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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** **May 12, 2025**

APPELLANT'S REPLY BRIEF ON APPEAL

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INTRODUCTION

The Trial Court found that Straight Path's controlling stockholder, Howard Jonas, committed a "flagrant" loyalty breach by coercing the Special Committee's release of a contractual Indemnity Claim against his flagship company, IDT.[1] Howard used his supervoting shares—and the threat of firing the independent directors—to condition a lucrative third-party sale on receipt of a nonratable benefit.[2] With a "gun to [their] head[s]," the Special Committee members released the claims at a price ($10 million) and a time (during the bidding for the Company) that they believed were unfair.[3]

The Trial Court also found that, because Straight Path did not satisfy a contractual condition precedent (a conclusion Plaintiff disagrees with but has not appealed), the Indemnity Claim's intrinsic value was less than the $10 million paid.[4] The Trial Court correctly recognized, however, that the "fair price" analysis is not

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[1] OP72, 82. Capitalized terms not defined herein have the same meaning as in Appellant's Opening Brief ("OB").

[2] OP45-50.

[3] A1522(1818:16-23); OP36-37.

[4] OP81.

limited to the intrinsic value of the asset, particularly a contingent litigation asset.[5]

Thus, the Trial Court conducted a parallel damages analysis to assess what a reasonable, arm's-length settlement of the Indemnity Claim would have been, if negotiations were not infected by Howard's breach.[6] To do so, the Trial Court used litigation discounts to generate a risk-adjusted valuation of the Indemnity Claim of about $8.5 million, and because it was less than $10 million, found no damages.[7] This was reversible error for two reasons.

First, the Trial Court used a March 29, 2017 valuation date (*i.e.*, when Howard extracted a coerced "agreement"-in-principle to release the Indemnity Claim), rather than the May 11, 2017 (signing) or February 28, 2018 (closing) dates of the Verizon/Straight Path Acquisition. The Indemnifiable Loss covered by the Indemnity Claim was a function of the Acquisition price,[8] and the Trial Court's valuation was based on prevailing bids as of March 29 (rather than deal price). The analysis, therefore, did not reflect the full facial value of the nonratable benefit.

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[5] OP72-73.

[6] OP74-81.

[7] OP81.

[8] OB37-39.

Defendants respond that the subject transaction is the Indemnity Claim's settlement, and because valuation is measured as of the "transaction at issue," the March 29 valuation date is appropriate.[9] This ignores repeated rulings that the "transaction in question" is *the Acquisition*. This conclusion is central to the Trial Court's motion to dismiss ruling, this Court's affirmance on interlocutory appeal, and the Trial Court's class certification decision. Defendants offer no basis to divert from the law of the case, nor meet the standard for doing so.

Moreover, the Trial Court found that Howard "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*."[10] Because the forced "agreement" on March 29 was itself a breach, that date simply cannot be used to simulate an outcome reached at arm's length.

Second, the Trial Court erred in not ascribing *any* value to a claim under the S&DA's Contribution Provision in its risk-adjusted valuation. Defendants concede

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[9] Appellees' Answering Brief ("AB") at 26-30.

[10] OP34.

that the Contribution Provision enabled a judicial finder-of-fact to fashion an equitable allocation between Straight Path and IDT for Indemnifiable Losses. This provision was available in *any* circumstance that indemnity was not, rendering a contribution claim highly valuable given IDT's undisputed comparative fault. The Trial Court found that IDT was solely responsible for the fraudulent Spectrum License renewals, and that the Consent Decree liabilities arose out of IDT's pre-Spin Off scheme.[11] Nonetheless, the Trial Court did not ascribe value, finding that all the equities were in Defendants favor. This ignores, however, that a different factfinder could easily have ruled differently. The Trial Court should have ascribed probability weighting to the contribution claim, as it did with risks to the Indemnity Claim.

Defendants do not directly address Plaintiff's argument. Instead, they raise two alternative grounds for affirmance that the Trial Court did not reach. Both fail. Defendants assert that the notice-and-consent procedures govern indemnification *and* contribution. But that argument lacks contractual and legal support, and Defendants did not challenge Plaintiff's reading at trial. Defendants also contend that the equities under contribution support IDT because the Consent Decree

[11] OP56.

liabilities were allocated to Straight Path under the S&DA. But this argument was rejected by the Trial Court twice, which found that the Consent Decree's license terminations arose out of IDT's fraud.

For these reasons, and those in Appellant's Opening Brief, Plaintiff respectfully asks that this Court reverse the Trial Court's Memorandum Opinion and remand for further proceedings.

ARGUMENT

I. THE TRIAL COURT ERRED IN USING A MARCH 29, 2017 VALUATION DATE

A. The Appropriate Valuation Date Is At Either The Signing Or Closing Of The Acquisition

1. The "Transaction In Question" Is The Acquisition

There is no dispute that the appropriate valuation date for entire fairness cases is that "of the transaction in question."[12] The issue on appeal is what *is* the "transaction in question": (i) the "agreement"-in-principle to release the Indemnity Claim, or (ii) the going-private Acquisition, where consideration to the Class was diverted by Howard's breach. Defendants contend that it is the former, and therefore the March 29 valuation date is correct.[13] But this conclusion is inconsistent with the law of the case and the Trial Court's own finding that the March 29 meeting itself was—both in its timing and outcome—the product of the breach.

The core pleading stage dispute between the parties was whether the claims here are derivative or direct. Plaintiffs argued that the claims were direct because the Indemnity Claim was a merger asset that the Special Committee sought to

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[12] OP73 n.401; *see also* OB33; AB27 n.6; OB37-39 (collecting cases).

[13] AB26-30.

distribute to stockholders as part of the Acquisition.[14] The Trial Court agreed, ruling that the complaint successfully "state[d] a claim that the side transactions"—*i.e.*, the Indemnity Claim release—"caused legally compensable harm to the target's stockholders by improperly diverting consideration from them to their fiduciaries."[15] Precedent "*compel[led]* the conclusion that the Complaint here states direct claims challenging *the fairness of the Verizon merger*."[16]

The conclusion that the challenged transaction was *the Acquisition* (from which Defendants diverted merger consideration) was affirmed on appeal and integral to the Trial Court's ruling on Plaintiff's contested class certification motion.[17] Defendants offer no basis to depart from the law of the case, let alone under the applicable standard.[18]

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[14] *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).

[15] OB34; *Straight Path I*, 2018 WL 3120804, *11 (quoting *Golaine v. Edwards*, 1999 WL 1271882, *7 (Del. Ch. Dec. 21, 1999)).

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

[17] *See* OB33-36.

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

Moreover, the March 29 meeting was *itself* the product of coercion.[19] As the Trial Court found:

> 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*.[20]

This pressure caused the Special Committee to accept a deal its members thought was unfair under duress, rather than preserve the claim or achieve an arm's-length settlement.[21] Because Howard's breaches forced the Special Committee onto an accelerated timeline, before it could assess the full value of the Indemnity Claim, the Trial Court's March 29 valuation date is itself infected by the breach.[22]

Defendants offer no defense of how a deal reached at a coerced meeting, with a "gun to" the Special Committee members' "head[s]" could possibly be the product of arm's-length bargaining. Nor have Defendants identified any case where a controlling stockholder extracted a nonratable benefit during negotiations over a

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[19] OB21-22.

[20] OP34 (emphasis added).

[21] OP36-37.

[22] OP39-43

going-private transaction, which was valued at interim rather than final deal terms. Indeed, every entire fairness case identified by Plaintiff, Defendants, and the Trial Court deployed either a signing or closing date valuation.[23]

2. Defendants' Assertion That A Signing/Closing Date Valuation Is "Speculati[ve]" Is Unavailing

Instead, Defendants contend that valuing the Indemnity Claim based on the final terms requires "rank speculation" as to the magnitude of Indemnifiable Losses. This argument fails.

First, the "rank speculation" cited by Defendants refers to a rejected argument made by the *controlling stockholder* in *Bomarko* that, even without breaching his duties, he might have negotiated a resolution of the litigation claim at issue.[24] Not only does this passage have nothing to do with the valuation date; it also stands for the premise that courts resolve ambiguities about a fair outcome, but-for the breach, *against the breaching party*. Reliance on *Bomarko* to punish the Class for

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[23] *See* OP37-39 (collecting cases). Under the instant facts, use of either a signing or closing valuation date yields the same result.

[24] AB28; *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1189 n.14 (Del. Ch. Nov. 4, 1999).

Defendants' coerced timeline turns the wrongdoer rule on its head.[25]

Second, Defendants misstate the record in asserting that "[b]idding 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," and would remain so absent the breach.[26]

The March 14 process letter informed bidders of the separation of the Indemnity Claim and asked for revised bids by March 30.[27] Between the letter's receipt and April 2, the major bidders raised their offers by *hundreds of millions of dollars*.[28] And the Trial Court found that "[n]either Straight Path's deal advisors nor the bidders ever intimated that preservation of the Indemnification Claim would 'imperil[] the auction[.]'"[29] The only evidence Defendants rely on for supposedly stalled bidding are their own expert's testimony, and observations by a

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[25] *See Thorpe v. CERBCO, Inc.*, 676 A.2d 436 (Del. 1996) ("once a breach of duty is established, uncertainties in awarding damages are generally resolved against the wrongdoer.").

[26] AB28-29.

[27] OB17.

[28] A4170-A4173; A0976-78 (¶¶143-151).

[29] OP50.

representative of a former plaintiff.[30] There is *no* evidence that the preservation of the Indemnity Claim would affect bid levels—let alone sufficient to upend the wrongdoer rule and give Howard an unsupported inference that bidding would have stopped, but-for his breach.

Third, Defendants contend that, because the Straight Path Board recognized that resolving the Indemnity Claim had benefits (like a smoother process), it is speculative to think that the Indemnity Claim would be live as of the final deal. Not so. While the Special Committee expressed an openness to settling, its members were clear that they would prefer to preserve the claim if a *fair* settlement was unavailable.[31] Instead, Howard forced the Special Committee into an unfair settlement on an unfair timeline.[32]

B. The Trial Court's Finding That The Indemnity Claim Was Not Viable Does Not Affect The "Arm's-Length Bargaining" Analysis

Alternatively, Defendants argue that because the Trial Court's finding that the

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[30] AB28.

[31] AB30.

[32] Defendants also contend that "the record is devoid of evidence that IDT would have agreed to settle after the auction ended…." AB29-30. But speculation about what opponent's decisionmaking has nothing to do with the risk-adjusted value of the claim itself. Neither the Trial Court on Defendants' expert included in its claim valuation analysis any assessment of what IDT might *choose* to pay.

Indemnity Claim was not "viable" applies as of the Acquisition, there is no error in the valuation date used.[33] This argument, however, elides over the Trial Court's necessarily bifurcated fair price/damages analysis.

The Trial Court began the fair price analysis by assessing the merits of the Indemnity Claim, and concluded it was not viable.[34] This is, in effect, an "intrinsic value" assessment of the Indemnity Claim with a "below deal price" finding. But entire fairness analysis is not limited to intrinsic value. The Trial Court must also assess the product of arm's-length bargaining:

> The question is one of entire fairness, and what the stockholders could have achieved, *absent the iniquities*. Below, I examine what a reasonable sale process for a release of the Indemnification Claim would have achieved, *absent the controller imposing an unfair process*. That value is greater than zero, because it involves the value of the claim, given its uncertainty, in a negotiation over its release at the time of the transaction.[35]

The Trial Court's bifurcated analysis makes practical sense, as it avoids

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[33] AB23-26.

[34] OP69.

[35] OP72 (emphasis added); *see also Bomarko*, 794 A.2d at 1189-90 (generating a "reasonable estimate of the value of the claim" based on, *inter alia*, the court's "assessment of the probability of success on the merits" to calculate fiduciary damages).

hindsight bias. The finding that the Indemnity Claim was not viable was made:

- After more than six years of litigation;
- After this Action survived three dispositive motions and one interlocutory appeal;
- By a different factfinder than who would have adjudicated the underlying claims; and
- In an 82-page decision making complex findings on many mixed questions of law and fact.

The parties at the time of an uncoerced settlement would have been working from risk assessments akin to that used by the Trial Court in its secondary damages analysis—not judicial findings of viability or nonviability. Indeed, the Special Committee valued the Indemnity Claim at about $60 million.[36] The findings regarding contractual defenses are only relevant to the extent they informed the Trial Court's risk adjustments, which Plaintiff did not appeal.

C. Defendants' Three "Independently Fatal" Errors Lack Merit

While Plaintiff merely seeks a valuation as of the appropriate date, Defendants identified three "independently fatal errors" in the Trial Court's analysis.[37] These

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[36] OP36.

[37] AB31.

arguments lack merit and, with respect to each, Plaintiff followed the Trial Court and record.

1. Litigation Costs

Defendants contend that Plaintiff's modified damages methodology does not properly account for the $30 million in expected litigation costs found by the Trial Court. This is incorrect. In its opinion, the Trial Court adopted "Defendants' suggested adjustment of $30 million," as "consistent with what the Special Committee reasonably would have assumed at the time of the settlement."[38] It then subtracted the $30 million from the Indemnity Claim's "baseline value," "*before* adjusting for litigation risk."[39] Plaintiff did precisely the same.[40]

The trial record also supports a finding that a contingency fee arrangement was a reasonable expectation, rather than a flat $30 million, particularly given the Trial Court's discount to 3.2% of face value. No reasonable fiduciary valuing a claim at around $37 million would expect to spend $30 million to litigate it. And while the Special Committee's counsel testified that he personally did not recall

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[38] OP76.

[39] OP76 (emphasis added).

[40] OP44.

having a conversation with his clients about hiring contingency counsel, he pointed out on the stand that the trust documents "specifically contemplate[d] the possibility of a contingency fee being paid to counsel."[41]

2. IDT's Ability To Pay

Similarly, Defendants contend that Plaintiff does not properly account for IDT's ability to pay. This is also incorrect. Again, Plaintiff adopted the Trial Court's damages methodology in every respect (other than the valuation date input). In the decision, the Trial Court did not include IDT's ability-to-pay as an input, and neither did Plaintiff.

This is the correct approach. The only support in the record for litigation discounting from a damages number capped at IDT's ability to pay was testimony from Defendants' expert—an academic, with limited expertise in litigating, negotiating, or mediating the settlement of legal claims.[42] This expert conceded that

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[41] *Compare* OP76 *with* A1596-1597(2112:24-2113:12). Because Defendants failed to cross-appeal the Trial Court's methodology of removing litigation costs prior to making risk adjustments, this Court can also decline to consider the argument. "A cross-appeal is necessary if the appellee seeks to … enlarg[e] the appellees' own rights or lessen[] the rights of an adversary." *See Haley v. Town of Dewey Beach*, 672 A.2d 55, 58 (Del. 1996). Here, the relief Defendants request with respect to litigation costs would lessen the Class's rights by reducing damages by $30 million.

[42] A1795(2902:7-2903:5).

Delaware courts had never applied his methodology, nor was he aware of other practitioners doing so.[43] He also conceded that he was no more qualified to opine on the methodology for risk adjusting the value of the Indemnity Claim than counsel for the Special Committee, or for the parties to this Action.[44]

IDT's ability to pay does not provide a basis for affirmance. At most, the Court should remand for a full determination of IDT's ability to pay and how it should be incorporated into a damages analysis.

3. Defendants Failed To Prove That The "Non-Cash Consideration" Had Any Material Value

Finally, Defendants contend that the 22% CPR, included as "non-cash consideration" for the "settlement" of the Indemnity Claim, added meaningful value.[45] There is, however, no support in the record for the premise that the CPR was worth *anything*—let alone enough to materially diminish the Class's damages using the correct valuation date.

Defendants cite no valuation analysis of the CPR, either from an expert or in

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[43] A1805(2944:22-2946:6).

[44] A1796(2905:4-19); A1801-1802(2927:19-2928:1).

[45] AB35-37.

the record, nor did they do so at trial.[46] Rather, Defendants rely entirely on Special Committee member Governor Bill Weld's *hope* that the CPR—thrust upon the Special Committee as a deal closing opportunity to "save face" at the end of the coercive March 29 negotiations—*might* have had real value.[47] Weld's optimism, however well-intentioned, does not establish that the CPR was additive.

Indeed, all other evidence supports the opposite conclusion. Straight Path CEO Davidi Jonas conceded that based on Straight Path's history of patent prosecutions, it was unlikely that the CPR would pay anything close to $40-$50 million.[48] Special Committee member Christopher Todd, an experienced patent litigator, testified similarly to having a "dim view" of the value of these IP rights.[49] Critically, Defendants argued at trial that Howard's acquisition of the *entire* portfolio of Straight Path intellectual property for $6 million was entirely fair.[50] If true, it is beyond belief that a 22% cash stream from that same portfolio was worth $40-$50

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[46] AB35-37.

[47] AB36.

[48] A1106(159:9-16).

[49] A1417(1399:24-1400:3).

[50] A2156; *In re Straight Path Commc'ns Inc. Consol. S'holder Litig.*, 2022 WL 484420, *13 (Del. Ch. Feb. 17, 2022) ("*Straight Path II*").

million. In fact, the CPR only ever paid out about $100,000.[51] Thus, the Court should decline to ascribe meaningful value to the CPR on the trial record, or remand for a further determination of value.

[51] A1649(2324:13-20).

II. THE TRIAL COURT ERRED IN ASSIGNING NO VALUE TO THE CONTRIBUTION CLAIM

A. The Trial Court's Factual Findings Rendered Straight Path's Contribution Claim Highly Valuable

In its decision, the Trial Court recognized that the Contribution Provision gave a factfinder broad discretion to allocate responsibility for Indemnifiable Losses equitably between IDT and Straight Path when indemnity was unavailable for "any reason," based on enumerated factors and a catchall for "other equitable considerations."[52] Even though the enumerated factors go to whose conduct as between IDT and Straight Path gave rise to the Indemnifiable Loss, the Trial Court found that the equities favored IDT, effectively because enforcing the Contribution Provision could have bankrupted IDT.[53] Plaintiff appealed, as the Trial Court erred by not giving probability weighting to different outcomes under contribution, as it did to litigation risks on the Indemnity Claim.[54]

In response, Defendants defend the Trial Court's decision to disregard the enumerated factors regarding who caused the loss, in apparent reliance on §6.03's

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[52] OP69-70; A2688.

[53] OP69-71.

[54] *See* OB48-49.

catchall clause.[55] This is, however, inconsistent with the S&DA. As Defendants concede, the listed equitable factors all point to comparative fault. §6.03 says the indemnifying party "*shall* contribute ... in proportion to [its] relative fault," and that "relative fault of the parties *shall* be determined by reference to" equitable factors.[56] Specific factors include which party made "untrue or alleged untrue statement[s]" or "omission[s]," whether false statements and omissions "relate[] to information supplied by [Straight Path] or IDT," and "the parties relative intents, knowledge, access to information and opportunity to correct" the misstatements.[57]

The Trial Court's own rulings confirm IDT's sole responsibility for the conduct giving rise to the Indemnifiable Loss—*i.e.*, the fraudulent renewal scheme and false statements to the FCC:

- IDT's consultant obtained access to rooftops, "sometimes through bribes," and deployed a single prototype radio only temporarily;[58]
- IDT submitted hundreds of renewal applications and other submissions to the FCC containing false representations;[59] and

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[55] A2688.

[56] A2688.

[57] A2688.

[58] OP10.

[59] OP10-11.

- Straight Path was unaware of the "methods that IDT Spectrum had employed in renewing the Spectrum Licenses" and "lack of permanent equipment."[60]

Applying the catchall provision only, Defendants rely on events *post-dating* the Indemnifiable Loss—*i.e.*, the negotiation of the Consent Decree and the Trial Court's findings regarding notice and consent.[61] But in doing so, Defendants fail to address undisputed facts *surrounding* notice and consent that could cause a factfinder to weigh even those equities differently. For example:

- Davidi Jonas put IDT on notice of a potential Indemnity Claim concerning IDT's license renewal scheme, but each of the Jonas family and Jonas-employed witnesses claimed not to remember what came of it;[62]

- Jonas family members and other conflicted fiduciaries controlled both sides of the notice and consent framework;[63] and

- Howard, IDT, and IDT's counsel were privy to the FCC investigation and settlement negotiations under a common interest and joint defense

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[60] OP16; OP18.

[61] AB 40.

[62] *See* OP16-17; A2779; *see also* OB11 ns.32-35.

[63] Even IDT's outside auditor considered this family conflict dynamic involving notice and consent, prompting IDT to disclose in a 10-K that it faced a material litigation risk even *after* the Consent Decree was executed. AR0001(JX396); AR0018.

privilege working group,[64] commented on drafts of the Consent Decree,[65] and ultimately supported Straight Path's entry into the Consent Decree.[66]

Defendants also point to the supposed inequity that the Consent Decree's 20% sale price penalty "grew in direct proportion to the success of Straight Path's auction of its spectrum licenses" and could have resulted in "damages that far exceed IDT's ability to pay.""[67] But this fundamentally misunderstands the nature of *equitable* contribution, which is not an "all-or-nothing" proposition. §6.03 plainly enabled a neutral arbiter to award equitable contribution damages at a level that IDT could have paid.[68]

Finally, Defendants invoke the deference afforded to a trial court's post-trial analysis.[69] But the question on appeal is not *this* Trial Court's balance of the equities under the Contribution Provision. It is what could the Special Committee have

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

[65] OP22-23; A0797-98; A3516-17; A1554-55(1946:17-1947:15); *see also* OB12-14 & ns. 50-58.

[66] A1317(1002:1-12).

[67] AB42 (quoting OP71).

[68] *See* A1731-32(2649:7-10, 2654:11-16). The Forfeited Licenses and $15 million penalty were also grounds for contribution and did not have the same proportional growth dynamic. *See* OB50. Defendants do not address these components.

[69] AB44.

reasonably expected in an uncoerced negotiation.

Here, each of the Special Committee directors and its able counsel, Mr. Fortinsky, testified that Straight Path's Indemnity Claim had significant value and that the coerced settlement was unfair.[70] And setting aside Defendants' mischaracterization of his testimony, Fortinsky testified at trial that he expected the litigation trust to pursue the full scope of potentially Indemnifiable Losses, would have been aware of a potential contribution claim, and could think of no reason why it would not have been asserted had Howard not coerced a settlement.[71] Even under coercion, the Special Committee thought the claim was worth about $60 million.[72]

Disinterested, independent directors acting in good faith are afforded deference under Delaware law,[73] and this Court has explained that "Delaware case law regarding opinions of counsel does not permit a trial court to substitute its legal

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[70] *See* OB25 & n.123; A1629(2241:11-16, 2244:18-23).

[71] A1650(2326:1-19).

[72] OP36.

[73] *See*, *e.g. Hamilton P'rs, L.P. v. Highland Cap. Mgmt., L.P.*, 2014 WL 1813340, *15 (Del. Ch. May 7, 2014) ("The good faith business decisions of informed, disinterested, and independent directors of Delaware corporations are entitled to deference under the business judgment standard of review…."); *see also In re Trade Desk, Inc. Deriv. Litig.*, 2025 WL 503015, *29 (Del. Ch. Feb. 14, 2025) ("Absent an abuse of discretion, that judgment will be respected by the courts.").

interpretation for one reached by counsel in good faith."[74] Thus, this Court should remand for further proceedings regarding damages that accounts for the value of the Contribution Provision and the disinterested directors' assessment of value.

B. The Notice-And-Consent Provisions Do Not Apply To The Contribution Provision

Defendants argue that contribution under S&DA §6.03 is conditioned upon the notice-and-consent requirements of §6.07, and therefore the Trial Court did not err in ascribing it no incremental value.[75] This is incorrect.

The Contribution Provision states that "equitable contribution" shall be paid when the "indemnity agreements provided for in Sections 6.01 and 6.02 are unavailable or insufficient, *for any reason*."[76] The availability of contribution when indemnification is unavailable "for any reason" is unambiguous and broad, and §6.03 says nothing about notice and consent. Rather, the only precondition is that

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[74] *Boardwalk Pipeline P'rs, LP v. Bandera Master Fund LP*, 288 A.3d 1083, *1124 (Del. 2022) (Valihura, J., concurring); *see also Williams Cos. Inc. v. Energy Transfer Equity, L.P.*, 2016 WL 3576682, *11 (Del. Ch. June 24, 2016) (explaining "it is not appropriate for me to substitute my judgment" for counsel's "subjective good-faith determination"), *aff'd*, 159 A.3d 264 (Del. 2017).

[75] AB46-48.

[76] A2688 (emphasis added).

there be "Indemnifiable Losses," which the Trial Court found present.[77]

Moreover, the plain intent of §6.03 is to compel the responsible party to pay its equitable share in *any* circumstance where indemnification under §§6.02 or 6.03 is unavailable. Delaware enforces the plain meaning of contractual terms,[78] and any ambiguities must be construed against IDT as the unilateral drafter of the S&DA.[79]

Defendants' argument makes even less sense when Article VI is read holistically. §§6.01 and 6.02 are reciprocal indemnification provisions, while §6.03 provides for contribution when indemnification under §§6.01 or 6.02 is unavailable. By its plain words, §6.07 governs notice and consent related to "*Third Party Claims*" for which "*indemnification* may be sought."[80] Neither the definition of Third Party Claims nor the notice and consent procedures in §6.07 say anything about contribution. By contrast, §6.03 provides for contribution for any "*Indemnifiable*

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[77] OP52 ("The Consent Decree gave rise to Indemnifiable Losses under the S&DA.").

[78] *See Weinberg v. Waystar, Inc.*, 294 A.3d 1039, 1044 (Del. 2023) ("Where language is unambiguous, we will give effect to the plain meaning of the contract's terms and provisions.").

[79] *See Twin City Fire Ins. Co. v. Del. Racing Ass'n*, 840 A.2d 624, 630 (Del. 2003); *Buckeye P'rs, L.P. v. GT USA Wilm., LLC*, 2022 WL 906521, *10 (Del. Ch. Mar. 29, 2022).

[80] A2690 (emphasis added).

Losses," which includes "any and all damage, loss, liability, and expense ... in connection with any and all Actions."[81] "Actions" are defined more broadly than Third Party Claims, to include "any claim, suit, arbitration, inquiry, proceeding, or investigation by or before any court, governmental or other regulatory or administrative agency or commission or any other tribunal," such as the FCC.[82] Reading this language together, the notice and consent provisions of §6.07 govern indemnification of Third Party Claims, while §6.03 provides that equitable contribution is available to recover for any Indemnifiable Losses when indemnification is unavailable "for any reason."[83]

In response, Defendants argue that "for any reason" means only when indemnification is not permitted for "public policy" reasons.[84] This severe limitation on the provision's plain words is not supported by any attendant contractual language or case law, and Defendants boldly cite none.[85]

Defendants also point to Professor Lawrence Hamermesh's off-the-cuff

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[81] A2675.

[82] A2672.

[83] A2688-91.

[84] AB46.

[85] AB47.

remark that he "always thought" notice and consent was a prerequisite for contribution.[86] But Defendants did not proffer Hamermesh as an expert on contracts or the allocation of liabilities in spin-off transactions, and he did not address contribution in his expert report or during his direct testimony.

Plaintiff's expert, Professor Guhan Subramanian, by contrast analyzed the contribution provision in his report and testified at trial as follows:

> It says "for any reason." So, on its face, [§6.03 is] clearly trying to be very comprehensive, very broad. Certainly, public policy could be one consideration or one reason to invoke 6.03. But it could be much broader than that. So, for example, in a situation where notice was not formally given, material prejudice, in that scenario, 6.03 could be invoked to say, okay, given the relative fault of the parties, where should indemnification go? …. [F]or example, if IDT had effectively gotten notice, they were aware of this claim or potential claim, but the formal notice as required was not given, then 6.03 could be invoked …. 6.03 would fill that, would be a catchall to cover that kind of scenario….[87]

Moreover, Subramanian's unrebutted testimony and Plaintiff's interpretation of §§6.03 and 6.07 allows them to be read harmoniously. Despite Defendants' selective quotations, §6.07 makes clear that a notice failure "shall *not* relieve the Indemnifying Party of its obligations under this Agreement, *except to the extent* that

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[86] AB48; A1799(2918:19-2919:16).

[87] A1703(2536:23-2538:21).

the Indemnifying Party is materially prejudiced by such failure to give notice."[88] As Subramanian testified, the contribution provision enabled a judicial arbiter to fashion an equitable contribution remedy taking into account any notice or consent-related prejudice suffered by IDT. Had Howard not coerced a settlement, a judicial arbiter may reasonably have found that IDT suffered material prejudice but nevertheless was responsible for a measure of contribution due to IDT's fraud on the FCC.

C. Straight Path's Optionality Under The Consent Decree Does Not Prevent Equitable Contribution

Finally, Defendants argue that equitable contribution to IDT would be unfair because Straight Path had an option under the Consent Decree that was not indemnifiable—termination of *all* the licenses—which the S&DA supposedly allocated to Straight Path.[89]

But the Trial Court rejected this argument at summary judgment. *See Straight Path II*, 2022 WL 484420, *9-10. Defendants argued that subpart (iv) of the S&DA's definition of Straight Path liabilities precluded indemnification for the

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[88] A2690 (emphasis added); *compare to* AB47 (refashioning the provision to say "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'").

[89] AB45; A2678 at "SPCI Liabilities" § (iv) ("Subpart (iv)").

Consent Decree's termination of spectrum licenses and the 20% sale price penalty.[90] The Trial Court squarely considered and rejected Defendants' argument, stating that the language of subpart (iv) was "unambiguous" in *Plaintiff's* favor:

> I agree that the quoted language is unambiguous, but it is apparent that the liability in question—the fine and the 20% penalty owed to the FCC as a result of the Consent Decree, which stemmed from the improper obtaining of spectrum license renewals—*does not arise out of, result from, or relate to the sale or termination of those licenses*, although the amount of liability is derivative of the sales price, in part. Instead, *the liability arises from the fraud that occurred when the spectrum licenses were renewed*. [Subpart (iv)] thus does not preclude the Indemnification Claim's viability, as a matter of law.[91]

The Trial Court *again* rejected Defendants' argument post-trial, and held that its summary judgment ruling was law of the case.[92] Defendants' argument fails now for the same reason it failed at summary judgment and following trial. The liability imposed by the Consent Decree arose out of and relate to IDT's fraudulent license

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[90] *See Straight Path II*, 2022 WL 484420, *10.

[91] *Straight Path II*, 2022 WL 484420, *10 (emphases added). Defendants' contention that the Trial Court "did not separately address" allocation of liabilities "resulting from any termination" (AB45 n.12) is flatly contradicted by the trial court's ruling (and law of the case) that the Consent Decree liability "does not arise out of, result from, or relate to the sale *or termination* of those licenses." *Straight Path II*, 2022 WL 484420, *10 (emphasis added).

[92] OP54-55.

renewal scheme, not the license terminations or Straight Path's sale to Verizon.

Defendants appear to tweak their twice-rejected argument by saying indemnification and contribution were precluded because Straight Path affirmatively *chose* to sell the Company rather than select "the Consent Decree's termination option,"[93] but the result would be the same. Under the Trial Court's non-appealed interpretation of subpart (iv) and law of the case, liability for additional license terminations under the Consent Decree would arise out of and relate to IDT's fraudulent license renewal scheme, not from the terminations themselves.[94] In fact, this is an odd argument for Defendants to make, as Straight Path's decision (under the Consent Decree's terms) to sell the Company instead of terminating the remaining licenses mitigated potential indemnification and/or contribution damages by billions of dollars.

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[93] AB45.

[94] *Straight Path II*, 2022 WL 484420, *10; OP54-55.

CONCLUSION

For the foregoing reasons and the reasons stated in Appellant's Opening Brief, this Court should reverse the Trial Court 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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