly nontextual "prohibitory promise" and thereby provide "meaningful consideration" to Sprint. *Id*.

T-Mobile is really arguing that without the phantom "prohibitory promise," 9(e) is somehow meaningless or vitiates the parties' bargain. AB23-24 (citing *Kuhn Const.*, 990 A.2d at 396-97 and *Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co.*, 166 A.3d 912, 927, 932 (Del. 2017)). But that is wrong: as Cox has explained—without rebuttal—an agreement to negotiate in good faith has value under Delaware law. OB25 (citing *SIGA Techs.*). Indeed, Cox's agreement not to enter the wireless market without first negotiating with Sprint had particular value for Sprint, which was last in wireless market share and had an inferior network to other potential partners. OB25-26; *see* A523 (461:15-462:2), A820-21 (1256:5-1257:3).

Unable to muster any textual defense, T-Mobile repeats the court's error, arguing that because 9(e) was "extremely important" to Sprint it simply ***must*** be more than a commitment to negotiate. AB24. But 9(e) must be interpreted based on what it says, not what T-Mobile or the court thinks it should have said. And the text of 9(e) includes no separate "prohibitory promise" independent of what the court correctly identified as a promise of future good-faith negotiations.

D. The extrinsic evidence, if relevant, supports Cox's interpretation.

Cox's opening brief pointed to extensive contemporaneous evidence supporting the conclusion that 9(e) is an agreement to agree in the future. T-Mobile has not undermined that conclusion.

The strongest contemporaneous evidence of the parties' intent is (1) Cox's insistence that the mutual-agreement proviso be moved from the second sentence of 9(e) to the first, where it directly modifies the obligation to "enter into a definitive MVNO agreement," and (2) its simultaneous margin comment and email characterizing 9(e) as an agreement to agree. OB27-29. T-Mobile dismisses that evidence as "meager," but offers ***no*** explanation for the movement of the mutual-agreement proviso, although it is plainly relevant to interpreting the agreement. *See, e.g.*, *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 56 A.3d 1072, 1128-32 (Del. Ch. 2012) (analyzing "drafting history" that reflects "key change" to an

initial draft). As for Cox's email and margin comment, T-Mobile simply reiterates the court's statement that they related only to the placement of the provision. But even if the ***purpose*** of the "agreement to agree" characterization related to the placement of the term, the ***fact*** of the characterization remains significant. It both reveals Cox's understanding of the provision as written and (because T-Mobile did not object) demonstrates T-Mobile's, too. *See* OB28-29. That evidence suggests that ***both*** parties understood (or should have understood) that 9(e) was an agreement to agree in the future.

Finally, T-Mobile points to the court's statement citing "[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." AB31 (quoting Tr. 14-17). T-Mobile does not cite any such "contemporaneous documents," however, because (other than Cox's December 4 edits, email, and margin comment) there are none. As Cox has explained, the court's "contemporaneous documents" were either generated years after the Settlement Agreement, do not describe 9(e) as anything resembling the "prohibitory promise" crafted by the court, or both. *See* OB44-46.

The factual evidence recited in T-Mobile's brief at 6-10 does not change that result. Both T-Mobile and the court assert that Sprint's rejection of an early Cox

proposal similar to Cox's current interpretation of 9(e) forecloses Cox's interpretation. AB6; Tr. 11:6. But they fail to acknowledge that Sprint also made proposals similar to ***its*** current interpretation, which ***Cox*** rejected. *See, e.g.*, AR1 (Sprint November 16 offer); B362 (Sprint November 22 offer). For example, Sprint's "best and final offer," on which both the court and T-Mobile heavily rely (AB6 (quoting Tr. 11 and B362)) was very similar to the position T-Mobile now takes—but Cox did not accept it. Instead, on December 4, Cox modified Sprint's proposal by moving the mutual-agreement proviso to its current location and advised Sprint twice that Cox viewed the provision as an agreement to agree. A1178, A1190-1191. Neither T-Mobile nor the court explains why Sprint's rejected offers are better evidence of the meaning of 9(e) than the provision's text and Cox's contemporaneous characterization of it.

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

Eager to prove that it acquired Sprint in a reverse triangular merger to avoid Section 19's bar on assignments by operation of law, T-Mobile unwittingly admits that that it lacks standing to enforce 9(e). It is undisputed that there was no voluntary assignment of Sprint's rights. If (as T-Mobile now claims) there was also no assignment by operation of law, then T-Mobile never succeeded to Sprint's rights at all and cannot enforce them.

A. Cox's pleadings did not discharge T-Mobile's burden to prove standing to assert Sprint's rights.

T-Mobile attempts to avoid its standing conundrum by claiming that allegations in Cox's Verified Complaint are somehow "critical admissions" that absolve T-Mobile of its burden to prove standing. AB34; *contra In re WeWork Litig.*, 2020 WL 7343021, at *5 (Del. Ch. Dec. 14, 2020) (plaintiff bears burden to prove standing). Not so. General references to T-Mobile as Sprint's successor-in-interest are not admissions that T-Mobile acquired specific rights to enforce 9(e) for purposes of the anti-assignment clause, which expressly forbids assignment by operation of law. OB31-32. The distinction that T-Mobile and the court miss is the difference between being a successor under section 18 and acquiring rights to enforce the agreement under section 19. There is no debate that T-Mobile merged

with Sprint. But Cox never alleged that T-Mobile acquired Sprint's rights under Section 19 and could enforce 9(e). Thus, the Verified Complaint ultimately says nothing about T-Mobile's ability to enforce 9(e)—a standing issue that is purely a question of law. *See AT&T Corp. v. Lillis*, 953 A.2d 241, 257 (Del. 2008) ("judicial admissions apply only to admissions of fact, not to theories of law, such as contract interpretation.") (quotations omitted).[2]

B. T-Mobile lacks standing to enforce the Settlement Agreement.

Once the phantom "admissions" are dispensed with, T-Mobile claims that it acquired Sprint in a "reverse-triangular merger" that "did not result in an assignment by operation of law" for purposes of the anti-assignment clause. OB35. As Cox already explained, that argument—never raised until post-trial argument—is both waived and unsupported by evidence sufficient to carry T-Mobile's burden of proof.

[2] The cases cited by T-Mobile involved factual admissions inconsistent with the party's subsequent arguments, *see, Merritt v. United Parcel Serv.*, 956 A.2d 1196, 1201-02 (Del. 2008) (admission that plaintiff's injury was "on-going"), or admissions about the effectiveness of agreements to which the pleader was itself a party, *see BE & K Eng'g Co., LLC v. RockTenn CP, LLC*, 2014 WL 186835, at *12 (Del. Ch. Jan. 15, 2014) (admission in separate litigation that agreement was in effect), *Schott Motorcycle Supply, Inc. v. Am. Honda Motor Co.*, 976 F.2d 58, 61 (1st Cir. 1992) (admission that agreement was in effect, where plaintiff later argued it had been revoked), *H.E. Contracting v. Franklin Pierce Coll.*, 360 F. Supp. 2d 289, 293 (D.N.H. 2005) (admission that contract controlled). None of these cases involved speculative statements about the legal effect of an agreement between third parties.

OB33-34. Although T-Mobile claims it raised the argument at trial and in its post-trial brief, it concedes it "did not use the term 'reverse triangular merger.'" AB37.

In any event, even if T-Mobile had carried its burden, it would not solve T-Mobile's standing problem. T-Mobile needs the transaction to be a reverse-triangular merger to avoid Section 19's prohibition on assignments "by operation of law," which require consent. But T-Mobile cannot have it both ways. In fact, T-Mobile cannot have it ***either*** way. If the transaction was a reverse triangular merger, then T-Mobile never acquired Sprint's rights at all and lacks standing to enforce them. And if the transaction was ***not*** a reverse triangular merger (or T-Mobile failed to prove that it was), then the bar on assignments by operation of law applies and T-Mobile lacks standing to enforce Sprint's rights. Either way, T-Mobile—as opposed to Sprint, which purportedly survives and could have brought suit—lacks standing to enforce 9(e).

Caught on the horns of this dilemma, T-Mobile retreats to Section 18's inurement provision, arguing that it is Sprint's successor in interest and as such can "assert the rights of the predecessor company." AB38-39. But if Sprint survived and T-Mobile did not obtain its rights by operation of law (as would be the case in a reverse triangular merger), then Sprint is not a "predecessor company" and T-Mobile is not Sprint's "successor" for purposes of the Settlement Agreement. And if T-

Mobile is neither an "assignee" nor a "successor," it is not entitled to the benefit of the inurement clause, which is its only basis for asserting Sprint's rights.[3]

Finally, T-Mobile's status as Sprint's parent company and "Affiliate" does not confer standing. AB39. Even if Section 9(e) obligated Cox to enter a definitive MVNO agreement with a Sprint "Affiliate," that is separate from the question of standing to enforce the agreement. It is well-established that parent companies and affiliates lack standing to sue on behalf of their subsidiaries or affiliates. *See Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1080 n.13 (Del. 2011). In all cases, T-Mobile's suit against Cox fails for lack of standing and must be dismissed.

C. To the extent Sections 18 and 19 conflict, the court inappropriately resolved the discrepancy.

T-Mobile's claim that it did not acquire Sprint's rights "by operation of law" deprives T-Mobile of "successor" standing and thus eliminates any need to resolve apparent conflicts between Sections 18 and 19. Because the court did so anyway, however, and because T-Mobile defended the court's action, we briefly address its errors here.

[3] This unexplored inconsistency highlights the harm caused by T-Mobile waiting to raise the reverse triangular merger argument until the last possible opportunity.

First, the court erred by relying on extrinsic evidence to find that T-Mobile had standing. In the two pages it devoted to standing (A958-60), T-Mobile never used the term "extrinsic evidence" or argued that extrinsic evidence supported its resolution of the conflict between sections 18 and 19. Because this argument was not made below, the court committed legal error as Cox was deprived of its due process right to challenge it. *See Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acq., LLC*, 202 A.3d 482, 502 n.77 (Del. 2019) ("an issue not raised in post-trial briefing has been waived ….").

Second, the court erred by relying on the evidence from after the time of contracting. T-Mobile's attempt to evade longstanding Delaware law on this issue by quoting it selectively is unavailing. *Star Cellular Tel. Co., Inc. v. Baton Rouge CGSA, Inc.* unequivocally held that where "a disputed writing is not plain on its face, the Court may consider extrinsic evidence, ***but only if it relates to the circumstances surrounding the drafting of the contract at issue***." 1993 WL 294847, at *7 (Del. Ch. Aug. 2, 1993) (emphasis added), *aff'd*, 647 A.2d 382 (Del. 1994). Likewise, in *ClubCorp, Inc. v. Pinehurst, LLC*, the court did not merely "prefer" time-of-contracting evidence; it declined to decide the case without a determination of the parties' "intent as reflected in … overt acts and statements pertaining to, or the context of, the contract's formation." 2011 WL 5554944, at *9 (Del. Ch. Nov. 15,

2011). These cases held that a review of extrinsic evidence is limited to the time of contracting.[4]

T-Mobile is left to argue that these controlling precedents are wrong, suggesting that "there is no reason course of conduct evidence should be accorded less weight" than time-of-contracting evidence "when applied to assignment clauses than other clauses." AB41. Not so. Once an acquiror begins acting on behalf of a target following a merger, counterparties like Cox have little choice but to engage with the acquiror. This particularly true here, given T-Mobile's post-merger representation to Cox that it was responding to the Cox RFP in place of Sprint. A422 (Tr. 176:5-8). The need to get on with business in 2020 says nothing about the parties' intentions in 2017.

Third, the court erred in ignoring the established analytical framework, which (absent evidence of the parties' contemporaneous intent) considers whether (1) "performance by the original contracting party is [] a material condition" of the

[4] The cases on which T-Mobile relies are not to the contrary, as they only examined extrinsic evidence from the time of contracting, s*ee United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 841-44 (Del. Ch. 2007) (extrinsic evidence from time of contracting showed defendant told plaintiff it viewed agreement as barring specific performance), or involve ongoing performance of contractual obligations, making post-contracting conduct relevant, *see, e.g.*, *GMG Cap. Invs., LLC v. Athenian Ventures Partners I, L.P.*, 36 A.3d 776, 783-84 (Del. 2012); *In re Mobilactive Media, LLC*, 2013 WL 297950, at *16 (Del. Ch. Jan. 25, 2013).

agreement; and (2) the assignment at issue poses unreasonable risk to the other contracting party. *Star Cellular*, 1993 WL 294847, at *8. Here, 9(e)'s identification of Sprint as Cox's potential exclusive counterparty was a material condition of the agreement. The scope of the services to be provided was specifically defined in terms of ***Sprint's*** network and was limited to ***Sprint's*** coverage areas. A1221. And allowing Sprint to freely assign its rights would have posed serious risks to Cox: if Sprint merged with an MNO hostile to MVNO arrangements (as T-Mobile was at the time, *see* A338), Cox would have been locked out of the wireless market forever.

The contrast with *Star Cellular* is striking. There, the merger "did not materially affect the Plaintiffs' position in" the parties' venture "or their rights under the Agreement" because "the defendants retained the same partner … in a different corporate form" and "made no material changes" to the venture's management, "practices or policies that altered the parties' bargain in any significant way." 1993 WL 294847, at *9-10. Here, the merger resulted in Cox being "effectively forced … to accept a new partner without [its] consent" (*id.* at *9)—a partner with a different management team, a documented history of hostility to MVNOs, little experience implementing them, and a completely different wireless network. *See* OB37-38. Whatever T-Mobile's protestations that it is a desirable MVNO partner today (AB42), that is not the scenario Cox faced during the RFP. T-Mobile's $90 million

higher proposal alone confirms this. And T-Mobile's arguments do not change the fact that substituting T-Mobile for Sprint results in a radical change from Cox's original bargain and puts Cox's MVNO ambitions at risk of failure. No reasonable party in Cox's position, when contemplating what the court (wrongly) determined was a perpetual, exclusive obligation to Sprint, would have allowed that perpetual obligation to be freely assigned to a then-unidentified party. Indeed, it is (at best) incongruous for T-Mobile to insist on an interpretation that both allows Cox to enter the market ***only with Sprint*** and obligates Cox to do so with a completely different company.

At a minimum, because the trial court did not perform the Star Cellular analysis, remand is necessary for the court to perform the analysis in the first instance.

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

Even if the court's other rulings were correct, reversal would be necessary because the court's injunctive remedy is marred by serious errors.

A. Because T-Mobile's breach claim accrued no later than October 2020, its request for an injunction is barred by laches.

T-Mobile does not dispute that if its breach claim accrued in October of 2020, it failed to act with the necessary "alacrity" to "seek[] a compulsory remedy." *AQSR India Private, Ltd. v. Bureau Veritas Hldgs., Inc.*, 2009 WL 1707910, at *10 (Del. Ch. June 16, 2009). The only issues remaining are when T-Mobile's claim accrued and whether T-Mobile's delay prejudiced Cox.

T-Mobile's claim accrued no later than October 14, 2020, when it asserted that Cox had committed a "direct breach" of 9(e) (A1691) and thus "objectively manifested an intent to treat" Cox's selection of Verizon "as a breach." *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62, 79 (Del. Ch. 2013). T-Mobile's response attempts to minimize its written allegation of "direct breach" by suggesting that if Cox's negotiations with Verizon "had not resulted in an agreement, there would have been no breach." AB45. But having asserted a "direct breach" in October 2020, T-Mobile cannot reverse course and choose a different breach theory in order to avoid laches.

As to prejudice, T-Mobile does not dispute that Cox invested heavily in its Verizon wireless venture after October 2020, or that Cox will lose the full investment if it chooses not to enter the wireless market—which it is contractually free to do. AB46. Instead, T-Mobile argues that Cox would have spent that money anyway, since Cox was on notice in October that "T-Mobile would enforce its rights if Cox breached" and still proceeded with Verizon. *Id*.

T-Mobile is wrong. The delay between Cox learning that it ***could*** be sued for "direct breach" and T-Mobile's suit materially prejudiced Cox. In October 2020, Cox had no binding commitment and could have exited the Verizon relationship costlessly. By the time T-Mobile sued, it was too late—Cox had invested considerable resources to negotiate a complex MVNO relationship with Verizon that required it to make investments approaching $100 million and had hired 100 employees for that venture. This is precisely the kind of prejudice that justifies a finding of laches. *See Whittington v. Dragon Grp., L.L.C.*, 2008 WL 4419075, at *8 (Del. Ch. Sept. 30, 2008).

B. The court's balancing of the equities is marred by serious factual errors.

Cox's opening brief detailed a series of factual errors that rendered the court's entry of a broad and perpetual injunction against Cox an abuse of discretion. T-Mobile's response does not salvage the court's errors.

First, T-Mobile argues that once it prevailed on the merits and demonstrated irreparable harm, injunctive relief was required unless Cox proved that T-Mobile "engaged in inequitable conduct." AB46 (quoting *BE & K Eng'g Co.*, 2014 WL 186835, at *23). That is not the law. *BE & K* is the only Chancery case to follow this rule since it was propounded in *Tull v. Turek* in 1958; the Delaware courts overwhelmingly perform the traditional balancing, even where both merits success and irreparable harm have been shown.[5] *See, e.g., N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 385-87 (Del. 2014); *Martin Marietta Materials*, 56 A.3d at 1144-47.

On the merits, Cox has demonstrated that any loss of "halo effect" or "synergies" that T-Mobile claimed it would receive from partnering with Cox are results not of Cox entering an agreement with Verizon but of Cox choosing ***not*** to partner with T-Mobile, which Cox was contractually free to do. Losses purportedly suffered by T-Mobile from that choice are not cognizable irreparable harm. *See* OB42-43. T-Mobile ignores this point.

[5] And for good reason: the rule announced in *Tull* was *dicta*, because there, "the correctness of the denial of injunctive relief ha[d] … become moot," because the covenant being enforced had expired. 147 A.2d 658, 663 (Del. 1958). This is presumably the reason it has almost never been followed.

T-Mobile also cannot defend the trial court's erroneous finding that in December 2017 Cox "understood Section 9(e) to mean exactly how I have construed it today." Tr. 76:18-19; *see also* Tr. 10:5-9, 14:15-18. The best evidence of Cox's December 2017 understanding is the email and margin note describing 9(e) as an "agreement to agree." *See supra* at Pt. I.D. T-Mobile ignores this and points to evidence recited at pages 6-10 of its brief as proof that the trial court's "finding is well supported by the evidence." AB48. It is not. Just as T-Mobile's evidence does not support the court's interpretation of 9(e) (*see supra* Pt. I.D), it is even less supportive of the court's finding about Cox's understanding of 9(e). Even if the Court were to conclude that Cox's December 4, 2017 margin comment and email are not dispositive of 9(e)'s meaning, they remain the best available evidence of Cox's contemporaneous ***belief*** about that meaning.

The rest of T-Mobile's evidence of Cox's contemporaneous belief consists mostly of evidence about ***Sprint's*** understanding, not Cox's. *See* AB7 (citing testimony of Sprint executive Robiatti); AB9 (citing internal Sprint presentation). The lone exception is an internal Cox financial presentation dated shortly after the Settlement Agreement that describes Sprint as a "Preferred Partner" if "Cox enters wireless market," but does not purport to define its legal scope or explain the

meaning of "Preferred Partner." A1501 (cited in AB9-10). It does not support the court's sweeping characterization of Cox's beliefs about its legal position.

All that remains is the court's determination that Cox developed its "litigation position" years later in consultation with counsel. *See* Tr. 17:17-19. That determination rests on two faulty premises: an improper inference about Cox's assertions of privilege and out-of-context testimony by a Cox lawyer.

First, T-Mobile does not dispute that the court looked to privilege claims to make its fact-finding. It argues only that the court did not draw "inferences" but only made "findings about what topics were under discussion." AB49. That is wrong. The court did not rely on the privilege claims merely to find that Cox obtained legal advice about the interpretation of 9(e), it used privilege claims to infer ***what that interpretation was***—namely, a "litigation interpretation of 9(e), that at most it requires Cox to negotiate in good faith." Tr. 17:9-11. That Cox obtained legal advice on this issue is properly determined from the log entries; the content of that advice is an impermissible inference. In any event, that improper inference about Cox's position in 2019 does not support any conclusion about what Cox's position was in 2017.

Similarly, the evidence T-Mobile describes as "damning"—a 2021 statement by Cox counsel Marcus Delgado indicating that Cox formed its litigation position

"in 2019 sometime"—does not prove whether or how Cox's litigation position differed from what Cox believed in December 2017. Certainly, it cannot support the court's decisive conclusion that Cox in December 2017 interpreted 9(e) "exactly" as the court interpreted it—particularly in light of contemporaneous written evidence to the contrary. Indeed, Mr. Delgado repeatedly testified that he did not recall Cox's December 2017 interpretation. A403 (97:9-15). Delgado also testified that his December 2017 email to Sprint describing 9(e) as an agreement to agree "was trying to convey that … [the] language was not a complete MVNO agreement, and it should be put in here as an agreement to agree later on an MVNO." A401 (89:2-18).

The court's finding that Cox knew in 2017 that 9(e) contained a perpetual and binding "prohibitory promise" was clearly erroneous. Because that finding infected all aspects of the court's balancing of the equities, the injunction must be lifted.

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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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2022, a copy of the foregoing *Public Version of Reply Brief of Defendant-Below, Appellant Cox Communications, Inc.* was served electronically upon the following counsel of record *via File & ServeXpress*:

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