



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

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APPELLEES' ANSWERING BRIEF

OF COUNSEL:

Jason Cyrulnik
Paul Fattaruso
Matthew Henken
CYRULNIK FATTARUSO LLP
55 Broadway, Third Floor
New York, NY 10006
(646) 844-2466

Rudolf Koch (#4947)
Kevin M. Gallagher (#5337)
Daniel E. Kaprow (#6295)
John M. O'Toole (#6448)
RICHARDS, LAYTON & FINGER, P.A.
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

*Counsel for Defendants Below-Appellees
IDT Corporation, Howard Jonas, and The
Patrick Henry Trust*

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NATURE OF PROCEEDINGS

The Trial Court found after a ten-day trial that, contrary to Plaintiffs’ theory, Howard Jonas’s actions led to an outcome that was in Straight Path stockholders’ best interests. Straight Path settled its fatally flawed, *non-viable* putative claim for indemnification for more than it was worth and, even more importantly, cleared the way for Straight Path to move forward with a remarkably successful multi-billion-dollar auction that benefitted its stockholders. In the words of the Trial Court, the evidence established that Howard Jonas truly “believed that he knew” what was in Straight Path’s best interests and “acted on his conviction.”¹

The Trial Court’s findings after ten days of testimony from 24 witnesses further confirmed that Howard’s conviction regarding Straight Path’s best interest was *well-founded and correct*: Straight Path’s purported indemnification claim was “in many ways, a flawed asset.” OP5. Not only was it *non-viable* and inequitable on its merits, it “was also rightfully considered a potential impediment to getting the best price for Straight Path in the auction.” OP5. The auction ultimately fetched a winning bid of \$3.1 billion—and Howard recognized that the risk of chilling that

¹ B343, *In re Straight Path Commc’ns Inc. Consol. S’holder Litig.*, 2024 WL 4602914, at *7 (Del. Ch. Oct. 29, 2024) (“*Straight Path V*”), *judgment entered*, 2024 WL 5136356 (Del. Ch. Dec. 16, 2024).

Except where otherwise indicated, this brief uses the Trial Court’s and Plaintiff’s defined terms, and emphasis in quotations is added.

auction by creating issues over a non-viable claim was decidedly *not* in Straight Path's best interests.

The Trial Court held that because Howard acted on his own conviction of what was best for Straight Path, rather than deferring to the company's special committee, "he was subject to entire fairness, including making stockholders whole for any unfairness in price."² As a result, the Trial Court conducted a thorough and searching entire fairness review based on the factual record developed at trial, and correctly concluded that the price was fair and Plaintiffs were wrong in claiming that Howard had caused *any* damage to Straight Path stockholders or had secured any unfair benefit for himself.

First and foremost, the Trial Court found, on an extensive factual record, that Straight Path's purported indemnification claim against IDT "had no economic value," simply "was not viable," and that "had the Special Committee successfully placed the claim in trust for Straight Path's stockholders, that asset would have had no value." OP69. On that basis, the Trial Court found in its analysis of "Fair Price" that the \$10 million cash component of IDT's payment (which also included a contingent payment right in IP recoveries) "was therefore not unfair." OP69.

² B343, *Straight Path V*, 2024 WL 4602914, at *7; *see also* OP45.

But the Trial Court did not stop there. It went on to examine “what a reasonable sale process for a release of the Indemnification Claim would have achieved, absent the controller imposing an unfair process,” to “evaluate the transaction holistically” and eliminate any possibility that Defendants may have profited from a breach. OP72-73. The Trial Court conducted a searching, fact-intensive analysis and soundly concluded that Plaintiff and the class “suffered no damages.” OP81.

Plaintiff challenges the Trial Court’s well-founded, fact findings based on two meritless criticisms, both of which ignore the deference required on this appellate review and do not alter the Trial Court’s ultimate conclusion, which is also independently supported on alternative grounds that the Trial Court did not need to reach, as discussed below. Accordingly, this Court should affirm the Trial Court’s thorough, fact-intensive decision.

SUMMARY OF ARGUMENT

1. *Denied.* The Trial Court correctly found, based on the trial record, that “the Indemnification Claim was not viable,” and that if it “had been held in trust” (as Plaintiff argues), “it would be valueless.” OP72. In its further analysis of what a “reasonable sale process for a release of the Indemnification Claim would have achieved” (OP72), the Trial Court correctly found, based on the trial record, that even assuming its viability, the claim’s risk-adjusted value was less than what IDT paid, such that “the price was fair” (OP82) and “the class therefore suffered no damages” (OP81). In its searching factual analysis from every perspective, the Trial Court analyzed the claim’s value *both* as purportedly diverted merger consideration as of the merger date (finding it was non-viable and “valueless”) *and* under its pre-merger settlement (finding it was worth less than even the \$10 million cash component of the settlement, excluding the rest of the consideration). From *either* perspective, the Trial Court found, the class suffered no damages. Moreover, Plaintiff’s proposed alternative calculation is flawed and would not alter the Trial Court’s conclusion.

2. *Denied.* The Trial Court correctly found, based on the evidence at trial, that Plaintiff’s last-resort appeal to the S&DA’s “contribution” clause as an “equitable backstop” to Straight Path’s non-viable indemnification claim was unavailing because the “underlying equities do not support a transfer payment from

IDT to Straight Path's former stockholders" (OP69-71). Moreover, the Trial Court did not accept (but rather assumed without deciding) Plaintiff's flawed premise that the "contribution" clause is somehow exempt from the S&DA's notice and consent requirements, and the failure of that flawed premise is independently fatal to Plaintiff's theory.

STATEMENT OF FACTS

A. IDT Spins Off Straight Path as a Patent Enforcement Company and Gives Straight Path a Portfolio of Low-Value Spectrum Licenses for Tax Reasons

In 2013, IDT Corporation, a publicly traded telecommunications company, decided to create and spin off Straight Path for the purpose of prosecuting infringement claims for a portfolio of patents without exposing IDT to counterclaim risk. OP2; A2024. In addition to the IP assets, IDT also gave Straight Path a portfolio of wireless spectrum licenses that IDT had obtained from an early-2000s bankruptcy sale. OP9; A2020. These licenses were “mostly moribund,” carried a *zero* value on IDT’s balance sheet, and were added to the spinoff as an afterthought, for tax reasons. OP2; OP9; OP12.

IDT and Straight Path executed a Separation and Distribution Agreement (S&DA) to effectuate the spinoff, with the spectrum licenses transferred to Straight Path ‘as is,’ without any representations or warranties, and responsibility generally allocated to Straight Path for liabilities pertaining to the business and assets it received. A2025-27; A2422-23; A2678-79.

B. Years After the Spinoff, Straight Path’s Spectrum Licenses Soar in Value—Attracting Market Attention

Following the 2013 spinoff, Straight Path’s almost-exclusive focus was on its patent portfolio, with the spectrum licenses constituting an “incredibly small,” “hardly noticeable” aspect of the business. OP3; A2027-28; A1072(21:14-23:6);

A1440(1491:17-22); A1367(1199:1-1200:12). In 2015, however, Straight Path's spectrum became increasingly well-positioned for potential use in the next generation of wireless technology (5G), and as a result the spectrum quickly grew in value, as did Straight Path's stock price. OP3; OP15; A2032-33.

As Straight Path's stock rose, so did market attention, including an anonymous short-seller who published a November 2015 report claiming that the regulatory renewals of Straight Path's licenses had been a fraudulent "cut-and-paste word processor exercise." A2033-34. The short-seller accusations prompted a federal securities fraud class action against Straight Path. A2036.

In response, Straight Path engaged Morgan Lewis to conduct an independent investigation. Morgan Lewis's July 2016 report concluded that the short-seller's core accusations were "contradicted by the available evidence and, therefore, inaccurate." A2041-42. Evidence from the 2010-2012 renewal period showed that the spectrum license owner's then-CEO, in consultation with two highly reputable FCC regulatory law firms, had developed an innovative, more-affordable means of renewing many of the licenses, while leaving many other licenses, which still were not economical to renew even under this more-affordable approach, to expire. OP3; OP10; A2021-23. At the time, conventional renewal would have been prohibitively expensive, especially relative to the minimal revenue the licenses

generated. A2020-21. Thus, without this affordable renewable procedure, IDT simply would not have renewed the licenses. A1208-09(566:14-568:21).

Even before Morgan Lewis completed its report, Straight Path's spectrum was generating interest from potential purchasers for 5G deployment. AT&T approached Straight Path in June 2016, and more interest soon followed.

A2043-44. Straight Path retained financial advisors and outside deal counsel for the anticipated sale of its spectrum. A2044.

C. Straight Path Rushes to Settle with the FCC to Clear the Way for a Successful Sale

The FCC did not approach Straight Path about the short-seller accusations. Instead, "it was Straight Path that approached the FCC in the first instance." A1445(1508:12-15); A1430-31(1452:21-1454:3). Straight Path witnesses all stressed the same core reason for this business decision: the desire to quickly obtain a clean bill-of-health from its regulator that could increase the profits Straight Path could achieve through the sale of its spectrum at an opportune time.³

In September 2016, the FCC responded to Straight Path's outreach by opening a formal inquiry into Straight Path (No. EB-SED-16-00022575), and it

³ OP20-21; A2045-46; A1092(102:3-103:4); A1369(1209:3-7); A1370(1212:5-1213:2); A1446(1512:21-1513:17); A1497(1716:16-1717:12, 1717:14-17); A1661(2370:17-2371:14).

also opened a separate formal inquiry into IDT (No. EB-SED-00022577). OP19; A2049-50.

Straight Path then rushed to settle with the FCC, quickly pressing for meetings to “discuss the scope and scale of a consent decree.” B350; *see also* OP21-22; A2050-53. Morgan Lewis explained that in its rush to settle with the FCC, Straight Path essentially negotiated against itself. A1188(487:2-21). Straight Path feared that any “wasted time” in securing a clean bill-of-health from the FCC “would have been wasted value as well” because Straight Path was approaching an ideal moment to maximize the value of its license portfolio in an auction to interested bidders. A1096-97(120:23-122:2); A2056.

Straight Path quickly finalized a deal with the FCC on January 11, 2017, with a unique structure and penalties that the FCC could not have imposed absent Straight Path’s consent. A1192-93(503:23-504:20); B1085; A2057. In addition to an upfront \$15 million payment and termination of 196 licenses (of Straight Path’s choosing),⁴ the Consent Decree gave Straight Path three distinct options: (i) make an additional cash payment of \$85 million in one year, (ii) terminate the remaining licenses in its portfolio and face no fines or other liabilities, or (iii) sell the

⁴ “Because Straight Path was given leeway to choose which licenses would be terminated, it strategically chose those with the least impact on the portfolio’s ultimate sale value.” OP24.

remainder of its license portfolio, and share 20% of the proceeds with the U.S. Treasury while keeping 80% for itself. OP24; A0975 ¶135; A3532.

This fast settlement, however costly it may have been, made good business sense for Straight Path, which wanted to and did secure a clean bill-of-health that paved the way for a well-timed, hugely successful auction. A2064-68. Straight Path, however, did not seek, let alone secure, IDT's consent to Straight Path's settlement with the FCC—nor could it conceivably have obtained IDT's consent to such a settlement structure, which would have made no sense from the perspective of a putative indemnitor. OP63; A2060-64; A1251(736:20-738:19), A1273-74(827:22-828:12); A1216(596:2-6); A1212(580:20-581:4). Straight Path did not consult IDT, but it did discuss with Howard, its controlling stockholder, the impact that the change in presidential administrations might have on the FCC investigation. OP22-24. Contrary to Plaintiff's contention (at 14) that "Howard supported the Consent Decree," the Trial Court found that Howard did *not* support the Consent Decree: "Ultimately, Howard took the position that it would be more favorable to wait for the new administration." OP24.

Consistent with IDT's exclusion from the negotiation process, the Consent Decree did not resolve the FCC's separate investigation into IDT, which was not closed until years later. A1155(352:17-353:16); A1287(846:6-847:22).

D. After Settling with the FCC, Straight Path Launches an Auction and Conceives of the Idea of Asking IDT for Indemnification

“The Consent Decree cleared the way for Straight Path to sell the Spectrum Licenses.” OP25. Thus, promptly after the Consent Decree, Straight Path launched an auction process, sending a first-round process letter to potential spectrum buyers on February 10, 2017. B354-59; OP25; A2068-69. Straight Path’s board formed a Special Committee to consider options for the company’s sale of its IP assets. OP26; A2069-70. Shortly thereafter, the Committee turned its attention to the concept of potentially seeking indemnification from IDT for the obligations Straight Path took upon itself in entering the Consent Decree without IDT’s consent. OP26; A2071-74.

The Committee’s analysis of the indemnification claim, or lack thereof, was largely shielded behind privilege. A2075. The Committee members did, however, acknowledge that when they looked at the contract, they realized that the S&DA’s plain language posed a serious obstacle to Straight Path’s ability to obtain indemnification from IDT because it allocated the liabilities for the Consent Decree to Straight Path (which would realize any benefits from the spectrum portfolio), not IDT. A1501(1733:19-1734:17); A2075-78.

At a Special Committee meeting on March 8, 2017, the members “unanimously agreed” that obtaining value through settlement of the

indemnification claim “would benefit” Straight Path stockholders.” A3568. The Committee understood that failure to settle the claim could adversely affect the bidding process. A1420(1412:15-19). Committee member Weld “stated that he would contact Howard Jonas, to discuss the possibility of negotiating a settlement of the Indemnity Claim.” A3566; OP28.

The Committee believed that Howard would be interested in brokering a settlement “because he stood to gain a lot in the Straight Path merger.” A1400-01(1333:21-1334:7). That is, Committee member Todd testified that the Committee understood that Howard, as Straight Path’s largest stockholder, “had substantial interest in the merger transaction going forward”—and the Committee was “hoping that Howard Jonas might convince or cause IDT to agree to pay some or all of an indemnification claim, *given the personal interest Howard Jonas had in the **Straight Path** transaction moving forward.*” A1376(1236:11-21). Weld reached out to Howard shortly thereafter. OP29.

E. Concerned that Pressing Indemnification Would Chill the Bidding for Straight Path, Howard Brokers a Settlement

The Trial Court found that the indemnification claim “was, in many ways, a flawed asset”—not only because it was “contractually questionable,” but also because its existence was “rightfully considered a potential impediment to getting the best price for Straight Path in the auction.” OP5.

When Straight Path’s deal advisors, Evercore and Weil Gotshal, learned of the Special Committee’s plan to exclude the indemnification claim from Straight Path’s sale process, they were extremely concerned that doing so “would negatively impact the sale process,” and strongly advised the Committee to reconsider. OP28-29; A2079-81; A2088-90; A3572; A1506(1754:6-13). As Weil testified, excluding the indemnification claim as the Special Committee was contemplating could have “broken the auction,” as bidders were concerned about the implications of that exclusion on the FCC review and Consent Decree. B650:15-651:20; B676:2-18.

Similarly, the original plaintiff in this action testified (before withdrawing its candidacy as a putative class representative) that he independently reached the same conclusion and had decided *not* to press Straight Path to pursue indemnification because he recognized that doing so could “chill any possible bidding process.” B944(461:14-23).

Consistent with the advisors’ and stockholders’ fears, upon learning that Straight Path was considering an indemnification claim, bidders immediately responded with questions and concerns, and expressly indicated that they wanted the claim “to be resolved prior to closing.” OP33; B368; A1724(2622:19-2623:11); A2096-97.

Among its chilling effects, the prospect of litigation over indemnification risked reopening the Consent Decree, which had provided Straight Path with a clean bill-of-health that, by its terms, could be revoked through a reopening of the investigation if “new material evidence” came to light during a battle over indemnification. A2111-13; OP24 (FCC “agreed not to pursue further investigation of Straight Path ‘in the absence of new material evidence’”).

Howard was informed of Evercore and Weil’s concerns with what the Committee was doing, and he shared the same concerns. A2090-92. He was concerned about the indemnification claim “potentially impacting the auction process, which he thought was in Straight Path’s best interests.” OP30-31. He urged the Special Committee members to reconsider their approach, openly expressed his frustrations with them, and told them that what they were doing was not in Straight Path’s best interest. A1560(1967:11-18).

On March 19, 2017, the Special Committee’s counsel proposed a meeting with Howard, initially suggesting March 23. OP32; B360-61. The parties scheduled the meeting to take place at Weil’s offices on March 29, 2017. A0983 ¶167. Going into the meeting, the Special Committee was aware that, as Committee member Zeidman testified, “Straight Path was getting close to the end of its bidding process and needed to get the indemnification claim settled.” A1459(1564:1-5). The Committee understood that bidders viewed the

indemnification issue as “an issue and a problem” and wanted it resolved.

A1420(1412:6-14); A2118-20. The Committee also expected that Howard would be motivated to help broker a settlement, based on Howard’s interest in facilitating a successful merger for Straight Path, which needed the claim settled to avoid chilling the auction. A2120-22; A1381(1256:1-5); A1460(1568:8-24); A1515(1787:3-9).

IDT, for its part, strongly believed that Straight Path’s indemnification theory had no merit, including for the same reasons that the Trial Court ultimately found it to be both “valueless” and “inequitable.”⁵ As a result, IDT’s CEO, Shmuel Jonas, had no interest in settling, much less within the quick timeframe Straight Path needed to clear the way for a smooth auction process. A1518(1799:20-1800:3); A1565-66(1990:6-1991:13).

Given IDT’s view, Howard worked in advance of the settlement meeting—acting from his motivation to help Straight Path overcome this obstacle to a smooth auction process—to persuade Shmuel to allow IDT to make a meaningful settlement offer. OP34; A1216-17(598:24-602:11). Howard ultimately persuaded Shmuel by committing that Howard would personally help capitalize the \$10 million cash portion of the settlement through an IDT stock purchase. OP34;

⁵ OP70-72; A2122-23; A1212(581:21-583:16); A1240(694:23-695:5); A1333(1064:20-1066:10); A1518(1799:20-1800:3).

A1217(601:15-602:11). That \$10 million cash component alone ultimately proved to be far more than the indemnification claim was worth (as Shmuel knew). OP5-6 (“Considering all the evidence at trial, I conclude that the [cash] price paid for the release of the Indemnification Claim was *higher* than would have resulted, absent the controller’s intervention.”).

At the March 29 meeting, Howard again expressed that he believed the Committee was jeopardizing Straight Path’s auction process over “an indemnification claim that probably was not worth anything anyway,” and thus was not acting in Straight Path’s best interest and was thereby “letting down all of the Straight Path shareholders.” A2124-26; A1335-36(1074:22-1076:1); A1358(1164:9-18). Howard explained his thinking at trial: “All the indemnification claim was going to do was kill the whole deal” with potential bidders, “and I wanted to save the deal.” A1361(1177:20-1178:20).

After the parties’ opening presentations and several hours of small-group negotiations, Straight Path and IDT reached an agreement to settle the indemnification claim in exchange for IDT’s payment of \$10 million cash, a contingent payment right in IP recoveries (with IDT committing to invest \$20 million in prosecuting the IP), and IDT’s release of all claims against Straight Path under the S&DA. OP37; A2140-42; A1398(1324:1-1325:9).

Special Committee member Weld, who was responsible for Straight Path's negotiations and the only witness to quantify the total value of IDT's combined cash and non-cash consideration, testified that he believed the total consideration from IDT "was worth somewhere between 40 and \$50 million." A1521-22(1814:16-1815:1); A1578(2040:2-20). The Committee celebrated the settlement, including because they understood that "the bidders had required" the indemnification claim be settled. A2144-45; A1463(1582:9-1583:1).

F. After Straight Path Announces Its Settlement of the Indemnification Claim, the Bidding Skyrockets

Straight Path had informed bidders about the indemnification claim on March 14, 2017, and informed them of the settlement with IDT by April 2. B1095; OP37. Between those two dates (prior to announcing the settlement), bidding "barely moved." A1350-51(1134:1-1135:5); B1095. Once bidders were informed that the indemnification impediment had been removed, the bidding accelerated markedly—it "ultimately more than tripled, almost quadrupled, to \$3.1 billion just a few weeks later." A1487(1678:19-1679:2); A2147; A2149-51.

The \$3.1 billion deal was a "huge windfall for Straight Path stockholders." OP3; OP38; A1107-08(164:17-167:23); A1442(1499:7-19). The Verizon merger agreement "required Straight Path to use reasonable best efforts to consummate the settlement term sheet it had entered with IDT." OP39.

G. This Litigation

This litigation commenced on July 5, 2017. The original complaint named the Special Committee members as defendants, but they quickly struck a deal to cooperate with Plaintiff’s counsel and were dismissed from the case without prejudice (such that Plaintiff remained free to re-name them as defendants as discovery and trial loomed). B505; A2153-55.

The Trial Court presided over extensive pre-trial proceedings (including a two-day hearing on the adequacy of a putative class representative who was ultimately disqualified), a ten-day trial plus additional review of video-recorded deposition designations, and a post-trial application for attorney fees.

The trial record in this case involved 874 joint exhibits, more than 100 paragraphs of fact stipulations, testimony from 24 witnesses (12 fact and 12 expert), and transcripts of 36 depositions (21 fact and 15 expert). The Trial Court found hundreds of facts—the post-trial opinion’s fact section alone has over 200 footnotes, often containing multiple record citations. Its factual findings are well-supported, do not even approach clear error, and Plaintiff does not seriously challenge them.

The Trial Court found on “a post-trial record,” that “Defendants proved that the [S&DA’s] notice and consent requirements of Section 6.07” for Straight Path to pursue an indemnification claim against IDT “were not met and that Plaintiff’s

theories were not tenable.” OP56-57. The Trial Court further found that Straight Path’s decision not to give IDT notice and obtain its consent to the Consent Decree resulted in “material prejudice to IDT.” OP63.

Accordingly, the Trial Court found that “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.” OP69. Plaintiff does not challenge these core findings on this appeal. The Trial Court’s conclusion was supported by a record “replete with evidence that Straight Path was impatient to resolve the FCC inquiry by entering the Consent Decree, at the expense of running afoul of Section 6.07 in the S&DA,” and that Straight Path in fact “deliberately avoided” giving IDT notice or seeking its consent as needed to comply with Section 6.07’s notice and consent requirements. OP66-67.

The Trial Court found that Straight Path did not comply with the contractual requirements,

because it was not in Straight Path’s interest to do so. Straight Path much preferred to allow the “golden chicken” (to use Shmuel’s memorable phrase) that was the sales auction to keep laying, instead of allowing IDT the ability to assume the defense of claim or change the terms of the settlement, interfering with the ovulatory process. Allowing IDT to have a say in the FCC Straight Path Inquiry risked delaying or harming the highly lucrative sales process. This was a reasonable decision on the part

of Straight Path, and paid off handsomely for its stockholders, but it is inconsistent with indemnification.

OP68-69 (original emphasis).

Finding unfair process but fair price, the Trial Court awarded nominal damages only. OP5-6; OP50; OP69; OP82.

After the Trial Court issued its post-trial opinion, Plaintiff’s counsel remarkably requested a fee award, requiring the Trial Court to “assess Jonas’ motivations, something that was less directly at issue in the substantive litigation.” B341, *Straight Path V*, 2024 WL 4602914, at *7. In doing so, the Trial Court observed that Howard’s own financial interest in Straight Path was actually *greater* than his interest in IDT, and that his actions were motivated by “his fear that attempting to preserve the asset via trust—which would require the buyer’s cooperation—would create a distracting issue for the sale of Straight Path that could damage the final auction price.” *Id.*, B343 The Trial Court further explained: “Jonas also believed—correctly, as I have found—that the litigation asset was not, ultimately, of value.” *Id.* Thus, Howard had “acted on his conviction that he knew best, superseding the will of the Special Committee”—which meant that “he was subject to entire fairness, including making stockholders whole for any unfairness in price.” *Id.*

But that analysis revealed that the price was decidedly *not* unfair: “The result was a finding that Jonas had acted in breach of his duties, but had ultimately caused no monetary harm to the class.” B346, *id.* at *8. The Trial Court stated, “the fact that his instincts proved correct once the viability of the Indemnification Claim was litigated is no exoneration.” *Id.*, B343. But it also made clear that however improper Howard’s conduct may have been: “I do not find, however, that Jonas *believed he was acting against the interests of Straight Path stockholders.*” *Id.* (original emphasis). Plaintiff did not appeal the Trial Court’s fee-award decision and appealed the Trial Court’s post-trial opinion only as to the limited, fact-intensive determinations discussed below.

ARGUMENT

I. The Trial Court's Fair Price Determination Was Not Affected by a "Valuation Date" Error

A. Question Presented

Was the Trial Court's fair price determination affected by an error regarding the "valuation date" of Straight Path's putative indemnification claim against IDT? (OP50-71.)

B. Scope of Review

Under the well-established "standard and scope of appellate review of the Court of Chancery's factual findings following a post-trial application of the entire fairness standard to a challenged merger," this Court "will not ignore the findings of the Court of Chancery if they are sufficiently supported by the record and are the product of an orderly and logical deductive process." *In re Tesla Motors, Inc. S'holder Litig.*, 298 A.3d 667, 698-99 (Del. 2023). "It is only when the findings below are clearly wrong and the doing of justice requires their overturn that we are free to make contradictory findings of fact." *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972). Accordingly, where, as here, "there is sufficient evidence to support the findings of the trial judge, this Court, in the exercise of judicial restraint, must affirm." *In re Tesla Motors*, 298 A.3d at 698 n.113.

While this Court's appellate review of "the formulation and application of legal principles" is "plenary and requires no deference," *id.* at 699, Plaintiff's

argument does not identify any error of law by the Trial Court, and under any standard of review, the Trial Court did not err. Moreover, this Court can affirm on alternative grounds that the Trial Court did not need to reach. *Kroll v. City of Wilmington*, 276 A.3d 476, 479 (Del. 2022) (“this Court may affirm on the basis of a different rationale” and “may rule on an issue fairly presented to the trial court, even if it was not addressed by the trial court”).

C. Merits of Argument

1. Appellant Misstates the Trial Court’s Decision: The Trial Court *Did* Assess the Indemnification Claim as of the Merger Date, and Found that It Was Non-Viable and Valueless

Plaintiffs’ principal criticism of the Trial Court’s post-trial opinion is that the Trial Court supposedly failed to assess the value of Straight Path’s putative indemnification claim as “diverted merger consideration” as of the “signing or closing” date of the Verizon acquisition. *See* Opening Br. at 3-4; *see also id.* at 6, 32-43. That criticism misstates the Trial Court’s opinion.

Far from overlooking the value of the indemnification claim as of the merger date, the Trial Court made that question the central focus of the “Fair Price” portion of its analysis (OP50-71) and concluded that the indemnification claim was “economically worthless” at that time. OP51. After conducting a thorough, fact-intensive analysis and even giving the Plaintiff the benefit of numerous favorable assumptions about the claim’s merit or lack thereof (OP54-56, OP81 n.434), the

Trial Court ultimately determined that “there was no viable claim for the Special Committee to pursue or preserve.” OP69. Accordingly, the Trial Court concluded:

Because the Indemnification Claim was not viable, it had no economic value. In other words, had the Special Committee successfully placed the claim in trust for Straight Path’s stockholders, that asset would have had no value.

OP69.

Plaintiff’s appeal remarkably does not even address this critical ruling at the heart of the Trial Court’s “Fair Price” analysis, much less refute it—because it is a well-founded finding of fact that is fatal to Plaintiff’s claim. Indeed, it is the unchallenged law of the case that if the indemnification claim was not viable, “no claim of breach of fiduciary duty against any of the IDT Defendants with respect to the Indemnification Claim could succeed.” *Straight Path II*, 2022 WL 484420, at *5. The Trial Court reaffirmed the threshold need for the claim to be viable in the very “law of the case” that Plaintiff quotes in her appeal brief, in which the Trial Court specifically discusses “the value of the Indemnification Claim (*supposing its viability*).” Opening Br. at 35 (quoting *Straight Path III*, 2022 WL 2236192, at *6).

In fact, Plaintiff expressly *conceded* this fundamental requirement of viability:

THE COURT: Doesn’t it have to be a viable claim then?

[PLAINTIFF’S COUNSEL]: Yes, Your Honor, it needs to be a viable claim.

B224:1-4.

The requirement of a *viable* claim is also well settled in Delaware precedent: “If the underlying derivative action is not viable, then there is no litigation asset to value or maintain, and likewise no value to divert to the controlling stockholder or other derivative action defendants.” *In re Primedia, Inc. S’holders Litig.*, 67 A.3d 455, 477 (Del. Ch. 2013).

Plaintiff’s argument on this appeal depends on pretending that the Trial Court did not make this critical factual finding at the heart of its “Fair Price” analysis. Plaintiff argues (at 36) that the basis of its direct claim is the premise that “the Special Committee sought to distribute interests in the Indemnity Claim to the Class as partial payment for the public shares.” Plaintiff then insists that the Trial Court somehow departed from the law of the case or other “settled precedent” by not analyzing the value of the indemnification claim as if it were so distributed—but that is exactly what the Trial Court *did* analyze when it held, in the clearest possible terms, that “had the Special Committee successfully placed the claim in trust for Straight Path’s stockholders, that asset would have had *no value*.” OP69. The Trial Court’s methodical “Fair Price” analysis (OP50-71) thus squarely addressed the precise question of the indemnification claim’s value as diverted

merger consideration, and the Trial Court found that it had no value. This Court need go no further to deny Plaintiff's first issue on appeal.

2. The Trial Court's Alternative Assessment of the Indemnification Claim's *Settlement Value* Correctly Applied the *Settlement Date*

Plaintiff's critique of the Trial Court's use of the March 2017 settlement date does not relate to the Trial Court's "Fair Price" analysis at all, but rather to the Trial Court's subsequent "Unified Analysis and Damages" discussion (OP72-82), which the Trial Court performed *after* conducting its analysis of "Fair Process" (OP46-50) and "Fair Price" (OP50-71). At the outset of its "unified analysis," the Trial Court again explained:

I have found that, based on the record at trial, the Indemnification Claim was not viable, and the price paid to release the claim was not unfair, because *if the asset had been held in trust for the minority, it would be valueless.*

OP72.

In the interest of equity, however, the Trial Court elected to take its thorough unified damages analysis a step further and assess the *additional* question of whether the settlement price that Straight Path and IDT agreed upon to release the indemnification claim on March 29, 2017, was *also* entirely fair, in order to "evaluate the transaction holistically and 'eliminate the ability of the defendants to

profit from their breaches of the duty of loyalty” in any way. OP72-73 (quoting *In re Dole Food Co. S’holder Litig.*, 2015 WL 5052214, at *2 (Del. Ch. 2015)).

For purposes of this further analysis, the Trial Court started by giving Plaintiff the benefit of the *counterfactual assumption* of the indemnification claim’s viability (the opposite of what the Trial Court found in its “Fair Price” analysis) and then calculated the claim’s “facial value” assuming its viability and adjusted that figure to account for claim-dispositive risks and the anticipated costs of litigation. OP74.

The Trial Court having already considered and decided that the indemnification claim would have been “valueless” if it had been “held in trust” as additional merger consideration for Straight Path’s stockholders (OP72), nothing Plaintiff now cites would have permitted, much less required, the Trial Court to analyze potential settlement using an alternate, *counterfactual* settlement date to assess the fairness of the March 2017 settlement.⁶

⁶ The precedent Plaintiff cites (at 37-38) simply follows the same principle the Trial Court applied, that transactions are assessed as of the “day of the transaction in question.” OP73 (citing *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1186-87 (Del. 1988)); see *In re Cellular Tel. P’ship Litig.*, 2022 WL 698112, at *53 (Del. Ch. 2022) (damages from merger measured as of merger date); *In re PLX Tech. Inc. S’holders Litig.*, 2018 WL 5018535, at *51 (Del. Ch. 2018) (damages for insufficient consideration measured by value of stock as of transaction date); *Owen v. Cannon*, 2015 WL 3819204, at *25 (Del. Ch. 2015) (same); *In re Rural/Metro Corp. S’holders Litig.*, 102 A.3d 205, 224-25 (Del. Ch. 2014) (same); *In re Dole*

To the contrary, as the Trial Court noted, using an alternate, counterfactual settlement date would have injected impermissible “rank speculation” into its analysis. OP73 n.401 (quoting *Bomarko, Inc. v. Int’l Telecharge, Inc.*, 794 A.2d 1161, 1189 n.14 (Del. Ch. 1999), *aff’d*, 766 A.2d 437 (Del. 2000)). For one, using a counterfactual date that *post-dates* the parties’ settlement would require rank speculation about how the bidding would have proceeded absent the settlement itself. Even the original plaintiff recognized that raising the putative claim during the auction threatened to “chill any possible bidding process.” B944(461:14-23). The bidding bears that out. Bidding essentially stalled between March 14, when bidders were first informed of the Special Committee’s separation of the indemnification claim, and April 2, when bidders were informed of its settlement. *See* B1095; A976-78 ¶¶143-51.

Food Co. S’holder Litig., 2015 WL 5052214, at *46 (Del. Ch. 2015) (damages measured by fair value of shares as of challenged transaction date); *In re S. Peru Copper Corp. S’holder Deriv. Litig.*, 52 A.3d 761, 816 (Del. Ch. 2011) (damages from purchase transaction measured as difference between amount paid and amount received as of purchase date), *aff’d sub nom. Ams. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012). As discussed, the Trial Court’s thorough analysis assessed *both* fair price as of the merger, “had the Special Committee successfully placed the claim in trust for Straight Path’s stockholders,” in which case the “asset would have had no value” (OP69), *and* the fair price of the March 2017 settlement to determine what the “reasonable result of a fair, uncontrolled negotiation of a release” would have been (OP81). In each instance, the Trial Court confirmed in its searching analysis of the factual record that the class suffered no damages, and Defendants obtained no benefit, at *either* juncture.

Only *after* the bidders were informed of the settlement and the chilling effect was removed did the bidding then skyrocket. *See* B1095; A986 ¶¶173-75.

Speculating that the bidding would have reached such heights *absent* the settlement announcement would run *contrary* to the evidentiary record. *E.g.*, B944(461:14-23); A1724(2621:1-2623:13); A1725(2625:13-2626:7); A1726(2628:2-2629:12).

Separately, Plaintiff's counterfactual settlement date assumes that IDT would have been willing to settle the indemnification claim after the auction was completed—which likewise runs contrary to the evidence: IDT's CEO emphatically (and correctly) viewed the indemnification claim as worthless and was unwilling to settle.⁷ Indeed, the Special Committee itself recognized that Howard's motive to remove the indemnification issue's chilling effect on Straight Path's auction was the driving motivator behind Straight Path's ability to achieve any settlement with IDT.⁸ That, of course, is why the Committee decided to reach out directly to Howard to broker the negotiations. *E.g.*, OP28; A2120-22; A1381(1256:1-5). Weighed against the substantial evidence that IDT's only reason for settling was Howard's strong motive to remove this obstacle from Straight Path's auction process, the record is devoid of evidence that IDT would have

⁷ OP34; A1212(583:8-16); A1213(584:17-585: 22); A1216(597:11-598:23); A1518(1799:20-1800:3).

⁸ A1381(1256:1-5); A1460(1568:8-24); A1515(1787:3-9).

agreed to settle after the auction ended and that motive evaporated. The full trial record thus amply supported the Trial Court’s conclusion that “the Indemnification Claim would not have had value had it been preserved.” OP81 n.434.

Finally, while Plaintiff argues (at 43) that “no reasonable, arm’s-length process would have resulted in a settlement predicated on prevailing bids as of March 29,” the Trial Court considered the evidence and correctly reached the opposite conclusion. The Trial Court found: “The facts of record demonstrate that Straight Path had a genuine interest in settling the Indemnification Claim in order to provide the Spectrum Licenses with clear title *ahead of a sale*.” OP73. The Trial Court found that the Special Committee itself recognized “the frictions that the Indemnification Claim brought to the sale process” and wanted the claim resolved for the benefit of maximizing the bidding in the auction.⁹ That is, the Committee was “aware at the time that resolving the Indemnification Claim could lead to a smoother sale process for Straight Path,” and was therefore duly motivated to settle. B330, *Straight Path V*, 2024 WL 4602914, at *3. Accordingly, this Court should affirm the Trial Court’s decision because the Trial Court’s findings that the actual settlement amount *exceeded* the reasonable value of an arms-length settlement were based on sound judgment and not clearly erroneous.

⁹ OP73; A1412(1380:19-1381:16); A1527(1835:16-1836:21); A1566(1994:17-21); A1569(2004:7-15).

3. In Any Event, Adopting Appellant’s Flawed Alternative “Facial Value” of the Indemnification Claim Would Not Result in a Different Ultimate Damages Conclusion

In addition to its lack of merit, Plaintiff’s argument also lacks any effect on the Trial Court’s conclusion that the class “suffered no damages as a result of the coerced settlement” (OP81) and can be affirmed on that separate ground. Plaintiff offers an erroneous alternative calculation, in which it increases the “facial value” of the claim to \$1.158 billion, *expressly adopts* the Trial Court’s 3.2% multiplier and \$30 million in litigation costs, and derives a purported risk-adjusted value of \$36.1 million. Plaintiff’s approach suffers from at least three independently fatal errors.

Correcting for Plaintiff’s errors exposes the fact that even if the Trial Court had adopted Plaintiff’s \$1.158 billion “facial value” of the claim, it yields the same conclusion: the risk-discounted value was less than the consideration Straight Path received from IDT, such that the class suffered no harm and Defendants received no unfair benefit. *Cf. Exit Strategy, LLC v. Festival Retail Fund BH, L.P.*, 326 A.3d 356, 365 (Del. 2024) (finding harmless error and affirming despite Court of Chancery’s misapplication of contractual formula because “application of the correct formula yields the same result”).

**a. Plaintiff's Failure to Properly Account for
Litigation Costs**

First, Plaintiff fails to properly account for the \$30 million in expected litigation costs. The factual record adduced at trial supported the Trial Court's conclusion that an "adjustment of \$30 million is consistent with what the Special Committee reasonably would have assumed at the time of the settlement." OP76; B362; A1596-97(2110:14-2114:15); A1790(2881:23-2882:11). Plaintiff does not challenge that finding on appeal. But Plaintiff wrongly subtracts these litigation costs from the "facial value" of the claim *before* applying the 3.2% multiplier, rather than after. That is, Plaintiff erroneously calculates as follows:

$$\$1.158\text{B} - \$30\text{M} = \$1.128\text{B}, \text{ and } \$1.128\text{B} \times 3.2\% = \$36.1\text{M}$$

This effectively reduces the litigation costs to 3.2% of the undisputed \$30 million, or less than \$1 million. That reduction is not supported by the record. The 3.2% risk multiple represents the calculation of risks posed to *recovery on the claim*, not risks posed to the prospect of *incurring litigation costs*, so Plaintiff's application of the 3.2% reduction to the costs of litigation is unsupportable.

Cases involving analogous calculations recognize this. For example, in *Bomarko*, the Court of Chancery valued the derivative claim at issue by multiplying (a) its "assessment of the probability of success on the merits by (b) the likely amount of a favorable recovery," and *then* "subtracting from that

result (c) the reasonable costs” the company “would have incurred in prosecuting the claim.” *Bomarko*, 794 A.2d at 1189. Indeed, the Trial Court here noted with approval the *Bomarko* methodology of discounting the claim based on “the probability of success *before* subtracting the reasonable costs of prosecuting the claim.” OP74 n.402.¹⁰

The following calculation fixes Plaintiff’s miscalculation, to follow the correct order of operations:

$$\$1.158\text{B} \times 3.2\% = \$37.1\text{M}, \text{ and } \$37.1\text{M} - \$30\text{M} = \$7.1\text{M}$$

As shown, this yields a value of *\$7.1 million* for the indemnification claim, *less* than the \$10 million cash component alone of IDT’s settlement payment. This is another independent ground for affirmance.

**b. Plaintiff’s Failure to Account for IDT’s
Limited Ability to Pay**

Second, Plaintiff’s alternative calculation fails to account for the undisputed limitations on IDT’s ability to pay an adverse judgment. Plaintiff claims a “facial value” of \$1.158 billion but then ignores that IDT could never conceivably pay anything approaching that amount. Because the Trial Court found that the risk-

¹⁰ Despite this, the Trial Court appears to have followed a different order of operations, but while that apparent inadvertence led the Trial Court to give Plaintiff the benefit of a higher final value for the claim than the predicate findings warranted, it did not affect the Trial Court’s ultimate conclusion.

adjusted settlement value of the indemnification claim was less than IDT's \$10 million cash settlement payment alone, it did not need to reach, and therefore declined to address, the issue of IDT's limited ability to pay. OP81 n.436. But to the extent Plaintiff hopes to argue that the claim's value was somehow greater than the settlement payment, it must account for the limitations on IDT's ability to pay.

Plaintiff conceded at trial that its own proffered expert concluded the *most* IDT could afford was \$230 million without being driven to bankruptcy. A2307; A1739(2680:13-20). And unrebutted evidence shows that Straight Path's Special Committee had no intention of driving IDT into bankruptcy. A1460(1571:3-20). Accordingly, \$230 million represents Straight Path's maximum plausible recovery on the claim. Applying the 3.2% risk discount to this maximum potential recovery once again yields a value of less than \$10 million—even without accounting for *any* litigation expenses, and yields a *negative* value accounting for expenses:

$$\$230\text{M} \times 3.2\% = \$7.36\text{M}, \text{ and } \$7.36\text{M} - \$30\text{M} = -\$22.64\text{M}$$

Even adopting Plaintiff's most aggressive estimate of IDT's ability to pay, under Chapter 11 bankruptcy sale scenario—which as noted the Special Committee was not interested in pursuing—Plaintiff conceded that its own expert concluded IDT could pay at most \$351.4 million in a bankruptcy. A2307. Applying the 3.2% risk discount and litigation expenses again yields a *negative* value, even when crediting the highest possible amount IDT could conceivably pay:

$$\$351.4\text{M} \times 3.2\% = \$11.24\text{M}, \text{ and } \$11.24\text{M} - \$30\text{M} = -\$18.76\text{M}$$

In sum, there was no scenario in which Straight Path could recover more than \$351.4 million against IDT, even with the most meritorious claim with a 100% chance of success on liability and damages, regardless of how astronomically high the theoretical damages amount might be. Thus, on this badly flawed claim that the Trial Court found reasonable parties would assign a 3.2% chance of success, the maximum value of the claim *before* expenses would be \$11.24 million—far less than the expected \$30 million cost of litigating the claim (and without even accounting for the expenses of pursuing recovery through a costly Chapter 11 process). In short, the risk-adjusted value of the claim was far less than the settlement amount when properly accounting for IDT’s limited ability to pay under even Plaintiff’s flawed assumptions. Again, this provides another independent ground for affirmance.

c. Plaintiff’s Failure to Account for Non-Cash Consideration

Third, Plaintiff’s alternative calculation fails to account for the significant non-cash consideration that IDT provided Straight Path, in the form of a 22% contingent payment right (“CPR”) from certain IP recoveries. Through the CPR, Straight Path not only secured upside value from litigation associated with the relevant IP, but also faced none of the exposure to downside risk that accompanies

such IP litigation. A1305(951:17-953:14). In addition, the CPR carried a commitment from IDT to invest \$20 million in prosecuting those cases.

A1304(950:9-19). Because the Trial Court found that the risk-adjusted settlement value of the indemnification claim was less than the settlement's \$10 million cash component alone, it did not need to assess the value of the CPR. OP51 n.323.

Special Committee member Weld, who was responsible for negotiating Straight Path's settlement, testified that the total settlement consideration Straight Path received from IDT, including the CPR, was worth between \$40-50 million. A1578(2040:7-2041:1). Weld was well-positioned to estimate the value of future IP recoveries under the CPR, as those assets had been the focus of Straight Path's business from its inception, and Weld had been a director since the company's inception. *See* A1491(1694:16-24). Far from establishing any valid alternative to Weld's sworn testimony regarding the value of IDT's settlement consideration, Plaintiff instead insisted post-trial: "*Nowhere* in the record is there any valuation analysis of the CPR that could possibly support a judicial finding of a reliable valuation." A1959 (original emphasis). If that were so, then Plaintiff failed to "provide a non-speculative way to quantify damages," *Great Hill Equity P'rs IV, LP v. SIG Growth Equity Fund I, LLLP*, 2020 WL 948513, at *23 (Del. Ch. 2020).

Properly accounting for the value of the CPR that Straight Path received, even assuming Plaintiff's full inflated calculation of a \$36.1 million value of the

indemnification claim (which is badly flawed for the reasons detailed above), that value is still *less* than the \$40-50 million value of IDT's settlement consideration and therefore does not alter the Trial Court's ultimate conclusion that a "settlement in that vicinity would have been a reasonable result of a fair, uncontrolled negotiation of a release," and "Plaintiff and the class therefore suffered no damages as a result" of the settlement. OP81. Again, this provides yet another independent basis for affirmance.

II. The Trial Court Correctly Concluded Based on the Factual Record at Trial that Straight Path Was Not Entitled to “Equitable Contribution” Under the S&DA

A. Question Presented

Did the Trial Court err in determining that the facts did not support a claim by Straight Path for “equitable contribution” from IDT? (OP69-71.)

B. Scope of Review

As discussed in Section I.B above, where, as here, “there is sufficient evidence to support the findings of the trial judge, this Court, in the exercise of judicial restraint, must affirm.” *In re Tesla Motors*, 298 A.3d at 698 n.113.

Plaintiff’s argument does not identify any error of law by the Trial Court, and under any standard of review, the Trial Court did not err. This Court can also affirm on alternative grounds that the Trial Court did not need to reach.

C. Merits of Argument

1. The Trial Court’s Thorough, Sound Factual Analysis of the Equities Based on the Full Trial Record Is Entitled to Deference and Must Be Affirmed

Plaintiff’s only other argument on appeal is that the Trial Court considered and rejected Plaintiff’s theory that the court should “attribute value to a potential claim under the S&DA’s contribution provision,” despite the undisputed non-viability of Straight Path’s indemnification claim. *See* Opening Br. at 45. That criticism, however, falls flat given the Trial Court’s sound and well-reasoned

analysis of the factual record to conclude that Straight Path was not remotely entitled to equitable contribution from IDT.

The S&DA's "equitable contribution" clause provides that under certain circumstances, an indemnifying party shall "contribute" to an indemnified party's loss in proportion to all "relevant equitable considerations." A2688. The Trial Court took stock of the relevant equitable considerations based on the totality of the extensive post-trial factual record and concluded that "it would be inequitable to pin the liability" on IDT stockholders for "the penalties Straight Path paid under the Consent Decree." OP70.

For starters, the Trial Court recognized that at the time of Straight Path's spin-off from IDT, the spectrum licenses that ultimately gave rise to the Consent Decree "were not considered to be particularly valuable." OP71. Indeed, they carried a "zero value" on IDT's balance sheet. A1253(745:5-24). IDT and Straight Path had included in them in spin-off as an afterthought, for tax reasons. OP71.

Having received these spectrum licenses in 2013 at a time when they carried little or no value, Straight Path proceeded to enjoy a tremendous boon as the licenses dramatically increased in value in the years after the spinoff, due to changes "in law and technology"—which represented *pure upside* to Straight Path with no equitable reason for IDT to further subsidize Straight Path's good fortune. OP71.

When Straight Path then faced an FCC inquiry that threatened its ability to maximize the value it wanted to extract from its spectrum licenses in an auction process at an opportune time, the Trial Court found that “Straight Path *rushed into the Consent Decree out of self-interest.*” OP70. The factual record makes this unmistakably clear: An ongoing FCC investigation threatened Straight Path’s ability to sell the spectrum licenses for top dollar. Straight Path was determined to obtain a clean bill of health from the FCC before selling the licenses because the cloud of that investigation would suppress the sale price Straight Path could achieve.¹¹

As part of its self-interested strategy, Straight Path deliberately left IDT out of its negotiations with the FCC, and thereby “interfered with IDT’s exercise of its contractual right to protect its interests” in such negotiations. OP70; A1096(120:12-22), A1661(2371:23-2372:19). Straight Path’s interference with IDT’s ability to protect its interest was particularly prejudicial under the circumstances, in several respects.

¹¹ *E.g.*, A1091(100:10-101:14); A1101(140:4-16); A1093(107:12-108:23); A1370(1210:9-1212:4); A1371(1215:11-21); A1373(1224:10-14); A1386(1276:7-18); A1409(1367:16-24); A1433(1464:13-1465:7); A1497(1716:23-1717:9, 1718:13-1719:10); A1497-98(1719:20-1720:8); A1551(1932:1-10); 1688(2479:11-19); B349.

For starters, as the former Chief of the FCC’s Wireless Bureau explained in un rebutted testimony, the FCC could not have revoked the spectrum licenses or even a monetary penalty based on conduct during the time IDT owned the licenses, including because the statute of limitations for any action for forfeiture or monetary penalty “had long run” by the time the FCC had begun its investigation. A1753(2739:2-24).

Thus, if IDT had an opportunity to protect its interest in negotiations with the FCC, it would have had strong grounds to fight and avoid any penalties at all, let alone the astronomical profit-sharing arrangement to which Straight Path *voluntarily submitted* under the Consent Decree. But Straight Path had determined that it was not in its economic interest to defend against a drawn-out regulatory battle because *it* (but not IDT) had a short window of time to extract extraordinary value from the licenses through an auction at a time when bidders wanted the spectrum to help them in a race to 5G, and Straight Path thus elected to strike a quick deal with the FCC rather defend any claims, to further Straight Path’s own interests. OP70-71; A1497(1718:13-1719:10). In other words, as noted, Straight Path decided that excluding IDT from the negotiations was in its “self-interest.” OP70.

Further exacerbating the prejudice to IDT, Straight Path proceeded to negotiate a Consent Decree settlement structure under which its agreed-upon

“penalty” *grew* in direct proportion to the success of Straight Path’s auction of its spectrum licenses. Thus, Straight Path was heavily incentivized to drive its FCC “penalty” payment as high as possible, because that putative “penalty” simply represented a percentage of the revenue Straight Path (and not IDT) would receive in its auction process. As the Trial Court explained it, the putative liability “grew in concert with increasing value of the company sale,” which if Plaintiffs’ flawed theory were correct, “would saddle IDT with liabilities that Straight Path *willingly incurred*, that grew as the windfall of the sale grew.” OP71. Obviously, IDT would never have agreed to such a settlement structure. *E.g.*, A1212(580:20-581:4); A1273-74(827:22-828:12). The Trial Court rightly explained, if IDT were deemed liable for the Consent Decree “penalties,” the perverse structure that Straight Path had negotiated for itself “was all upside to Straight Path, and all downside to IDT.” OP71.

Finally, the Trial Court recognized that Plaintiff’s purported “equitable contribution” sought “damages that far exceed IDT’s ability to pay or its liquidation value,” and that “bankrupting IDT in light of the windfall to Plaintiff is not supported” in equity. OP71. Straight Path obtained an auction price of *\$3.1 billion* from Verizon, from a license portfolio that had been worth *next to nothing* when Straight Path received it in the spinoff.

Plaintiff tries (at 48) to fault the Trial Court for not specifically mentioning certain enumerated examples of “relevant equitable considerations” referenced in S&DA Section 6.03, such as the parties’ “relative intents, knowledge,” and “access to information.” But the Trial Court’s thorough and holistic analysis of the equities plainly encompasses those factors—including, for example, Straight Path’s intent and “self-interest” in rushing into the Consent Decree while excluding IDT from the process (OP70-71) and submitting to penalties that the FCC could never have imposed without Straight Path’s consent (A1753(2739:2-24)). Moreover, Section 6.03 calls for assessment of all “equitable considerations appropriate in the circumstances,” not merely the listed factors, which are expressly designated as non-exhaustive factors to consider, “among other things.” A2688. Indeed, at the pretrial conference, Plaintiff’s counsel argued that the contribution provision was broadly “based on equitable principles,” not restricted to certain enumerated factors. A1029.

Underscoring the absence of a valid factual basis for equitable contribution under these circumstances, not a single fact witness testified that they ever thought Straight Path had a viable claim for equitable contribution or that anyone at Straight Path ever even *suggested* that Straight Path had a viable claim for equitable contribution. *See* A1799(2918:11-16) (Prof. Hamermesh observing “no indication that anybody on the Straight Path side” had “ever relied on” contribution

provision “or invoked it”). Indeed, the Special Committee’s primary legal advisor had no recollection of the contribution provision. A1650(2326:9-14).

The Trial Court rightly recognized on the extensive factual record that Plaintiffs’ “equitable contribution” theory was not remotely sustainable. Under the well-established standards of appellate review, that factual conclusion is entitled to deference and must be affirmed.

2. The Equities Would Not Warrant Contribution Given that Even Among the Options Available Under the Consent Decree, Straight Path Could Have Elected Not to Incur the Profit-Share with the FCC and Instead Select an Option that Was Expressly Allocated as a Straight Path Liability Under the S&DA

The Trial Court could have rejected Plaintiff’s meritless “equitable contribution” theory on other, independently sufficient grounds as well, which provide independent grounds for affirmance. For starters, as the Trial Court found, Straight Path entered the Consent Decree willingly and without seeking or obtaining IDT’s consent because it was in Straight Path’s own interests to do so. OP68. But even after Straight Path entered the Consent Decree, it made a further choice—in its own interests and without IDT’s consent—that caused it to incur obligations that even the Consent Decree did not require Straight Path to incur. The Consent Decree gave Straight Path several different options, including the option

of “termination of the remaining Spectrum Licenses” without *any* further fines or liabilities. OP24; A0975 ¶135.

Had Straight Path selected the Consent Decree’s termination option, that result could not have been subject to indemnification by IDT, because the S&DA expressly allocated to Straight Path, not IDT, all such liabilities resulting from any “termination.” A2678 (subpart (iv)). This allocation made perfect sense: IDT transferred the licenses to Straight Path *for free*, with no assurances or guarantees as to their viability or against later revocation or termination. A1255(754:12-17); A1256(756:11-757:9). Thus, to the extent that Straight Path sought payment from IDT for *license terminations*, such payment was squarely barred by subpart (iv) of the S&DA’s definition of “SPCI Liabilities,” which sensibly allocated that risk to Straight Path.¹²

The Trial Court found that Straight Path unilaterally “determined that its best course of action was to sell the company” and thereby subject itself to the obligation to share 20% of the sale proceeds with the government. OP4. Straight Path made that unilateral decision to avoid an alternative outcome—license

¹² The Trial Court concluded as a matter of “law of the case” that subpart (iv)’s allocation of “liabilities arising from ‘a sale’” did not apply to Straight Path’s payments under the Consent Decree (OP54-55), but did not separately address (and did not need to reach) subpart (iv)’s allocation to Straight Path of liabilities resulting from any “termination.”

termination—for which liability was expressly and logically *allocated to Straight Path* under the S&DA. Equity thus would preclude Straight Path from seeking contribution from IDT on this ground as well, which provides an independently sufficient basis for affirming the Trial Court’s sound ruling.

3. Plaintiff’s “Equitable Contribution” Theory Fails on the Independent Ground that an “Equitable Contribution” Claim Still Required Straight Path’s Compliance with the Notice and Consent Requirements in S&DA Article VI

Finally, this Court has independent basis to affirm the Trial Court’s opinion on the additional ground that Plaintiff is wrong that that the “contribution” clause bypasses Straight Path’s egregious “notice and consent infirmity” (i.e., its strategic choice to exclude IDT from its settlement process with the FCC). Plaintiff erroneously asserts (at 46) that the Trial Court “recognized” that the contribution clause “was not conditioned on a notice or consent requirement.” Not so. The Trial Court merely recognized *Plaintiff’s argument* to that effect and concluded that an “equitable contribution” theory *still* failed—“Even assuming Plaintiff is correct.” OP70.

But Plaintiff’s misinterpretation of the “contribution” clause to circumvent the S&DA’s notice and consent requirements is *incorrect*. Plaintiff advocates (at 46) for an unsupported and nonsensical interpretation of the words “for any reason,” to eliminate any preconditions at all for equitable contribution, including

the S&DA's own express notice and consent requirements. Obviously, the three words "for any reason" do not override the S&DA's other express provisions and requirements, and do not allow for coverage where the indemnitee has *breached* its contractual preconditions for any form of indemnification—much less where, as here, Straight Path purposely flouted the S&DA's notice and consent preconditions to advance its strategic interests, to IDT's material prejudice. Rather, companies include such equitable contribution provisions as a backstop for situations in which "indemnification is denied for public policy or other reasons,"¹³ not to afford a party an opportunity to end run around its own strategic breach of the notice and consent prerequisites.

The terms of the notice and consent requirements make this clear: a failure to provide written notice broadly shall "relieve" the indemnitor "of *its obligations under this Agreement*" to the extent the indemnitor is "materially prejudiced by such failure." A2690. And the S&DA broadly provides that IDT "*shall not be liable* for any settlement effected without its consent," without limitation. A2691. Neither clause contains any carveout for obligations or liability under the

¹³ Olson et al., DIRECTOR & OFFICER LIABILITY: INDEMNIFICATION AND INSURANCE §9:21. For example, for claims under federal securities law, "federal courts disallow claims for indemnification because such claims run counter to the policies underlying the federal securities acts." *Eichenholtz v. Brennan*, 52 F.3d 478, 484 (3d Cir. 1995). But contribution is allowed under certain securities laws. *Id.* at 483.

Section 6.03 contribution clause, which is subject to the same notice and consent requirements that govern *all* of Article VI.

In addition, as Professor Hamermesh observed at trial, the contribution provision expressly “presupposes” indemnity liability arising under Sections 6.01 or 6.02, such that “notice and consent would be a prerequisite,” and it therefore would not be reasonable to attribute independent value to an equitable contribution theory when assessing the value of Straight Path’s indemnification claim against IDT. A1799(2918:19-2919:16).

The record is tellingly devoid of any evidence that Straight Path ever countenanced Plaintiff’s contrived, post-hoc “contribution” theory. A1799(2918:11-16). Thus, independent of the Trial Court’s analysis of the factual record to conclude that Straight Path lacked any equitable basis to obtain contribution, Plaintiff’s “equitable contribution” theory does not overcome the dispositive threshold barrier presented by Straight Path’s undisputed, intentional failure to comply with its notice and consent obligations (*see* OP60-69).

CONCLUSION

For these reasons, Appellees respectfully request that the Court affirm.

OF COUNSEL:

Jason Cyrulnik
Paul Fattaruso
Matthew Henken
CYRULNIK FATTARUSO LLP
55 Broadway, Third Floor
New York, New York 10006
(646) 844-2466

/s/ Rudolf Koch
Rudolf Koch (#4947)
Kevin M. Gallagher (#5337)
Daniel E. Kaprow (#6295)
John M. O'Toole (#6448)
RICHARDS, LAYTON & FINGER, P.A.
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

*Counsel for Defendants Below-Appellees
IDT Corporation, Howard Jonas, and The
Patrick Henry Trust*

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