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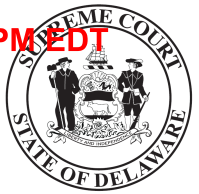

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALAN R. BELL, MICHAEL T. BOWERS, and OM PARKASH KALRA, *Plaintiffs Below/Appellants and Cross-Appellees* v. AT&T MOBILITY WIRELESS OPERATIONS HOLDINGS LLC; NEW CINGULAR WIRELESS PCS, LLC; and AT&T MOBILITY LLC, *Defendants Below/Appellees and Cross-Appellants.*	No. 343, 2022 Court Below: Court of Chancery of the State of Delaware Consol. C.A. No. 6886-VCL

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

NATURE OF THE PROCEEDINGS 1

SUMMARY OF THE ARGUMENT 2

STATEMENT OF FACTS 4

A. Formation of the Partnership 4

B. The Relevant Governing Documents 5

C. AT&T's Breaches of the Relevant Governing Documents 8

D. The Litigation 9

ARGUMENT 11

I. THE TRIAL COURT ERRED WHEN IT FAILED TO FIND THAT AT&T BREACHED THE GOVERNANCE PROVISION AND THE PROTECTED INFORMATION PROVISION OF THE PARTNERSHIP AGREEMENT 11

A. Question Presented 11

B. Scope of Review and Legal Standard 11

C. Merits of the Argument 11

1. There was no history of expansive delegations of authority to AT&T to manage the Partnership without regard to the Partnership Agreement. 12

2. The MNSA superseded all previous alleged delegations of authority. 18

3. The trial court wrongly subjected the MNSA to an analysis distorted by the 1995 resolution. 21

4. The trial court misinterpreted the Services and Authority Provisions of the MNSA. 26

5. The possibility of a derivative claim was illusory. 28

6. The trial court's failure to award the economic equivalent of Dissociation Remedy was both the natural consequence of its fallacious reasoning and error. 31

II. THE TRIAL COURT ERRED IN REFUSING TO AWARD RELIEF ON THE BASIS OF THE MNSA 32

A. Question Presented 32

B. Scope of Review and Legal Standard 32

C. Merits of the Argument 32

1. The trial court correctly found that the Partnership's operative reality included the right to receive revenue and pay expenses pursuant to the terms of the MNSA (inclusive of the 25% Premium and 10% Discount Provisions), but did not award the relief warranted by these findings. 32

2. The trial court erred in holding that Plaintiffs could not prove the value of the Premium and Discount Provisions. 35

3. The trial court made a finding regarding the value of the Premium and Discount but failed to apply it. 37

III. THE TRIAL COURT ERRED IN REFUSING TO SHIFT ATTORNEYS' FEES TO AT&T 39

A. Question Presented 39

B. Scope of Review and Legal Standard 39

C. Merits of the Argument 39

CONCLUSION 42

ORDERS OF JUDGMENT BEING APPEALED AND RATIONALE

Order Addressing the APR Plaintiffs' Exceptions
to the Special Discovery Master's Report (Oct. 4, 2018)..A

Memorandum Opinion Addressing Claims for Breach of the Partnership
Agreement Governing Salem Cellular Telephone (Sept. 28, 2021) ("Op.I") ....B

Order Denying Plaintiffs' Motion for Reargument (Oct. 15, 2021).........................C

Order Granting Claims for Breach of the Partnership Agreement
(Nov. 16, 2021) ....D

Memorandum Opinion Addressing Claims for Breach of Fiduciary Duty
in Connection with Freeze-Out of Minority Partners in
Salem Cellular Telephone Company (Mar. 9, 2022) ("Op.II")................................ E

Order Denying Motion for Attorneys Fees and Expenses (Aug. 23, 2022)............. F

Final Order and Judgment re: Salem Cellular Telephone Co. (Aug. 23, 2022).......G

TABLE OF AUTHORITIES

Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,
421 U.S. 240 (1975)....41

Americas Mining Corp. v. Theriault,
51 A.3d 1213 (Del. 2012)....32, 38

Brice v. Dep't of Corr.,
704 A.2d 1176 (Del. 1998)....41

Goldstein v. Denner,
2022 WL 1797224 (Del. Ch. Mar. 4, 2022)....30

Kane v. Burnett,
817 A.2d 804 (Del. 2003)....39

Levitt v. Bouvier,
287 A.2d 671 (Del. 1972)....11

Montgomery Cellular Holding Co., Inc. v. Dobler,
880 A.2d. 206 (Del. 2005)....41

Progressive Int'l Corp. v. E.I DuPont de Nemours & Co.,
2002 WL 1558382 (Del. Ch. July 9, 2002).... 20-21

Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund,
68 A.3d 665 (Del. 2013)....41

Shaw v. Elting,
157 A.3d 142 (Del. 2017)....41

Spencer v. Wal-Mart Stores E., LP,
930 A.2d. 881 (Del. 2007)....38

NATURE OF THE PROCEEDINGS

This matter comes before this Court on appeal from, *inter alia*, the Final Order and Judgment entered in Court of Chancery Cons. C.A. No. 6886-VCL. That consolidated case represents two of fifteen civil actions filed in the Court of Chancery which challenged freeze-out transactions involving thirteen partnerships.[1] On June 25, 2013, the fifteen cases were coordinated for purposes of pre-trial discovery under the caption *In re Cellular Telephone Partnership Litigation*, C.A. No. 6885-VCL, and the claims in the constituent actions were tried in a coordinated trial. The trial court entered two opinions addressing the substantive issues tried, the "Contract Ruling" (hereinafter "Op.I") and the "Fiduciary Duty Ruling" (hereinafter "Op.II"), Exhibits B and E, respectively.

On June 28, 2022, the Court of Chancery entered an Order Vacating Coordination of Actions. The Final Order and Judgment applying the rulings in Op.I and Op.II to the facts of Consol. C.A. No. 6886-VCL was entered on August 23, 2022 (Exhibit G hereto). This Appeal was filed on September 16, 2022.

[1] Certain of the plaintiffs in Ct. Ch. Cons. C.A. No. 6886-VCL are not represented by undersigned counsel, have settled their claims, and are not parties to this Appeal.

SUMMARY OF THE ARGUMENT

1. The trial court erred in holding that the Executive Committee delegated "expansive authority" to AT&T to manage the Partnership's business and, therefore, AT&T's "pervasive disregard" of the MNSA did not give rise to a material breach of the Governance Provision or the Protected Information Provision. According to the trial court, the grant of expansive authority arose from (i) an unwritten understanding; (ii) §4.8 of the Partnership Agreement; and (iii) a 1995 Resolution delegating to the majority partner "full, complete and exclusive authority to manage and control the business of the Partnership." However, these three bases do not sustain the trial court's rulings because (i) there is no written agreement as required by §4.4; (ii) the alleged agreement does not satisfy the requirements of the 1997 amendments to §4.8; and (iii) any pre-MNSA delegations of authority were negated by the MNSA integration clause. The trial court's holding fails to give effect to (i) the minority partners' history of resistance to the majority partner's *ultra vires* acts; (ii) the fact that the powers granted in the 1995 Resolution are exclusive to the majority partner; and (iii) the integration clause of the MNSA. Further, the derivative remedy posited by the trial court is both incomplete and illusory.

2. The trial court found the Partnership's operative reality included the MNSA; that the Partnership would have received more money if AT&T had complied with the MNSA Sharing Formula and Premium Provision; that the

Partnership was entitled to have its DCF calculated based on the MNSA; and that the Partnership was entitled to the value of the litigation asset arising from AT&T's past failures to comply with the MNSA. Nevertheless, the trial court failed to calculate or award the Partnership's DCF based on the MNSA; failed to calculate or award the litigation asset value of the claim for breach; and failed to explain its reasons for not doing so. This is an abuse of discretion.

3. The trial court found that "AT&T was the most obstructive litigant that this judge has ever seen, whether in private practice or on the bench." The trial court made findings of fact sufficient to establish AT&T's bad faith. Nevertheless, the trial court refused to award sanctions or shift fees. This is an abuse of discretion.

STATEMENT OF FACTS

A. Formation of the Partnership

In the 1980s the FCC sponsored lotteries for individual licenses to operate nonwireline cellular telephone systems in specific Metropolitan Statistical Areas ("MSAs").[2] To increase lottery participation and diminish the all-or-nothing nature of participant risk, the FCC permitted lottery participants to form lottery pools. The pool participants agreed in advance that, if any one of them won the lottery, then (i) all pool participants would form a general partnership governed by a pre-negotiated partnership agreement; (ii) the lottery winner would contribute the FCC license and own a majority general partner interest in the partnership; and (iii) the lottery losers would each contribute capital and own up to a 0.9999% minority general partner interest in the partnership.[3]

AT&T was not a participant in the Salem lottery pool.[4] Its predecessor (McCaw Communications) acquired its interest directly from the lottery winner and

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[2] *See* PTO at ¶¶4, 5 (A1330).

[3] *See Id.* at ¶¶20, 21 (A1342). *See also* A203 ("By virtue of being a party to the Settlement Agreement and the award of the authorization to the Lottery Winner, and pursuant to the Settlement Agreement, the parties hereto and the Lottery Winner became partners with respect to the Authorization and with respect to the intended construction and operation of the nonwireline cellular system (the 'Partnership'))."

[4] *See* A203 ("Jeanine Hochhalter ('Lottery Winner'), the predecessor in interest to McCaw Communications of Salem, Inc. ('McCaw'), was awarded the nonwireline cellular system construction permit ('Authorization') for the Market pursuant to a lottery held by the Federal Communications Commission ('FCC').").

adopted the pre-negotiated Partnership Agreement.[5] At all relevant times, AT&T operated that Partnership's system as an indivisible part of AT&T's unified unitary nationwide network. Nevertheless, AT&T accounted for the Partnerships' systems as though it were a stand-alone business. Op.I 42.

B. The Relevant Governing Documents

The Partnership Agreement stipulated that "complete and exclusive power to conduct the business affairs of the Partnership was delegated to the Executive Committee of the Partnership. *See* §4.3 (A208). The Salem Executive Committee consisted of three members, two selected by the majority partner and one selected by a "majority of the minority" partners acting alone. *Id.* The Partnership Agreement required that all assets of the Partnership be held in the name of the Partnership. *See* §3.1 (A206). Only Partners designated by the Executive Committee were vested with authority to bind the Partnership. *See* §4.9 (A211). No Partner was permitted to "assign, transfer, license, disclose, make available, use for personal gain, or otherwise dispose of . . . customer lists, proprietary information or other confidential information of the Partnership" without the prior written consent of the Executive Committee. *See* §10.2 (A215). To enforce compliance with these

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[5] At the time of formation, the majority partner owned 59.5972% of the Salem Partnership and each non-affiliate minority partner owned a .3424% interest. Thus, at inception the majority partner's interest was 174-times larger than the next largest partner interest. *See* A219-A221.

commitments, the Partners agreed that any Partner who committed a material breach of the Partnership Agreement would be required to sell its Ownership Interest for an aggregate amount equal to the balance of its capital account. *See* §§8.1, 8.2 (A213-A214).

In 1995, the Executive Committee adopted a resolution delegating authority to the Majority General Partner to manage and control the business of the Partnership. Op.I 99; A233-A237. As a part of the same resolution, the Executive Committee caused the Partnership to enter into a Cellular Agreement and a Switch Agreement governing operation of the Partnership by a majority partner affiliate. Op.I 17; A237. These were the first written agreements adopted by the Executive Committee regarding operations of the Partnership's Business.

The 1995 Resolution states that its grant of authority is being made pursuant to §4.4 of the Partnership Agreement (the "Delegation Provision"). A236. This provision (in its 1995 form) governed delegation by the Executive Committee of responsibilities and authority to Partners and Partner Affiliates. §4.4 (A209).

In addition to the Delegation Provision, §4.8 of the Partnership Agreement (the "Affiliate Provision") permitted the Executive Committee to enter into agreements with Partners and/or Partner Affiliates "for management services in connection with design, development, construction and operation of the Partnership's nonwireline cellular systems." *See* §4.8 (A210-A211).

In 1997 the Partnership amended the Delegation Provision to specify that delegations of authority to a Partner could only be made pursuant to written agreement. A279. This amendment superseded every inconsistent agreement or understanding and, once adopted, could not be modified by course of dealing or pattern of conduct. *See* Partnership Agreement §10.9 (A216-A217).

In 2005 the Executive Committee caused the Partnership to enter into a Management and Network Sharing Agreement (the "Management Agreement" or "MNSA") with an affiliate of AT&T. Op.I 22; A287-A289. The stated reason for adoption of the MNSA was that "the business has changed dramatically over the past nine years" and "[t]he new agreement more closely reflects how the business is currently managed." A284. AT&T represented that the MNSA would have "either a neutral or positive financial impact on the Partnership." *Id.*

The MNSA defined the Partnership's business in terms identical to AT&T's business. *Compare* "Manager's Business" and "Owner's Business" (A288, A289). It identified subscribers in terms that made every AT&T subscriber a Partnership subscriber. A290. It eliminated intracompany incollect roaming expense and outcollect roaming revenue. *Id*. at ¶(V)(F) (A293). It created a new traffic-based paradigm for calculating and allocating the Partnership's proportionate share of revenue and expense (*Id*. at ¶(V)(G) (A293)); it explicitly acknowledged the Partnership's right to share proportionately in the aggregate revenue generated from

utilization of AT&T's Entire Network (save and except for Outcollect Roaming Revenues received from third-party carriers) ("Shared Revenues" at A290); and it granted to the Partnership a 25% premium on all allocated revenue and a 10% discount on all sales and marketing expenses (A299).

C. AT&T's Breaches of the Relevant Governing Documents

AT&T never followed the MNSA. ("There is a strong argument that AT&T deprived the minority partners of meaningful value by failing persistently and pervasively to follow certain contractually specified methodologies for allocating revenue to the Partnership that appear in management agreement between the Partnership and an ATT affiliate"). Op.I 41. *See also Id*. at 61, 64, 131.

Specifically, AT&T breached the Management Agreement by, *inter alia*, treating the Partnership as an independent, stand-alone entity, and not as part of AT&T's unified unitary nationwide network (Op.I 42); by narrowly defining the Partnership Business as "those things….we do with our phones" (Op.I 46); by not allowing the Partnership to share in the aggregate revenue from AT&T's Entire Network (Op.I 46-47); by not allowing the Partnership to share in the profits of every AT&T business venture that used Partnership assets (Op.I 47); by calculating Partnership revenue and expense on the outdated and unreliable basis of subscribers (Op.I 47); by not calculating the Partnership's proportionate share of Shared Revenue and Shared Expenses based on the Partnership's proportionate share of

System Traffic (*Id.*); and by not applying a 25% premium to the Partnership's share of Shared Revenue and a 10% discount to the Partnership's share of sales and marketing expenses. Op.I 111; Op.II 131.

In February 2010, AT&T engaged PricewaterhouseCoopers ("PwC") to perform a valuation of the Partnership. Op.II 24. PwC valued the Partnership on the basis of AT&T's accounting records – none of which had been prepared in accordance with the MNSA. In July 2010 AT&T offered to purchase the minority partners' interest at a 5% premium over the PwC valuation. Op.II 34. The plaintiffs (holders collectively of 1.881% of the general partner interest) rejected the offer. *Id.* In September 2010, AT&T caused an affiliate purchase the Partnership's assets and assume all its liabilities for a cash payment of $219 million. *Id.*

D. The Litigation

On August 26, 2011, the former minority partners sent a letter asserting that AT&T had committed a material breach of the Partnership Agreement and provided AT&T thirty days in which to cure. Op.II 35; A300. On September 23, 2011, AT&T filed a declaratory judgment action in Chancery Court. A303. The former minority partners filed a counterclaim alleging that AT&T had (i) committed a material breach of the Partnership Agreement, failed to cure, and thereby triggered the contractual Dissociation Remedy; and (ii) breached its duty of loyalty by purchasing the Partnership assets at a price *and* with a process that were not entirely fair. A351.

After trial, the trial court found (i) that AT&T had committed material breaches of the Partnership Agreement, but that the MNSA-related damages were derivative only and the direct damages were inadequate to support the Dissociation Remedy; and (ii) that the Freeze-Out was unfair as to both price and process.

In its Contract Ruling (Op.I) the trial court overlooked the Delegation Provision and raised for the first time the suggestion that the 1995 Resolution was a source of AT&T's delegated authority.[6] AT&T never argued that the 1995 Resolution as an alleged source of its delegated authority.[7] Accordingly, Plaintiffs moved for reargument of the trial court's determination that a single clause in an Executive Committee resolution from 1995 permanently vested total managerial power of the Partnership in a single Partner and any entity that inherited that Partner's interest.[8] The trial court denied this motion based on the grounds stated in AT&T's response.[9]

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[6] *See* Plaintiffs' Motion for Reargument, ¶¶3-4 (A3159-A3160).

[7] *Id*. at ¶5 (A3160).

[8] *Id*. at p.1 (A3158).

[9] *See* Order Denying Plaintiffs' Motion for Reargument, Ex. C. *See also* Defendants' Opposition to Plaintiffs' Motion for Reargument (A3173-A3186).

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT FAILED TO FIND THAT AT&T BREACHED THE GOVERNANCE PROVISION AND THE PROTECTED INFORMATION PROVISION OF THE PARTNERSHIP AGREEMENT

A. Question Presented

Whether AT&T breached the Governance Provision by persistently and pervasively breaching the MNSA. (Preserved at A1156.)

B. Scope of Review and Legal Standard

The trial court's Contract Ruling was based on its interpretation of the Partnership Agreement and specific findings of fact related thereto. The standard of review is whether the trial court's interpretation of the Partnership Agreement was clearly wrong under the test enunciated in *Levitt v. Bouvier,* 287 A.2d 671 (Del. 1972). Specifically, if the findings of the lower Court are "sufficiently supported by the record and are the product of an orderly and logical deductive process," such findings will be accepted unless "clearly wrong and the doing of justice requires their overturn." *Id.* at 673.

C. Merits of the Argument

AT&T had no authority to act on behalf of the Partnership except as delegated by the Executive Committee in a written agreement. The MNSA (a written agreement adopted by the Executive Committee) was the sole source of the manager's authority. If AT&T (acting in its capacity as manager) breached the

MNSA, then it acted outside the scope of its delegated authority and in violation of the Governance Provision. This is a material breach of the Partnership Agreement and triggers the Dissociation Remedy.

1. There was no history of expansive delegations of authority to AT&T to manage the Partnership without regard to the Partnership Agreement.

Plaintiffs' claims relating to Governance and Protected Information are predicated on allegations that AT&T committed material breaches of the Partnership Agreement by, respectively, acting on behalf of the Partnership except through the Executive Committee and by disclosing confidential partnership information without the prior written consent of the Executive Committee. Plaintiffs proved that (i) the Executive Committee never specifically authorized the complained-of acts and (ii) those acts were breaches of the MNSA. Nevertheless, the trial court held that, prior to adoption of the MNSA, the Executive Committee had delegated "expansive authority" to AT&T to manage the Partnership's business and, therefore, AT&T's "pervasive disregard" of the MNSA did not give rise to a material breach of the Partnership Agreement. Op.I at 88. This is error.

According to the trial court, the pre-MNSA grant of expansive authority arose from three sources. First, an unwritten "understanding" that existed from the outset that "the majority partner had the authority to operate the day-to-day business of the

Partnership."[10] Second, the Affiliate Provision that authorized the Partnership to "enter into agreements from time to time with Partners and/or Partner Affiliates for management services in connection with design, development, construction, and operation of the Partnership's nonwireline cellular systems."[11] And third, a 1995 Resolution wherein the Executive Committee purports to formally delegate managerial authority to the Majority General Partner; *to wit*, "the Majority General Partner is hereby delegated full, complete and exclusive authority to manage and control the business of the Partnership."[12] These justifications are an insufficient basis upon which to sustain the trial court's holding.

The seventh WHEREAS clause in the 1995 Resolution states that the grant of authority is being made pursuant to the Delegation Provision in §4.4 of the

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[10] Op.I 98.

[11] *Id. See* JX15 §4.8 (A210-A211).

[12] Op.I 99. *See* A237. The 1995 Resolution was adopted the year after AT&T Wireless acquired McCaw Communications and its interest in the Partnership. *See* Tr. I (Wages) (A1562). Minority partners had "questioned the absence of any written agreement how AT&T [sic] managed their partnership" (Op.I 18) and had sued the majority partner over this issue. A238-A271. *See also* A227-A232. In response, the Executive Committee approved the Cellular Agreement and the Switch Agreement (Op.I 18, 99) by means of a resolution that included the expansive language relied upon by the trial court. The meeting minutes only reflect discussion of the Cellular and Switch Agreements; the minutes do not reflect any discussion of or agreement to delegating complete and exclusive managerial authority to McCaw. *See* A233-A235. Committee member Scott Anderson of McCaw stated the intent of the 1995 Resolution was "to put in place the paperwork and thereby respond to the concerns of some minority partners in other markets regarding why there are no written agreements." A234.

Partnership Agreement.[13] Notwithstanding testimony, briefing and argument regarding §4.4, the trial court failed to consider (or even cite) the Delegation Provision in Op.I.[14] The oversight is material since the provision dictated how, and the extent to which, the Executive Committee could delegate authority to manage the Partnership.

At the time the 1995 Resolution was adopted, the Delegation Provision said:

> The Executive Committee may delegate responsibilities and authority to the Chairman, a System General Manager, or other Partnership employees to the extent it considers such action reasonable; and <u>may delegate responsibilities and authority pursuant to construction and/or operations agreements</u>, <u>with Partners</u> and/or third parties (including McCaw and McCaw Affiliates) <u>for the development, design, construction and operation of the System</u>.

(Emphasis added.)[15] Thus, the 1995-version of the Delegation Provision contemplated two different categories of delegee; two different methods of delegation; and two different delegable scopes of authority. Delegation of authority

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[13] *See* A236.

[14] AT&T testified to the Delegation Provision at trial; Plaintiffs discussed the Delegation Provision in their post-trial briefing; and AT&T relied on the Executive Committee's authority under the Delegation Provision during post-trial argument. *See*, *e.g*., Tr. II (Wages) (A1906); Pls.' Post-trial Op. Br. (Contract), at n. 11 (citing §4.4 of the Bremerton Partnership Agreement (A2809)); Post-Trial Arg. Tr. III (A3156) (AT&T's counsel stating: "We think the partnership agreements say 'except as otherwise provided, the executive committee shall have the exclusive power' . . . And it's the existence of [the management agreements] that demonstrates that the executive committee delegated this. . . The executive committee delegated that, and that's what the point of the management agreement is.")

[15] A209; A1343.

to the Chairman of the Executive Committee, a System General Manager, or a Partnership employee could be made by Executive Committee action for any purpose so long as the committee considered such action reasonable. By contrast, delegation of authority to a Partner or Partner Affiliate could only be made "pursuant to construction and/or operations agreements" and only "for the development, design, construction and operation of the System." Delegation of authority to the majority partner or its affiliate could only be made (i) pursuant to a construction and/or operations agreement and (ii) for the development, design, construction and operation of the System. The alleged expansive delegation of authority does not comply with either condition.

In denying the motion for reargument based on the grounds stated in the opposition, the trial court held that the 1995 Resolution satisfies the agreements-requirement of §4.4 because (i) it confirms the unwritten understanding regarding AT&T's authority to operate the day-to-day business of the Partnership and (ii) evinces the parties' unwritten agreement that AT&T would have "full, complete and exclusive authority to manage and control the business of the Partnership." *See* Defendant's Opposition to Plaintiffs' Motion for Reargument, pp. 3, 7, 9-10 (A3175, A3179, A3181-A3182). But §4.4 does not contemplate delegation to a Partner of authority over <u>the Partnership</u>; rather, §4.4 addresses delegation of authority over

"development, design, construction and operation of the System."[16] Thus, by explicitly delegating authority over the Partnership (as opposed to the System) the 1995 Resolution exceeds the bounds of authority that could be delegated to a Partner under the then-existing Delegation Provision.[17]

An unwritten agreement of the type posited by the trial court is fatally deficient because it does not satisfy the minimum requirements of the Affiliate Provision, which permitted the Executive Committee to enter into agreements with Partners or Partner Affiliate "…for management services in connection with design, development, construction and operation of the Partnership's nonwireline cellular systems…." *See* A210. The provision explicitly required that such agreements (i) "provide for fees to be paid by the Partnership, representing reasonable profit and overhead allowances to the contracting parties" and (ii) "be on terms no less

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[16] The System is the nonwireline cellular telephone system constructed and operated in the Salem Metropolitan Statistical Area. It is owned by and distinct from the Partnership. *See*, *e.g.*, A204 ("The purpose of the Partnership is to engage in the business of constructing, owning, investing in and operating, directly or indirectly, nonwireline cellular telephone systems, including the system for the Market").

[17] The text of the 1995 Resolution supports an inference that the Executive Committee intended to give the majority partner authority over the System – not the Partnership. Specifically, in the 1995 Resolution, the Executive Committee took actions on behalf of the Partnership regarding matters that would have been delegated to the majority partner if there had in fact been a grant of expansive authority. *See* A237.

favorable to the Partnership than could be obtained if it was made with a person who is not a partner…." *Id.*

The 1995 Resolution fails to satisfy any of these Affiliate Provision requirements: it is not an agreement for management services in connection with design, development, construction or operation of the System; it does not provide for the fees to be paid under such an agreement; it does not assure that such fees are reasonable; and it does not set forth terms that can be adjudged to be "no less favorable to the Partnership than could be obtained if [the agreement] was made with a person who is not a partner." Thus, the Affiliate Provision, operating in tandem with the Delegation Provision, defeats the trial court's reliance on the 1995 Resolution.

Any question as to whether delegation of authority to a Partner required a written agreement was laid to rest by the amendment to §4.4 adopted by the Partnership in 1997, which replaced completely the relevant language in the 1995 version of the Delegation Provision:

> The Executive Committee may, to the extent it considers such action reasonable, delegate all or any portion of its responsibilities and authority, including but not limited to those related to development, design, construction, and operation of the System, to (a) the Chairman, a System Manager, or other Partnership employees and (b) **pursuant to written agreements**, Partners and/or third parties (including Affiliates of Partners).

A279 (emphasis added). Thus, the amendment simultaneously expands the scope of delegable authority (to "all or any portion of [the Executive Committee's] responsibilities and authority"); explicitly differentiates between partner delegees and non-partner delegees; and unequivocally requires a *written* agreement for delegation of authority to a partner or partner affiliate ("pursuant to written agreements").

The 1997 amendment of the Delegation Provision superseded every inconsistent agreement or understanding and once adopted, could not be modified by course of dealing or pattern of conduct. *See* Partnership Agreement §10.9 (A216-A217):

> This Partnership Agreement…supersedes all inconsistent prior agreements or understandings between the Partners with respect to the subject matter of this Partnership Agreement. This Partnership Agreement may be modified or amended by an instrument in writing adopted in accordance with the provisions of this Partnership Agreement.

The 1997 amendment was not, however, the last abrogation of the 1995 Resolution by the Partnership, the Executive Committee, and the majority partner.

2. The MNSA superseded all previous alleged delegations of authority.

In 2004 Cingular purchased AT&T Wireless and thereafter changed the name of the surviving corporation to AT&T.[18] As a part of this transaction, AT&T (*née*

[18] *See* Tr. I (Wages) (A1562).

Cingular) became the majority partner in the Partnership.[19] Its first official act as majority partner was to cause the Partnership to execute the MNSA.[20] As a result of the Executive Committee's adoption of this agreement, New Cingular Wireless Services of Nevada, LLC (an affiliate of the majority partner) became manager and operator of the Partnership's nonwireline cellular telephone system.[21] Inasmuch as the MNSA was backdated to January 1, 2003 – that is, prior to closing of Cingular's purchase of AT&T Wireless – AT&T (*née* Cingular) had no historic course of dealing with the Partnership that was not subject to the MNSA.[22]

The MNSA was drafted by AT&T alone and was adopted at its behest.[23] The MNSA had a comprehensive integration clause:

> [T]his Sharing Agreement expresses the entire understanding between the Parties hereto with respect to the subject matter hereof and supersedes all prior agreements among them relating to the subject matter and no representations, oral or written, other than those contained herein, shall have any force or effect.

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[19] *See* Tr. I (Wages) (A1562).

[20] *See* A284. AT&T Wireless disclosed the fact of the impending merger at a Partnership meeting on April 7, 2004. At the same meeting a majority partner representative reviewed the proposed MNSA advising that this agreement would be adopted by the Executive Committee to replace the Cellular System Operating Agreement and the Switch Sharing Agreement. Formal adoption of the MNSA occurred (after consummation of the merger) at the Executive Committee meeting on August 10, 2005. Op.I 23; A286. The contract was executed in October 2005 and made effective as of January 1, 2003. Op.I 23; A287.

[21] *See* A287.

[22] *Id.*

[23] *See* Op.I 23; A286; Tr. I (Wages) (A1722-A1723).

A298 (emphasis added). The 2005 Executive Committee resolution that adopted the MNSA (inclusive of the quoted integration clause) is of equal dignity to the 1995 Resolution that adopted the Cellular and Switch Agreements.[24] Assuming that the 1995 Resolution remained in effect after the 1997 amendment to §4.4 of the Partnership Agreement, the 1995 Resolution was annulled by the 2005 Resolution to the extent it was inconsistent with that resolution and/or the MNSA.[25] Upon its accession to the Partnership, AT&T (née Cingular) wiped the slate clean of all prior understandings, agreements, and delegations relating to the development, management, and operation of the Partnership's business.[26] *See Progressive Int'l*

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[24] *Compare* JX91 (A233) and JX229 (A286).

[25] *See* A287. The third and fourth WHEREAS clauses state that Owner and Manager, or an Affiliate of Manager wish to replace the Cellular and Switch Agreements in their entirety with the MNSA.

[26] Prior to issuance of the trial court's Contract Ruling, AT&T never argued that the 1995 Resolution was a source of its delegated authority. Rather, it asserted that its authority over business of the Partnership derived from "the parties' course of dealing" and from two written agreements adopted by the Executive Committee: *to wit*, the Cellular Agreement (for the period July 1995 through December 2002) and the MNSA (for the period January 2003 through October 2010). *See* Defs.' Pretrial Brief at A1308; PTO ¶ 141 (A1373); Defs.' Post-Trial Ans. Br. in Opp'n to Pls.' Breach of Contract Claims at A3026-A3027. *See also*, *e.g.*, Tr. I (Wages) (A1762) ("I believe the management agreement is written in such a way that it allows for AT&T to manage the business"); (A1889) ("Through the management agreement, I think [the Partnership] gave AT&T broad powers to conduct the business of the partnerships"). Plaintiffs, on the other hand, argued that (i) the Cellular Agreement was replaced in its entirety by the MNSA and (ii) AT&T did not manage the Partnership in accordance with the authority delegated in the MNSA. *See* Pls.' Post-Trial Opening Br. at A2874-A2875; *see generally* Pls. Post-Trial Opening Br.

Corp. v. E.I DuPont de Nemours & Co., 2002 WL 1558382, at *7 (Del. Ch. July 9, 2002) ("Absent fraud or other unconscionable circumstances...the existence of an integration clause between sophisticated parties is conclusive evidence that the parties intended the written contract to be their complete agreement").

3. The trial court wrongly subjected the MNSA to an analysis distorted by the 1995 Resolution.

Notwithstanding this fact, the trial court interpreted the scope of authority delegated in the MNSA through the lens of the superseded 1995 Resolution. According to the trial court:

> The **Services Provision** in the Management Agreement charged AT&T-as-Manager with the "management and operation of the [Partnership's] Business." MNSA § I. It further charged AT&T with providing "all services as are necessary to assure the commercially reasonable development and operation of the [Partnership's] Business." *Id*. Those services included construction and procurement, general and administrative services, technical operating services, sales and marketing services, and maintenance of the Partnership's licenses. The **Authority Provision** then gave AT&T the authority "to undertake…any and all other commercially reasonable actions necessary or advisable to develop, manage, and operate the [Partnership's] Business, which are not prohibited by law." *Id*. § II. **Against the backdrop of the 1995 Resolution, it is difficult to imagine an aspect of the Partnership's business that the delegation of authority did not encompass**.

(A2844) and Pls. Post-Trial Reply Br. (A3112). Both parties recognized that the 1995 Resolution could not have been the source of AT&T's delegated authority because the Partnership Agreement never empowered the Executive Committee to delegate authority to a Partner by resolution.

Op.I at 99-100 (emphasis added). Based on this analysis, the trial court concluded that AT&T did not breach the Partnership Agreement when it failed to comply with (i) the MNSA Shared Revenue Formula (*Id*. at 104); (ii) the MNSA Intra-Company Roaming Provision regarding allocation of revenue and expense associated with voice roaming (*Id*. at 116); (ii) the MNSA requirements regarding allocation of revenue from data usage (*Id*. at 120); and (iv) the MNSA requirements regarding allocation of revenue from Commercial Network Agreements (*Id*. at 129).

According to the trial court, AT&T had been <u>delegated authority to breach material provisions of the MNSA</u>, and, since AT&T had such authority, its breach of the MNSA did not give rise to a breach of the Governance Provision of the Partnership Agreement:

> The record establishes that from the outset, the Partnership gave AT&T expansive authority to operate its business. **The provisions in the Management Agreement regarding the assignment and allocation of revenue and expense reflect <u>AT&T's commitments as to how it would exercise its delegated authority, rather than limitations on its authority</u>.** AT&T's failure to comply with those provisions thus would give rise to a breach of the Management Agreement, but it would not result in AT&T exceeding the scope of its delegated authority.

Op.I 102-103 (emphasis added). *See also* Op.I 88. According to the trial court, a majority partner can successfully evade liability for breach of a Governance Provision if it causes a captive Executive Committee to delegate to an affiliate the authority to do things that the majority partner is itself forbidden to do, and an

aggrieved minority partner's only redress is a derivative claim against the affiliate for breach of the MNSA. Op.I 103.

Nevertheless, the trial court acknowledged that "a different outcome might be warranted on different facts." *See* Op.I 103 n. 39:

> Envision a partnership with a similar governance structure, including a provision comparable to the Governance Provision, <u>that lacked any history of the Executive Committee delegating its managerial authority</u>. Further envision that the Executive Committee decides to delegate authority to a partner and that <u>the sole documentation for the delegation is an agreement that specifies how the partner will allocate revenue and expense</u>. On those facts, the argument that the agreement defined the scope of the partner's delegated authority would be more persuasive.

(Emphasis added.) The trial court's decision regarding Plaintiffs' Governance claim turns on (i) the history of the Executive Committee delegating its managerial authority; and (ii) contractual provisions (in addition to the revenue assignment and allocation provisions of the MNSA) relating to that delegation. This is the lynchpin of the trial court's analysis – and it is wrong.

Based on testimony from a handful of minority partners, the trial court concluded that "there was an unwritten Affiliate Agreement in place from the formation of the Partnership that authorized AT&T to manage the Partnership." Op.I 12. However, the evidence is unequivocal that the minority partners objected to the unwritten understanding; threatened suit to set it aside; and thereby forced the Executive Committee to (i) ratify in writing fees previously paid pursuant to

unwritten agreements, (ii) abandon the alleged unwritten understanding, and (iii) approve written management and switch agreements. *See* A236:

> WHEREAS, **in light of threatened litigation involving the Partnership, it has been determined to be in the best interests of the Partnership to** approve the payment of management fees and switch sharing fees, to formally adopt resolutions ratifying the payment of such fees, and to **formally approve the form of written agreements regarding such fees**….

(Emphasis added). *See also* A230 ("The partnership agreements specifically call for negotiated contracts, yet there has never been any negotiation on any substantive issue in the years I have been on the Executive Committees and Board of Directors"); A238 (a class action complaint filed on behalf of *inter alia* Salem minority partners complaining of AT&T's violations of the Governance Provision (at A250-A256) and asserting the existence of common questions of fact with six other pending cases (at A240, A256-A257)).[27]

Based on the 1995 Resolution, the trial court concluded that the Executive Committee delegated expansive authority to the majority partner above and beyond the specific authority delineated in the Cellular Agreement, the Switch Agreement, and the MNSA. Op.I 99-100. According to the trial court, this grant of broad authority exceeded the grant of specific authority in the MNSA and, therefore,

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[27] Thus, the trial court relied on the majority partner's <u>prior violations</u> of the Governance Clause (from which it was forced to retreat by the minority partners) to justify the majority partner's <u>subsequent violations</u> of the Governance Clause (the consequences of which it now seeks to avoid).

permitted the majority partner to breach the MNSA without exceeding its delegated authority. Op.I 103.

The trial court's conclusion is based upon a literal interpretation of the 1995 Resolution. *See* A237:

> BE IT FURTHER RESOLVED: That the Majority General Partner is hereby **delegated the full, complete and exclusive authority** to manage and control the business of the Partnership….

(Emphasis added.) According to the trial court: (i) this delegation of 'full and complete authority' reached every aspect of the Partnership's business (*see*, *e.g.*, Op.I 100); (ii) to the extent the Executive Committee had authority over the business of the Partnership, it delegated that authority to the majority partner (Op.I 102-103); and (iii) the delegation of 'full and complete authority' was absolute and not limited by any companion agreement.

However, if (as the trial court said) the Executive Committee delegated to the majority partner every imaginable aspect of its authority over Partnership business, then the exclusive nature of that delegation would have prevented the Executive Committee from any further involvement in Partnership business. But both the trial court and the majority partner recognized that – notwithstanding the 1995 Resolution – the Executive Committee continued to have and exercise authority over Partnership business. Most importantly, the trial court found that the Executive Committee *alone* authorized the Partnership to enter the MNSA and that the majority

partner acknowledged, accepted, and facilitated that exercise of authority. Op.I 23. By ignoring the exclusivity provision, the trial court is clearly wrong.

4. The trial court misinterpreted the Services and Authority Provisions of the MNSA.

Finally, the trial court relies on the Services and Authority provisions in the MNSA in support of its finding that a preexisting delegation of expansive authority exceeded the narrow delegation of authority in the MNSA. Op.I 99. In so doing, the trial court erroneously agglomerates the evidence of multiple different delegations into a single unified expansive delegation.

The MNSA was executed by and between the Partnership (as Owner) and New Cingular Wireless Services of Nevada, LLC (as Manager). A287. The Manager was not at any time a partner in the Partnership. Op.I 1. The majority partner is not a party to the MNSA. A287. Neither the Services Provision nor the Authority Provision of the MNSA delegates any authority whatsoever to the majority partner. A291-A292. Conversely, the Manager is not a delegee of authority under the 1995 Resolution. A236-A237. The delegation of authority in the 1995 Resolution is exclusive to the majority partner and does not include affiliates. A237. Accordingly, whatever authority was delegated to the majority partner under the 1995 Resolution, that authority does not flow to the Manager. And whatever authority was delegated to the Manager under the MNSA, that authority does not flow to the majority partner. The trial court committed clear error when it ignored

the terms of the resolution and the contract in order to merge the two grants of authority into a single expansive delegation. *See*, *e.g.*, Op.I 100.

According to the trial court, the Services and Authority provisions and the 1995 Resolution combined to delegate to the Manager authority over every aspect of the Partnership's business. Op.I 100. And the trial court erroneously reasoned that since the Manager had authority over every aspect of the Partnership's business, it could act on behalf of the Partnership directly (by willfully breaching the revenue and expense allocation provisions of the MNSA) without exceeding the scope of its delegated authority. Op.I 5, 88, 102-103.

First, as demonstrated above, the 1995 Resolution is a delegation made exclusively to the majority partner. It does not extend to the Manager and, therefore, is not a supplement to the authority delegated to the Manager in the Services and Authority provisions of the MNSA.

Second, assuming *arguendo* that the 1995 Resolution could theoretically be extended to an affiliate of the majority partner, it does not apply because the MNSA contains an integration clause. A298.

Third, the delegation of authority stated in the Services and Authority provisions is not *by itself* sufficiently broad to invest the Manager with the full range of authority enjoyed by the Executive Committee. The delegation in the MNSA is to undertake "<u>commercially reasonable actions</u> necessary or advisable to develop,

manage, and operate the [Partnership's] Business." A291. A delegation of authority to undertake "commercially reasonable actions" is in no way comparable to a delegation of "full, complete and exclusive authority." *See* A237.

Thus, there is no relevant "history of the Executive Committee delegating its managerial authority" that somehow bleeds over to the majority partner affiliate. *See* Op.I 103 n.39. Instead, there is a contract (authorized by the Executive Committee) that defines the majority partner affiliate's obligations and authority vis-à-vis the Partnership.

In addition, there is overwhelming evidence that the majority partner affiliate persistently and pervasively breached that contract for its own financial benefit. But the trial court concluded that whatever the majority partner affiliate did, it was not a breach of the Partnership Agreement. This Jesuitical casuistry is a roadmap for circumvention and nullification of partnership agreements by unprincipled majority partners.

5. The possibility of a derivative claim was illusory.

According to the trial court, any loss of rights and remedies under the Partnership Agreement are adequately compensated by the possibility of a derivative action against the majority partner affiliate.[28] *See*, *e.g.*, Op.I 89, 101-102. However,

[28] AT&T never asserted that claims based on the MNSA were derivative in nature.

the remedy proposed by the trial court provides incomplete relief and is (more likely than not) illusory.

As AT&T so vividly demonstrated during the twelve years of this lawsuit, a dishonest majority partner is reluctant to reveal their pervasive and persistent breach of agreement. *See*, *e.g*., Op.I 70 ("As the court noted on several occasions, AT&T was the most obstructive litigant that this judge has ever seen, whether in private practice or on the bench"). As a practical matter, the minority partners are so far removed from operation of the Partnership's business, they cannot reasonably be expected to discover breach of the MNSA outside the context of litigation. In this case, it took years to uncover the fact of the Manager's non-compliance. By the time the minority partner plaintiffs had a good faith basis upon which to assert a derivative claim, that claim may have been time barred or given rise to a laches defense.

Further, to the extent a derivative claim exists, it is an incomplete remedy. A derivative claim compensates the Partnership for the Manager's breach of the MNSA but does not compensate the minority partner plaintiffs for the majority partner's breach of the Partnership Agreement. The rights and remedies available to the minority partners under the Partnership Agreement are separate from and in addition to the rights and remedies available to the Partnership in a derivative action.

But if the trial court is correct in its analysis, then the majority partner affiliate – <u>acting on behalf of itself and the Executive Committee</u> – has full, complete, and

exclusive authority to unilaterally amend, novate, and/or terminate the MNSA at any time. If the majority partner affiliate were sued derivatively for breach of the MNSA, it could defend by saying, "At the same time that I did the complained-of acts, I agreed on behalf of myself and the Executive Committee that I would no longer be required to comply with the MNSA." Thus, the trial court's hypothetical derivative claim is an illusory remedy.[29]

The net effect of the trial court's logic is that the minority partners have no remedy under the Partnership Agreement; the Partnership has no remedy under the MNSA; the majority partner affiliate gets to keep all its ill-gotten gains; and the majority partner gets to violate the Governance Provision with impunity. None of these is an acceptable outcome. And all of these are a direct consequence of three erroneous decisions by the trial court: (1) its erroneous interpretation and application of §4.4 of the Partnership Agreement (as amended in 1997) (A279); (2) its erroneous interpretation and application of §4.8 of the Partnership Agreement (as amended in 1997) (A279-A280); and (3) its erroneous interpretation and application of the integration clause of the MNSA (A298).

The MNSA – an agreement regarding assignment and allocation of revenue and expense from the operation of Partnership business – is the only source of

[29] *See, e.g., Goldstein v. Denner*, 2022 WL 1797224, *17 n.16 (Del. Ch. June 2, 2022) (discussing the permissibility of direct challenges on entity-level claims).

authority for AT&T to act on behalf of the Partnership.[30] There is no cocoon of expansive authority within which AT&T can breach the MNSA without breaching the Governance Provision.

6. The trial court's failure to award the economic equivalent of the Dissociation Remedy was both the natural consequence of its fallacious reasoning and error.

By exceeding the authority granted to it under the MNSA, AT&T breached the Governance Provision. Thus, the trial court erred in failing to enter judgment in Plaintiffs' favor on the claims for breach of the Governance and Protected Information Provisions[31] and, consequently, in failing to award dissociation damages. *See* Op.I 172 ("Dissociation damages would have been warranted if the plaintiffs had proven their claim for breach of the Governance Provision").[32]

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[30] This is precisely the circumstance described by the trial court as warranting a different outcome in Plaintiffs' claim for breach of the Governance Provision. *See* Op.I 103 n.39.

[31] The trial court's denial of Plaintiff's Protected Information claim is predicated on its finding that the Executive Committee delegated expansive authority to AT&T. Op.I 154, 156-157. If the scope of AT&T's authority was defined solely by the MNSA, then it did not have authority to pre-approve its disclosure of Protected Information. Accordingly, a successful claim for breach of the Governance Provision establishes a material breach of the Protected Information Provision. Op.I 156.

[32] AT&T contends that the contractual Dissociation Remedy is unavailable because the remedy is disproportionate to the damages sustained. This argument – particularly in the context of a proven breach of the Governance Provision – is wrong. *See*, *e.g.*, APR Plaintiffs' Pretrial Brief at A1163-A1173.

II. THE TRIAL COURT ERRED IN REFUSING TO AWARD RELIEF ON THE BASIS OF THE MNSA.

A. Question Presented

Whether the trial court erred in failing to award breach of fiduciary duty relief on the basis of, *inter alia*, the MNSA 25% premium on revenue, the MNSA 10% discount on sales and marketing expenses, and the litigation asset value associated with AT&T's pre-dissolution breaches of the MNSA. (Preserved at A2875-A2881.)

B. Scope of Review and Legal Standard

An award of damages resulting from an entire fairness proceeding is subject to an abuse of discretion standard. *Americas Mining Corp. v. Theriault,* 51 A.3d 1213, 1251 (Del. 2012). A trial court must give reasons for its decisions so that the parties will have a basis for challenging the decision and the reviewing court may properly discharge its appellate function. *Id.*

C. Merits of the Argument

1. The trial court correctly found that the Partnership's operative reality included the right to receive revenue and pay expenses pursuant to the terms of the MNSA (inclusive of the 25% Premium and 10% Discount Provisions), but did not award the relief warranted by these findings.

In ruling on Plaintiffs' breach of fiduciary duty claim, the trial court correctly found that the Partnership's operative reality included the right to receive revenue and pay expenses pursuant to the terms of the MNSA. Op.II 61. Further, the trial court correctly found that – even though the MNSA provided for a 25% premium on

Partnership revenue and a 10% discount on Partnership sales and marketing expenses – AT&T never gave the Partnership either the premium or the discount. Op.I 41. In fact, as the trial court correctly found, AT&T's breaches of the MNSA were both persistent and pervasive. *See*, *e.g.*, Op.I 5, 88, 97; Op.II 61, 64, 131.[33] On the basis of these and other findings, the trial court correctly determined that the Freeze-Out price failed to account for either (i) the value to which the Partnership was contractually entitled under the MNSA; or (ii) the litigation asset based on AT&T's past breaches of the MNSA. Op.II 61. Nevertheless, the trial court failed to give effect to these findings in its valuation of the Partnership and failed to explain its reasons for not doing so.

The trial court correctly found that the MNSA was an integral part of the Partnership's operative reality. *See*, *e.g.*, Op.II 61 ("The Partnership's operative reality included the right to receive the benefit of the Premium Provision"). Based on this fact, the trial court correctly found that the failure to account for the MNSA resulted in an unfair valuation. *Id.* ("By failing to account for these contractual rights, PwC's analyses undervalued the Partnership"). This MNSA-related unfairness manifested itself in two distinct ways (both of which are material to the

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[33] *See also* Op.II 11-12 ("Despite having written the MNSA, ATT pervasively disregarded it…. AT&T never followed the Shared Revenue Formula…. AT&T also disregarded the requirement in the [MNSA] that AT&T apply a premium to Shared Revenues and a discount to the Partnership's share of 'Sales and Marketing Expenses').

valuation): First, the trial court correctly found that AT&T's failure to calculate future cash flows based on the MNSA reduced those cash flows and, as a result, artificially suppressed the DCF value of the Partnership. *See*, *e.g*., Op.I 173:

> It seems more likely than not that the Partnership would have benefitted materially from a traffic-based allocation. . . . Assuming the subscriber count was 75% lower than it should have been, then a traffic-based allocation might have resulted in four times as much revenue going to the Partnership.

(Emphasis added.) *See also* Op.II 64 ("The Premium Provision implies that the value of the Partnership would be at least 25% higher than AT&T's valuation"). Second, the trial court correctly found that AT&T's failure to include the litigation asset value of a MNSA-related claim for pre-dissolution unpaid revenues and excess expenses resulted in a Freeze-Out price that was unfair. *See*, *e.g*., Op.II 61 ("[T]he [Freeze-Out] price failed to account for . . . the litigation asset based on AT&T's past breaches of the Management Agreement").

The trial court correctly found that AT&T did not rescind or amend the MNSA. Op.I 41 ("AT&T did not specifically invoke the Modification Right. AT&T simply developed its own internal allocation methodologies without considering the Management Agreement."). Instead, as the trial court correctly found, AT&T simply did not follow the specified allocation methodologies. *Id.* Then again, neither did the trial court – and that is error.

2. The trial court erred in holding that Plaintiffs could not prove the value of the Premium and Discount Provisions.

According to the trial court, "[i]t is impossible to know how the Partnership's performance would have changed if AT&T had complied with its contractual commitments to the Partnership…. Unfortunately, those problems cannot be fixed. The financial records that AT&T maintained are all we have." Op.II 100-101. But the reason that AT&T's fallacious financial records are 'all we have' is because the trial court quashed Plaintiffs' interrogatories and requests for production regarding mobile data traffic.

Plaintiffs propounded interrogatories asking AT&T to state the annual increase in network mobile data traffic.[34] In addition, Plaintiffs requested that AT&T produce all documents concerning any increase in network mobile data traffic in any partnership's geographic area and any corresponding revenue generated from that increase.[35] AT&T objected to these requests, and Plaintiffs

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[34] *See* Plaintiffs' Second Sets of Interrogatories to the AT&T Defendants, *e.g*., A426, A482, A522-A523. The interrogatories ask AT&T to detail the increases generally and specifically as they relate to emerging devices, connected devices, machine-to-machine services, and embedded computing devices.

[35] *See* Plaintiffs' Third Request for Production to AT&T, No. 60 (A568). AT&T objected to this request. *See* A689. Without waiving these objections, AT&T said that it had made "a reasonable and appropriate document production in response to Plaintiffs' prior requests, <u>including trial balance information reflecting revenue and revenue types for the Partnerships</u>." A690 (Emphasis added).

moved to compel.[36] Following a hearing, the trial court appointed a Special Discovery Master ("SDM"). The SDM issued a report wherein he completely rejected Plaintiffs' attempts to obtain information regarding traffic on the Partnership systems. *See* SDM Report, p. 54 (A1061):

> I conclude that additional discovery into AT&T's business units focused on Connected Devices and growth in mobile data traffic during the Relevant Period is not advisable, particularly given the burden of such discovery.[37]

On the basis of the SDM's report, the trial court denied Plaintiffs' motion to compel and entered a protective order barring any further discovery about, *inter alia,* traffic, thereby depriving Plaintiffs and the trial court of the evidence necessary to calculate MNSA-related damages.[38] Thus, the reason that the trial court did not have evidence regarding the amount of traffic on the Partnerships' systems was because the trial court refused to allow such discovery.

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[36] *See Plaintiffs' Motion to Compel*. A901-A944.

[37] With respect to Plaintiffs' request that AT&T produce documents concerning increases in mobile data traffic and all corresponding revenue generated from mobile data traffic, AT&T said, "The burden of combing through AT&T's records for documents concerning revenue is simply not justified in this valuation case." AT&T Defendants' Answering Brief on motion to compel at A973.

[38] *See* Ex. A at ¶5(b).

3. The trial court made a finding regarding the value of the Premium and Discount but failed to apply it.

Nevertheless, the trial court calculated a DCF value inclusive of the 25% premium and 10% discount. "If the cash flow projections were adjusted to comply with the Premium Provision and include a 25% premium for Shared Revenues and the 10% discount for Sales and Marketing Expenses, then the concluded value of the DCF model would have been $920,830,852.18." Op.II 131.[39] However, the trial court did not apply the revenue premium or expense discount in its calculation of entity value and did not explain its failure to do so. "For purposes of a remedial damages calculation following a proven breach of fiduciary duty, valuing the Partnership at $714,039,606.48 is a responsible estimate." *Id.*

Thus, after (i) identifying the MNSA as the operative reality of the Partnership; (ii) enumerating AT&T's myriad breaches of the MNSA; and (iii) quantifying the financial effect of the Premium Provision on valuation, the trial court refused to give effect to its findings. This refusal is inconsistent with the trial court's stated objective: "Because its fair value determination is being used for the purpose of remedying a proven breach of the duty of loyalty, the court has sought to achieve <u>a remedy that eliminates to the extent possible the ability of AT&T to profit from its breach</u>. On close issues, the court has given the plaintiffs the benefit of the doubt,

[39] This valuation does not accord any litigation asset value to the Partnership's claim against AT&T for past breaches of the MNSA. Op.II 131.

resulting in a valuation that favors the plaintiffs." Op.II 3 (emphasis added). But this is absolutely not what the trial court did. Instead of valuing the Partnership based on the MNSA, the trial court valued the Partnership based on AT&T's demonstrably erroneous accounting paradigm.

A trial court is charged with an obligation to give reasons for its findings. *Americas Mining Corp.,* 51 A.3d at 1251. Here the trial court simply came to the end of its lengthy consideration of the MNSA and of the MNSA's potential effect on damages and concluded, without elaboration, that "the remedial award also does not incorporate value for AT&T's pervasive breach of the MNSAs." Op.II 131. The trial court's failure to give any explanation for this decision, coupled with its findings that support inclusion of premium/discount-related value, renders the decision arbitrary and capricious.[40] The decision does what the trial court said, explicitly, that it sought to avoid: it lets AT&T profit from its breach of fiduciary duty.

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[40] Where a trial court acts in an arbitrary and capricious manner, an abuse of discretion will be found. *Spencer v. Wal-Mart Stores E., LP,* 930 A.2d. 881, 887 (TABLE) (Del. 2007).

III. THE TRIAL COURT ERRED IN REFUSING TO SHIFT ATTORNEYS' FEES TO AT&T

A. Question Presented

Whether the trial court abused its discretion by refusing to shift attorneys' fees to AT&T after finding that (i) AT&T was the most obstructive litigant that the judge has ever seen, whether in private practice or on the bench; and (ii) Plaintiffs have been prejudiced as a result of this conduct. (Preserved at A1269, A1202, A2912.)

B. Scope of Review and Legal Standard

The standard of review regarding a trial court's decision not to shift attorneys' fees is abuse of discretion. *Kane v. Burnett*, 817 A.2d 804 (TABLE) (Del. 2003).

C. Merits of the Argument

According to the trial court, "AT&T was the most obstructive litigant that this judge has ever seen, whether in private practice or on the bench." Op.I 70; Op.II 37.

> [T]his [case] has been an effort by the plaintiffs to hack through the – one of the largest forests of discovery, objections, and delays and problems that I have seen. And that goes for both on being on the bench and in practice. And you guys [AT&T] are No. 1, you know. It's good to be No. 1, I guess. But the number of problems and inability to understand things and need to revisit issues that you-all have raised over the course of these nine years, both before and after me bringing in the Special Master, dwarfs anything I have ever encountered.

Op.I 70 n.32. At trial, AT&T attempted to cite <u>prejudice arising from its own failure to comply with a discovery order</u> as a basis to prevent plaintiff from offering

AT&T's responses to that order. *See* Tr. II at A1915-1916. In response, the trial court ruled:

> The specific question that AT&T was tasked with doing was to identify gross revenue that AT&T received from monetizing partnership information to government entities. The crux of this number already establishes that it was for monetizing partnership information.
>
> The idea that AT&T would now try to turn around and claim prejudice because it can't show that parts of the number were generated by not monetizing partnership information would effectively be a concession that the number is wrong, that AT&T didn't provide the information that it was ordered to provide. I don't think that this is prejudicial at all.
>
> **What is prejudicial is the fact that the plaintiffs haven't been able to get at any of this information** and that we had to go to this length to try to aggregate the information. And if there's any source of that prejudice, it is in the manner that AT&T conducted the partnership business by not segregating these amounts and identifying them up and, instead, putting us all in this position where it has to be dealt with after the fact in this manner.

See Tr. II at A1920-A1921 (emphasis added). According to the trial court, for the better part of eight years AT&T aggressively resisted discovery "even after the court ruled against AT&T on specific issues." Op.I 70. Nevertheless, the trial court (i) never made a fee award against AT&T for its persistent and pervasive failure to make discovery and comply with court orders; and (ii) refused to shift fees to AT&T.[41]

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[41] AT&T has correctly pointed out that during the entire history of this case, "*Plaintiffs* (APR and Prickett) were the only parties sanctioned." *See* AT&T Defs'

Fee shifting is appropriate where bad faith conduct increases litigation costs. *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund,* 68 A.3d 665, 687-88 (Del. 2013). As the trial court acknowledged:

> [It is permissible] to award attorney's fees when the 'losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Brice v. Dep't of Corr.*, 704 A.2d 1176, 1179 (Del. 1998) (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258–59 (1975)). "Although there is no single definition of bad faith conduct, courts have found bad faith where parties have unnecessarily prolonged or delayed litigation, falsified records, or knowingly asserted frivolous claims." *Shawe*, 157 A.3d at 149.

Op.II 132 (emphasis added). This bad faith exception to the American Rule exists to deter abusive litigation and to protect the integrity of the judicial process. *Shawe v. Elting*, 157 A.3d 142, 149-50 (Del. 2017). It is appropriate to make an award of attorneys' fees for repeated instances of bad faith in the litigation process. *Montgomery Cellular Holding Co., Inc. v. Dobler,* 880 A.2d. 206, 229 (Del. 2005). And it is hard to imagine a more worthy candidate for fee shifting than AT&T. The trial court's refusal to shift fees is an abuse of discretion.

Reply on the motion to stay (filed in this Court on October 14, 2022) at A3192 (emphasis in original). The sanction awarded to AT&T and against Plaintiffs is compelling evidence of abuse of discretion: The trial court awarded sanctions against Plaintiffs for tardy discovery responses but refused to impose *any* sanctions on AT&T – "the most obstructive litigant that this judge has ever seen."

CONCLUSION

For the reasons stated above, Plaintiffs request that this Court (i) reverse the trial court's judgment regarding Plaintiffs' claims for breach of the Governance and Protected Information Provisions and render judgment establishing Plaintiffs' entitlement to the Dissociation Remedy; (ii) reverse the trial court's judgment regarding Plaintiffs' claims for fiduciary duty to the extent that judgment fails to accord value for (a) the present value of future cash flows derived from the 25% premium on revenue and 10% discount on sales and marketing expense and (b) the litigation asset value of AT&T's past breaches of the MNSA; (iii) reverse the trial court's judgment denying Plaintiffs' request that it shift fees and expenses to AT&T; and (iv) remand the case to the trial court for further proceedings not inconsistent with these judgments.

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