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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE STRAIGHT PATH COMMUNICATIONS INC. CONSOLIDATED STOCKHOLDER LITIGATION	No. 19, 2025 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2017-0486-BWD **Public Version filed on March 20, 2025**

APPELLANT'S OPENING BRIEF ON APPEAL

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NATURE OF PROCEEDINGS

The trial in this case established that Howard Jonas, the controlling stockholder of Straight Path Communication, Inc. ("Straight Path" or the "Company") conditioned his support for a high-premium sale of Straight Path on the diversion of a component of the merger consideration to himself.

Specifically, Straight Path held an indemnity claim (the "Indemnity Claim") against Howard's flagship company, IDT Corporation ("IDT").[1] This claim arose from the Separation and Distribution Agreement ("S&DA") between the companies effectuating Straight Path's 2013 spin off from IDT (the "Spin Off").

By 2017, spectrum license assets held by Straight Path were highly attractive to large wireless carrier companies. The unquestionably independent members of Straight Path's board of directors (the "Straight Path Board") formed a special committee (the "Special Committee") as part of a sale process. It decided to distribute *pro rata* interests in a trust that would litigate the Indemnity Claim post-closing as a component of merger consideration, along with consideration from a third-party buyer. Because the magnitude of the indemnifiable loss at issue (the "Indemnifiable Loss") was a function of Straight Path's ultimate sale price, so too

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[1] Members of the Jonas family are referred to by their first name for concision and not familiarity or disrespect.

was the facial value of the Indemnity Claim.

When Howard learned of the Special Committee's plan, he was apoplectic, as the Indemnity Claim posed a grave threat to IDT. As the Court of Chancery ("Trial Court") found following trial, Howard launched a "campaign of abuse and coercion" against the Special Committee and forced it to release the Indemnity Claim "in a manifestly unfair manner"[2] for only $10 million, which the Special Committee and its counsel testified was unfair.

The Trial Court found that Howard's conduct amounted to a "flagrant" breach of his duty of loyalty to Straight Path's public stockholders, and that because the coerced settlement was subject to an unfair process, it was not entirely fair.[3] However, the Trial Court's fair price analysis concluded that the settlement amount still fell within a range of reasonableness. In reaching that conclusion, the Trial Court valued the claim at only "$8.4288 million," based upon "litigation discounts," and awarded only nominal damages.[4]

The Trial Court's fair price analysis warrants reversal for two reasons.

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[2] Memorandum Opinion, dated October 3, 2023 at 5 (Exhibit A) (cited hereinafter as "OP_").

[3] OP82.

[4] OP74-82. The Trial Court also dismissed the aiding and abetting claim against IDT for lack of damages, a required element of aiding and abetting.

First, the Trial Court committed legal error by using March 29, 2017—the date of a meeting between the Special Committee, Howard, and others where a release of the Indemnity Claim was coerced—as the Indemnity Claim's valuation date.

This ruling violated the law of the case and settled precedent using signing or closing valuation dates for merger litigation. Verizon's acquisition of Straight Path (the "Acquisition") was signed on May 11, 2017 and closed on February 28, 2018. Prior rulings in this action established that Plaintiff's claims were direct because the coerced settlement diverted merger consideration from Straight Path's public stockholders, *i.e.*, "side benefits Howard Jonas extracted from the sales process [that] were directly related to the Verizon merger."[5] At class certification, the Trial Court held that the coerced settlement "could not have ripened into a cognizable injury until the [Acquisition] was actually consummated" and that "[t]he *value attributable to the loss of the Indemnification Claim could not be known until the Merger was finalized*, even if the fact of its settlement was known…."[6] Nonetheless, the Trial Court valued the Indemnity Claim post-trial as if it were a separate

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[5] *In re Straight Path Commc'ns, Inc. Consol. S'holder Litig.*, 2018 WL 3120804 *13 (Del. Ch. June 25, 2018) ("*Straight Path I*"), *aff'd sub nom.*, *IDT Corp. v. JDS1, LLC*, 206 A.3d 260 (Del. 2019).

[6] *In re Straight Path Commc'ns, Inc. Consol. S'holder Litig.*, 2022 WL 2236192 *6 (Del. Ch. June 14, 2022) ("*Straight Path III*").

transaction from the Acquisition, rather than a component of consideration, inconsistently with those prior rulings.

In addition, the Trial Court's valuation date was legal error as the March 29 meeting's timing and outcome were the product of Howard's coercion, at an early stage of Straight Path's sale process and well before the Indemnity Claim's value was even known. The Trial Court recognized that the meeting was coercive, explaining that "Howard injected a further element of time pressure by threatening to hold his support for *any* sale unless the Indemnification Claim was resolved *by the end of March*" and that the Special Committee therefore felt pressured "to resolve the claim *at the March 29 meeting*."[7] The meeting also occurred when the prevailing bid was more than three times less than the ultimate deal price. By choosing March 29, 2017 as the valuation date, the Trial Court allowed the unfair process to infect its fair price analysis, and therefore erred.

Second, the Trial Court erred in ascribing no value to a related claim Straight Path had against IDT for "contribution." In concluding that Straight Path's claims were only worth about $8.4 million, the Trial Court relied on its finding that Straight Path had not satisfied the "notice and consent" conditions for asserting an Indemnity Claim. Even accepting that conclusion, however, those conditions did not apply to

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[7] OP34 (emphases added).

contribution, which required a court or arbiter assessing the claims to weigh the parties' responsibility for the Indemnifiable Loss at issue, when indemnity was unavailable for *any* reason. This error in applying the contract's terms provide an independent basis for reversing the Trial Court's fair price and damages rulings.

Plaintiff respectfully requests that the Court reverse the Trial Court's decision and remand the action for determination of the fair price and damages to be assessed against Defendants Howard Jonas and IDT.

SUMMARY OF ARGUMENT

1. The Trial Court erred in valuing the diverted merger consideration as of March 29, 2017—when the controlling stockholder coerced the Indemnity Claim's release—rather than the May 11, 2017 signing or February 28, 2018 closing of the Acquisition.

2. The Trial Court erred by failing to attribute any value to a claim for "Contribution" under § 6.03 of the S&DA. The Contribution provision provided for contribution in proportion to IDT's relative fault, and stated that contribution "shall be determined" by reference to specific factors, such as the identity of the party who made false statements, and the parties' relative intents, knowledge, and access to information. The Trial Court did not consider these express factors in applying all of the equities in Howard's and IDT's favor.

STATEMENT OF FACTS

I. IDT

Howard founded IDT in 1990 and took it public in 1996.[8] Howard has been IDT's chairman since its founding and CEO through 2013, when he was succeeded by his son, Shmuel.[9] While "IDT has grown into a large enterprise," the Trial Court found that "in many ways it continues to be run like a family business."[10]

IDT owned telecommunications patents that could be monetized through patent infringement claims (the "IP Assets").[11] IDT also owned over nine hundred FCC-issued spectrum licenses, through which the holder had the right to operate in the 28 and 39 GHz bands in geographies across the country (the "Spectrum Licenses").[12]

IDT needed to renew the Spectrum Licenses in 2010, which required showing that it had constructed transmitting equipment capable of providing users with "substantial service."[13] At the time, the future value of the Spectrum Licenses was

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[8] OP8; A0963(¶80); A1309-310(970:15-972:9).

[9] OP8.

[10] OP8.

[11] OP11-12.

[12] OP9-11.

[13] OP9-10; A1833-34(3056:11-57:8); A4715; 47 C.F.R. §30.104 (2018).

uncertain, and IDT carried out an ambitious scheme to secure license renewal on a shoestring budget.[14] IDT deployed a consultant who went from license area to license area, "obtain[ed] access to suitable rooftops, sometimes through bribes, where he would set up a homemade radio transmitter he built for $450. [The consultant] would only stay long enough to demonstrate signal viability, typically an hour or less, before breaking down the transmitter and moving to the next site."[15]

In hundreds of renewal applications and subsequent submissions, IDT "consistently represented to the FCC … that it *had constructed equipment capable of transmitting*…."[16] "[T]hese representations contained no caveats for the present-tense language or explanations of the ephemeral nature of [IDT]'s 'construction.'"[17] Howard and his sister, Joyce Mason, who was IDT's general counsel, each signed these applications, certifying their veracity.[18]

II. STRAIGHT PATH

In March 2013, Howard and the IDT board of directors (the "IDT Board") considered spinning off the IP Assets into a separate publicly traded company (*i.e.*,

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[14] OP9-10; A2634; A3388-A3401; A2705; A2810; A1834(3058:5-22); A1120(213:11-22), A1130(254:10-13).

[15] OP10; A2705; A2810.

[16] OP10-11 (emphasis added); A4722-23 (emphasis added).

[17] OP11; A4722-23; A3290-327.

[18] OP11; A3290, A3340.

Straight Path) to shield IDT from patent infringement countersuits.[19] For tax reasons, IDT included the Spectrum Licenses with the new company's assets.[20] IDT spun off Straight Path on July 31, 2013 pursuant to the S&DA.[21]

S&DA §6.02 provided that IDT "shall indemnify" Straight Path from "the failure of IDT … to pay, perform or otherwise discharge any of the IDT Liabilities…."[22] S&DA §1.01 defined "IDT Liabilities" as "any Liabilities of [Straight Path] … arising, or related to the period *prior to* the Effective Time" of the Spin Off, including "any and all claims, debts, liabilities, and obligations … arising under … any law, rule, regulation, action, order, or *consent decree of any Governmental Entity*…."[23]

S&DA §6.03 provided for "contribution" in any "circumstances in which the indemnity agreements provided for in Sections 6.01 and 6.02 are unavailable or insufficient, *for any reason*."[24] In that case, "[IDT] … shall contribute to the amount paid or payable to [Straight Path] as a result of such Indemnifiable Losses, *in*

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[19] OP11-12.

[20] OP12.

[21] OP13; A2670; A0964-65(¶¶ 91, 94).

[22] A2688.

[23] A2674 (emphasis added), A2676 (emphasis added).

[24] A2688 (emphasis added).

proportion to the relative fault."[25]

Davidi, a second of Howard's sons, became Straight Path's CEO at the Spin Off.[26] At all relevant times, Howard owned more than 70% of Straight Path's voting power,[27] and the Jonas family collectively had a greater percentage economic interest in IDT compared to Straight Path.[28]

III. THE SHORT SELLER REPORT

By 2015, it was clear that the Spectrum Licenses might become valuable components of future 5G wireless networks.[29] Straight Path's stock price increased, speculation of an acquisition grew, and IDT's pre-Spin Off renewal process drew negative scrutiny.[30]

On November 5, 2015, a pseudonymous short seller report alleged that IDT "likely committed over 150+ counts of fraud against the US government" because its transmission equipment was "never built on the sites as specified in the filings."[31] The Straight Path Board hired Morgan Lewis & Bockius LLP ("Morgan Lewis") to

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[25] A2688 (emphasis added).

[26] OP13; A0965(¶92).

[27] OP45.

[28] OP45.

[29] OP15.

[30] OP15; A4770-781; A1076-77(39:15-41:4).

[31] OP15; A2711.

investigate.[32]

On February 26, 2016, Davidi emailed his brother Shmuel (IDT's CEO), Menachem Ash (IDT's in-house counsel), and Jason Cyrulnik (long-time counsel to the Jonas family, IDT, and Straight Path, then at Boies Schiller Flexner LLP). Davidi asked for a call, noting that "[a]ccording to a clause in the [S&DA], IDT indemnifies [Straight Path] for activities prior to the separation."[33] Davidi wrote "[g]iven the posture of the claims against [Straight Path] to date[,] that clause may be implicated."[34] Ash agreed to a call. However, the parties to the email (all Jonas family members or IDT-affiliated witnesses) claimed at trial to not remember any call, or if it even occurred.[35]

On July 21, 2016, Morgan Lewis delivered a memorandum to the Straight Path Board summarizing the findings of its internal investigation.[36] Morgan Lewis concluded that no transmission equipment was in place at any site visited, nor had such equipment ever been permanently installed.[37] Rather, Morgan Lewis found

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[32] OP16; A0967-68, A0973(¶¶105, 124); A1081(58:12-59:2).

[33] OP17; A2779.

[34] OP17; A2779.

[35] OP17; A2780; A1135(275:10-76:15); A1296-97(918:10-919:7); A1785(2861:20-62:8); A1673(2418:6-14); A1241(698:7-11).

[36] OP18; A2782.

[37] OP18; A2782.

that the evidence supported the conclusion that IDT had renewed all the licenses through the very brief deployment of the single prototype radio.[38] Morgan Lewis concluded that, prior to the short seller report, Straight Path was unaware of the lack of permanent equipment installation.[39]

IV. THE FCC INVESTIGATION

On September 20, 2016, the FCC launched parallel inquiries into IDT and Straight Path.[40] IDT and Straight Path coordinated their response through shared legal counsel and other lawyers working pursuant to a common interest privilege.[41]

IDT admitted to the FCC that any renewal demonstrations occurred while IDT held the licenses.[42] Straight Path told the FCC that "IDT is obligated to reimburse Straight Path for the payment of any liabilities arising or related to the period prior to the Spin-Off."[43] Three days later, IDT's annual 10-K disclosed that "should the FCC impose liability on Straight Path, [IDT] could be the subject of a claim from Straight Path related to that liability."[44]

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[38] OP18; A2782.

[39] OP18; A2782.

[40] OP19; A3067; A3092.

[41] OP19-20; A4413-427; A4346-48.

[42] OP20; A3411-12.

[43] OP20; A3127.

[44] OP20; A3435.

By mid-2016, Straight Path began receiving interest from potential acquirers.[45] In October 2016, the Company retained Evercore Group LLC ("Evercore") and Weil, Gotshal & Manges LLP ("Weil").[46] The Straight Path Board decided that the pending FCC inquiry investigation could damper acquisition bids and decided to engage with the FCC regarding a potential settlement.[47]

In November 2016, Morgan Lewis sent the FCC proposed terms for a consent decree. Negotiations between Straight Path and the FCC took place throughout December 2016.[48] Cyrulnik personally commented on multiple drafts of the consent decree, while simultaneously engaging with IDT regarding its obligations under the S&DA's indemnity provisions.[49]

Also in December 2016, Davidi met with Howard and informed his father that the FCC had proposed a settlement in which Straight Path would give up half of the proceeds from selling the Spectrum Licenses.[50] Howard told his son that "this is a first offer … you should keep negotiating … because you can do much better."[51]

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[45] OP20; A4083; A1094(110:12-111:13); A1369(1208:22-209:2).

[46] OP21; A0967(¶¶103-104), A0976(¶¶138-139).

[47] OP20-21; A0967(¶103), A0976(¶138).

[48] OP22-23.

[49] A0797-98; A3516-17.

[50] OP22; A1314(990:6-14), A1315(992:1-6).

[51] OP22; A1315(992:1-6).

On December 18, 2016, Evercore described in an email that Breau, Straight Path's general counsel, conveyed that "Howard Jonas and/or IDT would contribute a lot towards funding [any FCC penalty]."[52] Four days later, Breau, Straight Path regulatory counsel, Howard, and Shmuel had a call to discuss "the deal overall."[53]

In early January 2017, Howard and Davidi met again to discuss the FCC's most recent offer ("20 percent"),[54] which was materially the same as the final deal. Unlike before, Howard did *not* tell Davidi to refuse the deal or continue negotiating.

On January 8, 2017, Howard flew to meet Straight Path director and former Massachusetts Governor William Weld at the home of a colleague in the Dominican Republic.[55] Howard initiated the meeting, which was "important to him, as became clear right away."[56] The material terms of the Consent Decree were "pretty far along," and Howard was "generally aware" of those terms.[57] Howard supported the Consent Decree rather than "open[ing] ourselves up to some kind of risk [] with a new FCC."[58]

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[52] OP22-23; A3510.

[53] OP23; A3514; A3811-17; A3511; A1346-47(1117:13-119:2).

[54] OP23; A1315(992:12-23).

[55] OP23; A1316(996:23-97:17); A1553(1940:5-9, 1941:12-22).

[56] A1553(1942:19-21), A1554(1943:7-11).

[57] A1554-55(1946:17-1947:15).

[58] A1317(1002:1-12); A1247(723:1-18).

During their meeting, Weld and Howard discussed that Straight Path was considering seeking indemnity from IDT.[59] Howard—IDT's executive chairman—did not withhold IDT's consent to settle with the FCC, even having learned about Straight Path's contemplated assertion of indemnity.[60]

V. THE CONSENT DECREE

Straight Path entered into the consent decree with the FCC on January 11, 2017 (the "Consent Decree").[61] In exchange for resolving the alleged violations, Straight Path agreed to pay $15 million and surrender 196 of the Spectrum Licenses (the "Surrendered Licenses").[62] Straight Path also agreed to either (i) an additional penalty of $85 million, due within 12 months; (ii) termination of all remaining Spectrum Licenses; or (iii) forfeiture of 20% of the proceeds from a sale of the remaining Spectrum Licenses.[63]

VI. THE SALE PROCESS

A. The Straight Path Board Forms The Special Committee

On January 31, 2017, the Straight Path Board authorized Evercore to identify

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[59] A1555(1947:11-23); A3549; A1627(2234:5-35:22).

[60] A1555(1949:6-11).

[61] OP24; A3518; A3517; A3532.

[62] OP24; A0975(¶135).

[63] OP24; A0975(¶135).

and contact potential bidders.[64]

On February 6, 2017, the Straight Path Board formed the Special Committee consisting of three independent directors: William Weld, Christopher Todd, and Fred Zeidman.[65] While the initial purpose of the Special Committee was to decide what to do with the IP Assets, evaluation of Straight Path's options regarding the Indemnity Claim quickly became the Special Committee's focus.[66] The Special Committee retained Shearman & Sterling LLP ("Shearman").[67]

B. The Special Committee Attempts To Preserve The Indemnity Claim

The Special Committee met on February 14, 2017. Shearman discussed preserving the Indemnity Claim as a component of the merger consideration that would go to stockholders in a sale.[68] The Special Committee decided to explore preserving and pursuing the Indemnity Claim (*i.e.*, through post-closing litigation) on the stockholders' behalf.[69] The Special Committee wanted to ensure that the unaffiliated stockholders received fair value for the Indemnity Claim, which might

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[64] OP25; A0976(¶¶140-141).

[65] OP25-26; A0978(¶152).

[66] OP26; A1624(2224:7-14), A1625(2228:18-23); A1553(1939:9-22).

[67] OP26; A0969(¶109).

[68] OP26; A3549.

[69] OP26-27; A3549.

be undervalued by a third-party bidder.[70]

Straight Path received initial bids on March 2, 2017.[71] On March 8, the Special Committee met.[72] While the Special Committee decided that it was willing to explore a pre-Acquisition settlement, it nonetheless wanted to prepare a trust to preserve the Indemnity Claim should settlement efforts fail.[73]

On March 10, 2017, the Special Committee resolved that the upcoming second-round bid process letter would disclose to bidders that the Indemnity Claim would be excluded from the transaction.[74] The Special Committee resolved again on March 13 to exclude the Indemnity Claim from any sale.[75] On March 14, the full Straight Path Board told Evercore to send the second-round bid process letter, which said "that Straight Path presently intends … that the potential indemnification claim of Straight Path under [the S&DA], will also be excluded from the transaction."[76]

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[70] OP27; A1555(1949:23-50:2); A1628(2238:14-17).

[71] OP28; A0976(¶143).

[72] OP28; A3565; A3568.

[73] OP28; A3568; A1590(2085:24-87:3), A1591(2089:13-90:10), A1629(2244:6-17); A1558(1960:14-1962:4).

[74] OP29; A3570.

[75] OP29; A3572.

[76] A3583; A4170; A1559(1963:18-64:22).

VII. HOWARD COERCES AN UNFAIR SETTLEMENT OF THE INDEMNITY CLAIM

A. Breau Tips IDT to the Special Committee's Plan

David Breau was Straight Path's general counsel from February 2016 until the Acquisition.[77] Breau owed his job to Shmuel (IDT's CEO) and remained grateful to the Jonas family through trial.[78] By March 8, 2017, Breau was privy to the Special Committee's plan to preserve the Indemnity Claim.[79] He saw Shmuel on March 10, and told Shmuel of the Special Committee's plan.[80] Shmuel immediately told his father, Howard, who was very upset.[81] The Special Committee never authorized Breau to share this information with IDT.[82]

B. Howard Threatens Weld

Breau began contacting the Special Committee members to schedule direct calls with Howard. Shearman informed Breau that it was not prudent for Howard to speak directly with the Special Committee members, without counsel.[83] Howard

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[77] A0966(¶97).

[78] A1660, 1670-1671(2366:8-16, 2407:11-13, 2410:9-2411:3); A1238-39(686:22-687:13, 689:10-12).

[79] A3568.

[80] OP28; A1215-16(595:4-96:1), A1239(690:2-18).

[81] OP28; A1239(690:19-21); A1323(1023:18-1024:7), A1352(1141:23-1142:18).

[82] A1633(2258:11-14); A1688-89(2479:22-2481:2).

[83] OP30; A1632-33(2256:22-2257:16), A1634-35(2264:20-65:10).

was enraged to learn that Shearman blocked access to "my directors."[84]

On March 14 and 15, 2017, Howard called Weld about a dozen times.[85] Eventually, Weld picked up because "Howard [wa]s obviously distraught."[86] During the call, Howard was very angry and bullied Weld to drop the Indemnity Claim.[87] Weld said "Howard, we're just not going in that direction"—*i.e.*, where the Indemnity Claim was not preserved.[88] Howard responded "[t]hen I'll tell you what I'm going to do, I'm going to put it all on Mintz."[89]

Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, P.C. ("Mintz"), where Weld was a partner, had been FCC counsel to both IDT and Straight Path at the time of the Spectrum License renewals.[90] Weld perceived that Howard's intention to "put it all on Mintz" was a threat against his firm and a direct response to the Special Committee's attempt to pursue the Indemnity Claim. Howard "wanted the indemnification claim to be abandoned or settled for very short money."[91] When

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[84] A1325(1031:9-13), A1353-54(1146:4-48:4); A1540(1888:24-89:5); A4797.

[85] OP30; A1323-24(1026:4-27:17); A1559(1965:11-1966:12).

[86] OP30; A1559-60(1965:11-1967:3).

[87] OP30-31; A1560(1967:7-18), A1581(2053:16-18).

[88] A1560(1967:19-1968:1).

[89] OP31; A1560(1967:19-68:1); A1353(1144:9-1145:23).

[90] OP31; A0968(¶106); A1527(1838:20-23).

[91] A1560(1968:18-24).

asked if he took the threat seriously, Weld testified "you can't not take it seriously."[92]

C. Howard Threatens To Block Any Transaction That Preserves The Indemnity Claim For Straight Path Stockholders

On March 19 or 20, 2017, Cyrulnik (as IDT's counsel) told Jerome Fortinsky at Shearman that Howard "was not prepared to commit to support a potential transaction that would allow an indemnification claim under the [S&DA] to be pursued against IDT…."[93] From this call with Cyrulnik, the Special Committee understood "that Mr. Jonas was conditioning his support for the merger on the indemnity claim being resolved."[94]

By conditioning his support for a sale—which Straight Path needed due to his supervoting shares[95]—on pre-transaction settlement of the claim on his terms, Howard presented the Special Committee with an impossible choice: release the Indemnity Claims for "short money," or risk imploding the sale process.[96]

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[92] A1560(1969:5-11).

[93] OP32; A4171; A1630(2245:21-2246:6), A1636(2270:21-24), A1636(2272:5-15); A1630(2245:24-2246:2), A1636(2272:5-15).

[94] OP32; A1636(2271:17-2272:2), A1637(2274:9-12), A1655(2346:6-14).

[95] OP32; A1637(2273:16-2274:8).

[96] *See, e.g.*, A1566-67(1994:17-1995:11); A1415(1390:2-12); A1654(2341:2-5), A1655(2345:20-23); *see also* A0827(n.231).

D. Howard And Cyrulnik Force The Special Committee Into A Coercive Settlement Negotiation

Adding to the pressure, Cyrulnik told Fortinsky that unless the Indemnity Claim was resolved by March 31, 2017—when Howard was scheduled to take an international trip—Straight Path would not get Howard's support for a Straight Path sale *at all*.[97] "Accordingly, the Special Committee felt that the weight of these asymmetrical negotiating positions put pressure on them to resolve the claim" by the end of March.[98]

Hoping to bring a neutral perspective, Shearman tried to secure Howard's agreement to a mediator and suggested retaining former Chancellor Chandler or former Vice Chancellor Lamb.[99] As Fortinsky wrote Cyrulnik, "[i]f you want us to re-evaluate our sense of the strength of our position, … we will give much greater weight to what we hear from someone of their stature and experience."[100] Cyrulnik rejected Shearman's recommendations on the grounds that Chancellor Chandler and Vice Chancellor Lamb had reputations that were "highly questionable" or "not good."[101] Shearman was surprised by (and disagreed with) Cyrulnik's bitter

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[97] OP34; A1637-38(2276:6-2277:11).

[98] OP34.

[99] OP32; A3584; A1638(2279:16-2280:21), A1639(2283:4-2284:12).

[100] A3586.

[101] OP32; A3585.

criticism, and Fortinsky wondered whether IDT was trying to avoid the presence of a mediator altogether.[102] Trapped between Howard's ultimatum and his imposed deadline, the Special Committee agreed to a March 29 meeting, without the support of any neutral.[103]

A few days before the meeting, Shmuel and Howard agreed to settle the Indemnity Claim for $10 million and "not a penny more[.]"[104] Howard communicated this $10 million cap to Weld ahead of the meeting.[105]

Howard also took steps to ensure that he could fire the Special Committee. Howard's supervoting shares were held in a trust.[106] On March 28, Cyrulnik secured a dissolution agreement for the trust.[107] By signing the agreement, Howard could replace the Special Committee members with directors who would comply with his demands.[108]

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[102] A1639(2282:16-2283:3).

[103] A1639(2284:2-4).

[104] OP34; A1248(725:16-726:1); A1338(1085:1-20).

[105] OP34; A1564-A1565(1985:21-1987:14).

[106] OP12-13; A3553.

[107] OP35; A3589-592; A1356-57(1158:19-1159:16).

[108] OP35; A3592.

E. At The March 29 Meeting, Howard Coerces The Special Committee Into Releasing The Indemnity Claim For $10 Million

On March 29, 2017, the Special Committee, Howard, their counsel, and other representatives of IDT and Straight Path met to discuss the Indemnity Claim.[109] The Special Committee still "perceived that th[e] indemnification claim had tremendous value."[110] However, the Special Committee and its advisors understood Howard's "stated position to date [to be] that *he was going to block any deal* that allowed the Indemnity Claim to survive."[111]

The Special Committee and its advisors believed that Howard might follow through if he did not extract a resolution of the claim *that day* that suited him and IDT. As Weld testified:

> A. I thought we had to do what everyone thought we had to do that day, which was to resolve the indemnity claim, which I suppose means settle the indemnity claim one way or the other. And, you know, *there was not equality of bargaining power* going into that room in the afternoon, I can tell you that.
>
> Q. … So I believe I heard you say you felt like you had to get the claim resolved one way or another. Did I hear you correctly?
>
> A. Yes.
>
> Q. And that's at that meeting, am I right?

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[109] OP35; A0983-84(¶167).

[110] A1628(2239:1-2).

[111] A1643(2299:17-22); A1414(1388:6-21).

A. That day, yes.[112]

The day began with a large meeting of all attendees. Howard was "upset" and "angry at the directors."[113] He referred to them as "bullshit directors" for purportedly "not fulfilling their … job to kind of look out for Davidi, his son."[114] Weld understood Howard's anger to come from the Special Committee's "refusal to settle the indemnification claim caus[ing] him to suffer a loss of control…."[115] Eventually, the Special Committee made an opening demand of about $60 million to resolve the claim,[116] which was the product of all the circumstances including Howard's threats and ultimatum regarding timing.[117]

The discussion then moved to a breakout session including Howard, Cyrulnik, and the Special Committee members.[118] In the hallway leading into the breakout session, Howard flashed the trust dissolution agreement to Weld, saying "Bill, look

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[112] A1566-67(1993:15-1994:4); *see also* A1414(1388:17-21); A1629(2242:8-18).

[113] A1644(2301:23-2302:3); A1568(1991:18-21); A1395(1313:11-13).

[114] OP35; A1644(2302:4-7); A1395(1313:1-13), A1415(1392:14-1393:23); A1480(1649:23-1650:8).

[115] A1566(1992:9-10).

[116] OP36.

[117] *See supra* 20-24; *see also* A1925(n.281).

[118] OP36; A0984(¶168).

at this … [i]t's already been dissolved."[119] Prior to entering the small group meeting, the Special Committee members realized that this meant Howard could fire them on the spot.[120]

As the Trial Court found, "[t]his realization added to the intense pressure on the Special Committee to come to an agreement" *at the March 29 breakout session*.[121] Seeking to secure *something* for the Straight Path stockholders, the Special Committee capitulated to Howard's $10 million number, pre-wired with Shmuel days earlier.[122] The Special Committee recognized that the $10 million settlement was not fair, but that it was the best they could do for Straight Path's stockholders, given Howard's coercive conduct and timeline. As Weld testified, the Indemnity Claim did not settle for fair value, but "was a sacrificial lamb to get the [Acquisition] done…."[123]

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[119] OP36; A1568(2000:21-2001:1).

[120] OP36; A1568(2001:2-2002:5).

[121] OP36; A1570(2007:2-9); A1396(1313:14-1314:3).

[122] OP36-37; A1527(1835:16-1836:2), A1569(2004:7-15); A1395(1312:2-1313:13), A1414-15(1387:23-1390:12); A0984(¶169).

[123] A1570(2008:24-2009:1); *see also* A1423(1423:23-1424:1) ("…while I didn't like it, while I thought it was too low, I thought it was necessary in order to protect the rights of all the shareholders"); A1418(1403:3-4) ("I think it's fair to say that all three of us thought [$10 million] was too low.").

VIII. THE AFTERMATH

The Special Committee authorized the Company to enter an initial term sheet documenting the "agreement"-in-principle to release the Indemnity Claim on April 6, 2017.[124] That day and in the following days, the Company received increased offers from several bidders, driving up the amount that Straight Path would need to pay the FCC.[125]

On April 7, 2017, IDT asked for a change to the initial term sheet, which the Special Committee used as an opportunity to seek additional consideration, given the increased Indemnifiable Loss since March 29.[126] Their efforts were met with more threats, this time from Cyrulnik to Shearman.[127] The Special Committee capitulated again. On April 9, 2017, Straight Path executed a new term sheet, for consideration that by that juncture was even less fair (and would become increasingly so, as the bidding increased before the final deal).[128]

On May 11, 2017, Verizon agreed to acquire Straight Path—not including the

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[124] OP37; A3593.

[125] OP37-38; A0986(¶¶173-74).

[126] OP38; A3604; A0986(¶176).

[127] OP38; A3604.

[128] OP38; A3607.

Indemnity Claim—for $3.1 billion.[129] The sale closed on February 28, 2018. Although Verizon paid $3.1 billion for Straight Path, only $2.45 billion was paid to stockholders. Straight Path paid $614 million of the sale proceeds (20%) to the FCC to satisfy the Consent Decree.[130] Straight Path had already paid the FCC the $15 million upfront fine.[131]

Straight Path also forfeited 196 Spectrum Licenses. Plaintiff's spectrum expert valued the Surrendered Licenses at $529 million.[132] Thus, the Indemnity Claim that Howard coerced the Special Committee into releasing for $10 million had a facial value of about $1.158 billion.

IX. RELEVANT PROCEDURAL HISTORY

The original complaint in this action was filed on July 5, 2017[133] After dismissing the Special Committee members without prejudice, the original plaintiffs filed an amended complaint on August 29, 2017.[134]

On September 24, 2017, Defendants moved to dismiss the complaint on the

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[129] OP38; A3611; A4095-99.

[130] A0987(¶181).

[131] A0975(¶137).

[132] A1810-11(2964-65), A1815-16(2984:8-2987:4); *see also* A4557.

[133] A0270; A0313.

[134] A0460.

basis that the claims were derivative.[135] On November 20, 2017, the Trial Court issued a letter opinion staying the action pending the closing of the Acquisition. "Because the Complaint seeks redress for direct claims of stockholders arising from the merger, and does not seek to enjoin the merger, the matter is not ripe."[136]

The Acquisition closed on February 28, 2018.

On June 25, 2018, the Trial Court issued a memorandum opinion denying Defendants' motions to dismiss, holding that the claims could be asserted directly because the coerced settlement diverted merger consideration from Straight Path's public stockholders and served as a nonratable benefit to Howard and IDT.[137] This Court affirmed that decision following an interlocutory appeal.[138]

On February 17, 2022, the Trial Court denied Defendants' motions for summary judgment in full.[139] The Trial Court granted Plaintiff's motion for class certification on June 14, 2022.[140]

Plaintiff reached a $12.5 million settlement with Defendant Davidi Jonas on

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[135] A0558-566.

[136] A0727-28.

[137] *Straight Path I*, 2018 WL 3120804 *13-20.

[138] *IDT Corp. v. JDS1, LLC*, 206 A.3d 260 (Del. 2019) (TABLE).

[139] *In re Straight Path Commc'ns Inc. Consol. S'holder Litig.*, 2022 WL 484420 (Del. Ch. Feb. 17, 2022) ("*Straight Path II*").

[140] *Straight Path III*, 2022 WL 2236192.

August 12, 2022, which the Trial Court approved on December 22, 2022.[141]

Trial took place over ten days: August 29 through September 2, 2022, and December 5 through December 12, 2022. Post-trial briefing concluded on April 28, 2023, and post-trial argument occurred on May 3, 2023.

On October 3, 2023, the Trial Court issued its post-trial Memorandum Opinion. The Trial Court found that Howard committed a "flagrant" breach of his duty of loyalty to the Class by, among other things, engaging in a "campaign of abuse and coercion" and forcing the Special Committee to release the Indemnity Claim in a "manifestly unfair manner."[142] Thus, Defendants failed to satisfy this Court's "fair process" prong of the entire fairness test.[143] However, the Trial Court found—Plaintiff respectfully submits, incorrectly—that the Indemnity Claim was "economically worthless" because Straight Path did not satisfy the S&DA's notice and consent provisions, and thus the $10 million was within a range of fairness.[144]

But this "d[id] not end [the Trial Court's] analysis. The question is one of entire fairness, and what the stockholders could have achieved, absent the

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[141] OP41.

[142] OP47, 82.

[143] OP46-50; *Weinberger v. UOP, Inc.*, 457 A.2d 711 (Del. 1983).

[144] OP51.

iniquities."[145] It then "examine[d] what a reasonable sale process for a release of the [Indemnity] Claim would have achieved, absent the controller imposing an unfair process."[146] "This assessment provide[d] an opportunity to evaluate the transaction holistically and 'eliminate the ability of the defendants to profit from their breaches of the duty of loyalty.'"[147]

To do this, the Trial Court calculated the facial value of the Indemnity Claim based on the top bid for Straight Path as of *March 29, 2017*: $293.4 million.[148] Per the footnote below, this calculation is about $20.6 million too low due to a math error.[149] The Trial Court then deducted $30 million in estimated litigation costs and applied a series of litigation discounts to conclude that "[a] settlement in t[he]

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[145] OP72.

[146] OP72.

[147] OP72-73 (citing *In re Dole Food Co., Inc. S'holder Litig.*, 2015 WL 5052214 *2).

[148] OP74-75.

[149] The components of the Trial Court's calculation of the facial value of the Indemnity Claim are: (i) the $15 million upfront cash penalty; (ii) 20% of the merger proceeds based on the prevailing top bid on March 29 of $800 million ($160 million); and (iii) a valuation of the Surrendered Licenses, which Appellant's expert estimated would be worth about 14.8% of the total Spectrum License portfolio. OP75. This last component was calculated incorrectly, as the Trial Court took 14.8% of $800 million (which was 85.2% of the total Spectrum License value based on the prevailing bid; not 100%). The correct amount is $139 million. (85.2% / 100% = $800 million / $939 million; $939 million - $800 million = $139 million.) Correcting the arithmetic, the facial value of the Indemnity Claim using the Trial Court's assumptions is $314 million.

vicinity" of $8.4288 million "would have been a reasonable result of a fair, uncontrolled negotiation of a release of the Indemnification Claim."[150] Accordingly, the Trial Court held that Howard was liable for only nominal damages.

[150] OP81. Correcting for the math error (*supra* n.149), that amount should be $9,088,000.

ARGUMENT

I. THE TRIAL COURT ERRED IN VALUING THE DIVERTED MERGER CONSIDERATION AS OF MARCH 29, 2017

A. Question Presented

Did the Trial Court err in valuing the diverted merger consideration as of March 29, 2017—when the controlling stockholder coerced the Indemnity Claim's release—rather than as of the signing or closing of the Acquisition? The question was raised below and considered by the Trial Court. *See* A2307-308; OP73 n.401.

B. Scope Of Review

While this Court reviews a trial court's fair price determination for abuse of discretion, its "review of the formulation and application of legal principles … is plenary and requires no deference." *Kahn v. Lynch Commc'n Sys., Inc.*, 669 A.2d 79, 84 (Del. 1995); *see also Kahn v. Tremont Corp.*, 694 A.2d 422, 428 (Del. 1997). "[I]n an appropriate case, this Court may review *de novo* mixed questions of law and fact…." *Zirn v. VLI Corp.*, 681 A.2d 1050, 1055 (Del. 1996).

C. Merits Of Argument

In calculating the facial value of the Indemnity Claim, the Trial Court erred by using a March 29, 2017 valuation date—*i.e.*, when Howard coerced an agreement-in-principle to release the claim.[151] This decision was legal error.

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[151] OP74-75.

1. The Trial Court Did Not Follow The Law Of The Case

The Trial Court relied on *Cede & Co. v. Technicolor, Inc.* for the undisputed proposition that the valuation date for "fair price in the merger context" is the "day of the transaction in question."[152] But the Trial Court incorrectly found that the "transaction in question" was the coerced agreement-in-principle to release the Indemnity Claim; *not* the Acquisition. This was inconsistent with the law of the case that Howard diverted merger consideration to himself and IDT.

"The law of the case is established when a specific legal principle is applied to an issue presented by facts which remain constant throughout the subsequent course of the same litigation."[153] The doctrine "applies to decisions rendered by a court that arise again later in the same court, in the same proceedings" and "operates as a form of intra-litigation *stare decisis*."[154]

At the pleading stage, Defendants argued that "the allegations in the Complaint boil down to the assertion that IDT did not pay Straight Path enough for the settlement of the indemnification claim," and therefore asserted a derivative

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[152] OP73 n.401 (citing *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1186-87 (Del. 1988)); *see also Weinberger*, 457 A.2d at 713).

[153] *Frederick-Conaway v. Baird*, 159 A.3d 285, 296 (Del. 2017).

[154] *Id.* (citing *Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A.*, 2015 WL 5278913 *7 (Del. Ch. Sept. 10, 2015)).

claim.[155] In rejecting this argument, the Trial Court looked to *Parnes v. Bally Entertainment Corporation.*[156] and its progeny, which "compel[led] the conclusion that the Complaint here states direct claims challenging *the fairness of the Verizon merger*."[157] The Court found that under *Golaine v. Edwards*, Plaintiff successfully "state[d] a claim that the side transactions [*i.e.*, the coerced Indemnity Claim release] caused legally compensable harm to the target's stockholders by improperly diverting consideration from them to their fiduciaries."[158]

To support this, the Trial Court looked to the relevant Complaint allegations showing that the Special Committee intended to distribute *pro rata* interests in the Indemnity Claim to the public stockholders:

> The Special Committee … set about preserving the indemnification claim…. The Special Committee instructed its counsel to draft the paperwork necessary to create a litigation trust. The trust would pursue the indemnification claim against IDT post-merger. It would exist for the benefit of the Straight Path stockholders, and not Straight Path itself; upon sale of the company, then, stockholders would *receive two forms of consideration*—a beneficial interest in the trust and a proportionate share of consideration paid by the buyer.[159]

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[155] *Straight Path I*, 2018 WL 3120804 *19.

[156] 722 A.2d 1243, 1245 (Del. 1999).

[157] *Straight Path I*, 2018 WL 3120804 *12 (emphasis added).

[158] 1999 WL 1271882 *7 (Del. Ch. Dec. 21, 1999); *see also Houseman v. Sagerman*, 2014 WL 1600724 *13 (Del. Ch. Apr. 16, 2014).

[159] *Straight Path I*, 2018 WL 3120804 *12 (emphasis added).

The Trial Court went on to recognize that it was Howard's threats to block the Acquisition that caused the release of the Indemnity Claim and by extension the diversion of a category of contemplated merger consideration:

> Howard Jonas explicitly conditioned his support for a sale of the company on the elimination of the indemnification claim. Indeed, he threatened to blow up any sale unless the Special Committee dropped its plan to preserve the claim. Howard thus manipulated the sales process to secure significant benefits for IDT and himself at the expense of Straight Path's other stockholders…. [T]he side benefits Howard Jonas extracted from the sales process were directly related to the Verizon merger.[160]

Following the Trial Court's grant of interlocutory appeal, this Court summarily affirmed the Trial Court's denial of the motions to dismiss.[161]

Then, at class certification, Defendants argued that purchasers of Straight Path stock between public announcement of the Indemnity Claim settlement and closing of the Acquisition were not harmed and thus lacked standing. In rejecting this argument, the Trial Court wrote that:

> [T]he injury suffered was suffered by the stockholders of Straight Path via their ownership of Straight Path stock, and arising as it did from the loss of consideration in the Merger with Verizon … [I]t could not have ripened into a cognizable injury until the Merger was actually consummated….
>
> The fine to be paid, and therefore the value of the Indemnification Claim (supposing its viability), was due as a percentage of the proceeds

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[160] *Straight Path I*, 2018 WL 3120804 *13 (emphasis added).

[161] *IDT Corporation v. JDS1, Inc.*, 206 A.3d 260.

> of any sale of Straight Path. Indeed, a bidding war erupted in April and May 2017…. The *value attributable to the loss of the Indemnification Claim could not be known until the Merger was finalized*, even if the fact of its settlement was known…. The wrongdoing—that is, the diversion of the Merger consideration—had not yet crystallized, as the Merger had not yet been consummated.[162]

The Trial Court expressly defined the Class as those holding at closing, and supported that determination on the fact that harm did not "crystallize" until closing. Prior to that, the magnitude of the Indemnifiable Loss under the S&DA, the facial value of the claim, and the harm to the Class were all unknown.

Because this Court affirmed the denial of the motions to dismiss and Defendants did not appeal the class certification rulings, it is law of the case that the claim challenges the diversion of merger consideration in the Acquisition. Departure from the law of the case requires new and material evidence not previously presented or an intervening change of controlling legal authority.[163] None exist here. The trial proved the two primary pretrial bases for assessing the claims as direct ones challenging the diversion of merger consideration—*i.e.*, that the Special Committee sought to distribute interests in the Indemnity Claim to the Class as partial payment for the public shares, and that Howard's coercive conduct thwarted that goal.

Thus, the Trial Court erred in finding that the coerced term sheet was the

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[162] *Straight Path III*, 2022 WL 2236192 *6 (emphasis added).

[163] *See Sciabacucchi v. Malone*, 2021 WL 3662394 *5 (Del. Ch. Aug. 18, 2021).

"transaction in question" for valuation date purposes, as opposed to the Acquisition.

2. The Trial Court Did Not Follow Settled Precedent Using Signing or Closing Valuation Dates In Merger Cases

In cases challenging merger transactions, Delaware courts use the date of the challenged transaction to value the subject shares. The Trial Court erred by instead valuing the diverted merger consideration as of the earlier date of the coerced "agreement."

Where plaintiffs pursue a quasi-appraisal remedy, the courts generally use a closing date valuation, like in *Cede & Co. v. Technicolor*—the only authority relied on by the Trial Court in connection with the valuation date.[164] In other cases, where breaching conduct led the board to approve a suboptimal deal (*e.g.*, by steering away from a disfavored bidder), courts have applied a signing date valuation.[165] Here, the outcome is the same regardless of whether a signing or closing date is applied.

Consistent with the prior rulings in the case, the Class was harmed when its

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[164] 542 A.2d at 1187 (valuing the "cashed-out minority's share interest on the day of the merger") (citing *Weinberger*, 457 A.2d at 713); *see also In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205, 224-26 (Del. Ch. 2014) (measuring damages as of "time of the merger"); *Owen v. Cannon*, 2015 WL 3819204 *29 (Del. Ch. Jun. 17, 2015) (same); *In re PLX Tech. Inc. S'holders Litig.*, 2018 WL 5018535 *51 (Del. Ch. Oct. 16, 2018) (measuring damages as of closing), *aff'd*, 211 A.3d 137 (Del. 2019).

[165] *E.g.*, *PLX*, 2018 WL 5018535 *51; *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1250 (Del 2012); *In re Dole Food Co., Inc. S'holder Litig.*, 2015 WL 5052214 *46 (Del. Ch. Aug. 27, 2015).

shares were cashed out without receiving that diverted merger consideration. The Trial Court's opinion does not cite any authority for the proposition that valuation can be assessed at a pre-merger date when a coerced and non-final agreement is reached on a controller side deal.[166] Plaintiff could not identify any such precedent either. Defendants did not cite any authority regarding the appropriate valuation date at all.

In the Memorandum Opinion, the Trial Court wrote that Plaintiff "cite[d] only *Bomarko*" in support of a valuation date as of the Acquisition.[167] Respectfully, this appears to be an oversight. Consistent with the referenced precedent, Plaintiff cited *In re Cellular Telephone Partnership Litigation*.[168] and *In re Southern Peru Copper Corporation Shareholder Derivative Litigation*[169] in her opening post-trial brief below for the proposition that "[t]his Court generally uses a valuation date of

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[166] Indeed, as of the Court's March 29, 2017 valuation date, the only agreement regarding the Indemnity Claim's release was a coerced handshake. By the time the term sheet was executed on April 9, 2017, third parties had already increased their bids, and the facial value of the Indemnity Claim had increased by 75%. A0986(¶¶173-77).

[167] OP73 n.401.

[168] 2022 WL 698112 *53 (Del. Ch. Mar. 9, 2022) ("[d]amages should be measured at the time of the Freeze-Out" in an entire fairness case).

[169] 52 A.3d 761, 815-16 (Del. Ch. 2011) (calculating damages as the "difference between … fair price and the market value of [the merger consideration] as of the Merger date" in an entire fairness case).

signing, or closing, in breach of fiduciary duty deal cases."[170] The *Bomarko* passage referred to by the Court was not intended as valuation date-related support, but rather for the use of litigation discounts to value a litigation asset.[171] Because Defendants did not address the applicable valuation date in their opening post-trial brief, Plaintiff did not cite additional authority in her post-trial answering brief.

3. In Selecting An Erroneous Valuation Date, The Trial Court's Fair Price And Damages Analysis Was "Infected" By The Loyalty Breach

The timing of the March 29, 2017 "settlement" of the Indemnity Claim was the product of the unfair process. The Trial Court's selection of that valuation date infected its fair price and damages analyses with the unfair process. These analyses are, therefore, unreliable.

"A strong record of fair dealing can influence the fair price inquiry, reinforcing the unitary nature of the entire fairness test. The converse is equally true: *process can infect price*."[172] A dubious process can call into question a low but nominally fair price.[173] "Factors such as coercion, the misuse of confidential

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[170] A1955(n.403).

[171] *See* A2307.

[172] *Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 467 (Del. Ch. 2011) (collecting authorities).

[173] *Jacobs v. Akademos, Inc.*, 326 A.3d 711, 752 (Del. Ch. Oct. 30, 2024).

information, secret conflicts, or fraud could lead a court to hold that a transaction that fell within the range of fairness was nevertheless unfair compared to what faithful fiduciaries could have achieved."[174]

Here, the independent Straight Path directors sought to provide for the post-Acquisition monetization of the Indemnity Claim for the benefit of the Class. The Special Committee unanimously voted to preserve the Indemnity Claim on several occasions.[175] An interest in the Indemnity Claim was to be part of the consideration, because the Special Committee members believed that was the best way to maximize the value of the asset.[176] It follows that in the but-for-the-breach world, the Indemnity Claim would have been resolved with full knowledge of the final Acquisition price and by extension, the full Indemnifiable Loss, rather than the early-stage bid used by the Trial Court.

Howard's breaching conduct thwarted the Special Committee's intentions, forcing a coercive settlement on a coercive timeline, before the full value of the Indemnifiable Loss was known (or knowable). Specifically:

- Straight Path General Counsel Breau—who was beholden to the Jonas family—leaked the Special Committee's plan to preserve the Indemnity

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[174] *ACP Master, Ltd. v. Sprint Corp.*, 2017 WL 3421142 *19 (Del. Ch. Aug. 8, 2017), *aff'd*, 184 A.3d 1291 (Del. 2018).

[175] *See* OP26-28; A3549.

[176] *See* OP27-28; A3568.

Claim to IDT, without authorization.[177]

- Howard then called the directors directly (over Shearman's instruction), berated them, and threatened to inculpate Weld's law firm.[178]

- Through Cyrulnik, Howard threatened to block any transaction that preserved the claim.[179]

- Cyrulnik conveyed that unless there was a deal by the end of March (when Howard was scheduled to go on an international trip), Howard would not support any transaction at all.[180]

Trapped between Howard's threat to block the deal and his ultimatum on timing, the Special Committee agreed to the March 29, 2017 meeting, without a mediator with fiduciary expertise as they had hoped.[181] At the meeting, Howard made it clear that the Special Committee members had no choice but to accept the terms offered *at that meeting*, *on March 29*.[182] Specifically:

- Howard conveyed to Weld that IDT would not pay more than $10 million.[183]

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[177] OP28-29; A1633(2258:11-14); A1688-89(2479:22-2481:2).

[178] OP30-31; A1560(1967:19-1968:1); A1353(1144:9-1145:23).

[179] OP32; A4171; A1630(2245:21-2246:6).

[180] OP34; A1637(2276:6-2277:11).

[181] OP32, 33-34.

[182] OP33-37.

[183] OP34; A1564-65(1985:21-1987:14).

- Howard verbally abused the directors at the meeting.[184]
- Howard dissolved the blind trust that previously held his shares allowing him to fire the directors on the spot, which he pointedly told Weld about as the final "negotiations" began.[185]

As Weld explained, the Special Committee did not believe it had "a realistic choice other than to take the deal that Howard presented *on March 29*."[186] Indeed, Weld "maintained right along that [he] thought the situation didn't leave us with much choice. I even used the phrase 'gun to our head,' which means the same thing."[187]

The Trial Court agreed, finding that:

> Howard had injected a further element of time pressure by threatening to withhold his support for *any* sale unless the Indemnification Claim was resolved *by the end of March*. Accordingly, the Special Committee felt that the weight of these asymmetrical negotiating positions put pressure on them to resolve the claim *at the March 29 meeting*.[188]

The Memorandum Opinion recognized the need to "analyze whether Howard's flagrant process violations caused IDT to pay less than 'the value that the stockholders would have received if the defendants had followed a reasonable

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[184] OP35-36; A1644(2302:4-7); A1395(1313:1-13); A1415(1392:14-1393:23); A1480(1649:23-1650:8).

[185] OP35-36; A1568(2000:15-2001:1).

[186] OP36; A1570(2007:6-9).

[187] A1522(1818:16-23).

[188] OP34 (emphasis added).

process to obtain the best transaction reasonably available[.]'"[189] It erred, however, because no reasonable, arm's-length process would have resulted in a settlement predicated on prevailing bids as of March 29. As a result, the Trial Court's fair price and damages analyses are unreliable.

4. Correcting For The Trial Court's Valuation Date Error

Using the erroneous Coerced-Agreement Date for valuation purposes, the Trial Court calculated a facial value of the Indemnity Claim of $293.4 million.[190] From that, it deducted $30 million in estimated litigation costs, and multiplied the difference by 3.2%—*i.e.*, the risk-adjusted value of the claim based on the Trial Court's factual findings. It found that the product ($8.4288 million) was a "reasonable result of a fair, uncontrolled release of the Indemnification Claim."[191]

Recalculating the Trial Court's estimated result of an uncoerced negotiation using the correct valuation date shows that the error harmed the Class. The Indemnifiable Loss as of the Acquisition—and thus the facial value of the Indemnity

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[189] OP72 (citing *Goldstein v. Denner*, 2022 WL 1797224 *3 (Del. Ch. June 2, 2022).

[190] OP75.

[191] OP81. As discussed at n.149, *supra*, correcting for the Trial Court's arithmetic error in calculating the value of the Surrendered Licenses yields an amount of $9,088,000.

Claim—was $1.158 billion.[192] Subtracting $30 million in litigation costs and using the same 3.2% expected value results in a $36.1 million value of the Indemnity Claim, but for the breach. This is a conservative valuation that adopts all of the Trial Court's findings other than the valuation date.

[192] This is calculated by taking: (i) the $15 million upfront cash penalty; (ii) 20% of the merger proceeds at the $3.1 billion merger price ($614 million); and (iii) a $529 million valuation of the Surrendered Licenses.

II. THE TRIAL COURT'S CONCLUSION THAT THE INDEMNITY CLAIM WAS ECONOMICALLY WORTHLESS ERRONEOUSLY FAILED TO ASCRIBE VALUE TO THE S&DA'S CONTRIBUTION PROVISION

A. Question Presented

Did the trial court err in failing to ascribe value to a potential claim under the S&DA's "Contribution" provision, S&DA § 6.03? The question was raised below and considered by the Trial Court. *See* A1980-82; A2295-96; OP69-71.

B. Scope Of Review

This Court "review[s] questions of contract interpretation *de novo*."[193] Issues involving mixed questions of law and fact are likewise reviewed *de novo*.[194]

C. Merits Of Argument

The Trial Court also erred by failing to attribute value to a potential claim under the S&DA's contribution provision, S&DA Section 6.03 (the "Contribution Provision"), resulting in an unfair price determination that harmed the Class.

Before engaging in its fair price analysis, the Trial Court determined that "Straight Path's failure to fulfill the notice and consent requirements of Section 6.07 of the S&DA is dispositive in determining that the Indemnification Claim was

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[193] *GMG Cap. Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012); *see also Oberly v. Kirby*, 592 A.2d 445, 457-58 (Del. 1991) (questions of contract construction raise "legal questions that are subject to *de novo* review by this Court").

[194] *Miller v. PennyMac Corp.*, 77 A.3d 272 (Del. 2013).

economically worthless…."[195] However, as the Trial Court recognized, the S&DA's Contribution Provision was not conditioned upon a notice or consent requirement.[196] The Contribution Provision provided for equitable contribution if indemnification was "unavailable or insufficient, *for any reason*."[197] This "*for any reason*" language is as broad as it could possibly be, and plainly applies to a notice and consent infirmity.[198]

Thus, if notice and consent defects rendered indemnification unavailable, the Contribution Provision nevertheless required IDT to pay "just and equitable contribution" in "proportion to [its] relative fault," as follows:

> In circumstances in which the indemnity agreements provided for in Sections 6.01 and 6.02 are unavailable or insufficient, *for any reason*, to hold harmless an Indemnified Party in respect of any Indemnifiable Losses arising thereunder, each Indemnifying Party, in order to provide for just and equitable contribution, *shall contribute* to the amount paid or payable by such Indemnified Party as a result of such Indemnifiable Losses, *in proportion to the relative fault* of the Indemnifying Party or

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[195] OP51. *See also* OP69 ("Straight Path's failure to comply with the notice and consent requirements of Section 6.07 of the S&DA fatally undermines the Indemnification Claim. Without proper notice or consent, there was no viable claim for the Special Committee to pursue or preserve.").

[196] OP69-70. The notice and consent requirements of Section 6.07 are expressly tied to indemnification under Sections 6.01 and 6.02. Section 6.07 does not reference contribution under Section 6.03. A2688, A2690-91.

[197] A2688 (emphasis added).

[198] It is also consistent with S&DA Section 6.07's language that a failure of notice "shall not relieve [IDT] of its obligations under [the S&DA]," except in the case of material prejudice. A2690-91.

> Parties on the one hand and the Indemnified Party or Parties on the other in connection with the statements or omissions or alleged statements or omissions that resulted in such Indemnifiable Losses, as well as any other relevant equitable considerations. The relative fault of the parties *shall be determined* by reference to, among other things, whether the untrue or alleged untrue statement of a material fact or the alleged omission to state a material fact relates to information supplied by [Straight Path] or IDT, the Parties' relative intents, knowledge, access to information and opportunity to correct or prevent such statement or omission, and any other equitable considerations appropriate in the circumstances.[199]

The equitable principles and considerations written into the Contribution Provision rendered a contribution claim against IDT far from worthless, and potentially highly valuable.

Indeed, the Trial Court found that "the Consent Decree gave rise to an Indemnifiable Loss under the S&DA"[200] and that "most—but not all—of the actions cited by the FCC in its investigation involve pre-spin activity."[201] These conclusions are supported by the Trial Court's findings that the fraudulent license renewal efforts that gave rise to the Consent Decree happened fully on IDT's watch, and IDT was solely responsible for the false statements and omissions made to the FCC.[202] The Trial Court also credited Morgan Lewis's investigative findings that Straight Path

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[199] A2688 (emphases added).

[200] OP52.

[201] OP56.

[202] OP9-11.

was not even aware that IDT had used a single prototype radio to renew the licenses, or that equipment had been removed from the sites.[203] Recognizing that Straight Path bore some responsibility for failing to remediate the problem post-spin, the Trial Court, in its fair price analysis, assigned an 80% probability that Straight Path would prevail in showing that IDT's pre-Spin Off conduct gave rise to the Consent Decree liabilities.[204]

Nonetheless, the Trial Court failed to attribute *any* value to the contribution claim, which was in error for several reasons.

First, the Trial Court did not apply the factors expressly included in the Contribution Provision, which states that relative fault "*shall be determined*" by consideration of, among other things, whether false statements and omissions "relate[] to information supplied by [Straight Path] or IDT," the parties "relative intents, knowledge," and "access to information."[205] Each express factor strongly indicates that IDT was predominantly responsible for the Indemnifiable Losses. Ignoring this, the Trial Court relied upon the Contribution Provision's catchall

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[203] OP16 ("neither Davidi nor the rest of the Board was aware of the methods that IDT Spectrum had employed in renewing the Spectrum Licenses"); OP18 ("Morgan Lewis concluded that, prior to the [Sinclair Upton] Report, Straight Path itself was unaware of the lack of permanent equipment.").

[204] OP78-79.

[205] A2688.

reference to "other relevant equitable considerations" and applied *all* of the equities in Howard's and IDT's favor to conclude that a contribution claim was not viable.[206]

In doing so, the Trial Court relied on notice and consent defects—which, again, were not conditions for seeking contribution—and focused on the Consent Decree's term providing for Straight Path's payment of 20% of the sale price to the FCC. The Trial Court determined that it would be unfair to impose the Consent Decree liability on IDT "that grew as the windfall of the sale grew," and which would "far exceed IDT's ability to pay or its liquidation value" and/or "bankrupt[] IDT."[207]

But the Trial Court erred in failing to consider that a hypothetical court or arbitration panel may have applied the equities *differently* and/or given greater priority to the specifically enumerated factors written into the Contribution Provision. In the context of attempting to value Straight Path's litigation asset, the Trial Court erred by concluding that its own application of the equities necessarily eliminated *any* value to a litigation claim under the Contribution Provision. This approach improperly gave IDT and Howard the benefit of certainty in a necessarily uncertain "but-for world," *i.e.*, what a judicial arbiter might do if Howard had

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[206] A2688; OP69-71.

[207] OP71.

permitted the Indemnity Claim to be preserved and pursued through litigation rather than coercing a settlement.[208]

Second, the Trial Court erred by focusing solely on the Consent Decree's provision requiring Straight Path to pay 20% of the sale price to the FCC, without considering the $15 million upfront payment and Surrendered Licenses, when balancing the equities. Even if this Court accepts the Trial Court's determination that it would be unequitable for IDT to pay for an "uncapped" liability in the form of a raising sale-price component to the Consent Decree, such considerations do not apply to the other two components. The $544 million value of those two components was effectively uncontested at trial.[209]

Third, even accepting the Trial Court's determination that notice and consent were not satisfied under S&DA Sections 6.01 and 6.02, it ignored related equitable considerations that would have allowed a factfinder adjudicating the underlying

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[208] *See Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 441 (Del. 1996) ("[O]nce a breach of duty is established, uncertainties in awarding damages are generally resolved against the wrongdoer"); *Gesoff v. IIC Indus. Inc.*, 902 A.2d 1130, 1154 (Del. Ch. 2006) ("[T]he court can, and has in the past, awarded damages designed to eliminate the possibility of profit flowing to defendants from the breach of the fiduciary relationship"); *Weinberger v. UOP, Inc.*, 1985 WL 11546 *9 (Del. Ch. Jan. 30, 1985) ("the minority should be compensated for the wrong done to them even though a damage figure cannot be ascertained …with any degree of precision"; "equity will not suffer a wrong without a remedy"), *aff'd*, 497 A.2d 792 (Del. 1985).

[209] *See* A1953-58.

Indemnity Claim to award damages under the Contribution Provision.

But for the breach, the Indemnity Claim would have been adjudicated years before the trial here—with a different record, stronger witness memories, different parties-in-interest, and different access to privileged information. That factfinder could have relied on the rife conflicts associated with Straight Path seeking indemnity from IDT in excusing technical notice and consent deficiencies.

Specifically, the CEOs of Straight Path and IDT were brothers, and management of both companies were beholden to the Jonas family. The documentary record shows that Straight Path management knew how to execute on the notice and consent procedures, and in fact did so when Davidi emailed IDT management regarding indemnification in connection with the *Zacharia* securities action. This conflict manifested itself through trial, as each of the Jonas-affiliated witnesses involved in Davidi's attempt to seek indemnity would not or could not provide any affirmative testimony as to what happened beyond the content of the email.[210]

Thus, the Trial Court's failure to ascribe value to the contribution claim is further erroneous because it did not consider that a neutral arbiter could have put weight on the fact that the notice and consent process was controlled by members of

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[210] *See supra* n.35.

the Jonas family at both Straight Path and IDT.

For the foregoing reasons, the Trial Court's determination that the Indemnity Claim was not viable was reversible error.

CONCLUSION

For the foregoing reasons, this Court should reject the Trial Court's erroneous fair price and damages analyses, reverse the Trial Court's Memorandum Opinion and Final Order, and remand the action for a determination of fair price and damages to be assessed against Defendants Howard Jonas, The Patrick Henry Trust, and IDT.

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CERTIFICATE OF SERVICE

I, Mark D. Richardson, hereby certify that, on March 20, 2025, I caused a true and correct copy of the foregoing to be served on the following via File & ServeXpress:

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