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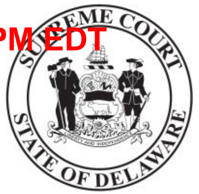

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IDT CORPORATION, HOWARD JONAS, and THE PATRICK HENRY TRUST,	)	
Defendants Below, Appellants,	)	No. 388, 2018
v.	)	Court Below: The Court of Chancery of the State of Delaware, C.A. No. 2017-0486-SG
JDS1, LLC and THE ARBITRAGE FUND,	)	
Plaintiffs Below, Appellees.	)	

APPELLANTS' OPENING BRIEF

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Dated: September 5, 2018

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ABBREVIATIONS AND DEFINED TERMS

Term	Definition
Board	The Straight Path board of directors
Complaint, Compl., or Amended Complaint	Verified Consolidated Amended Class Action and Derivative Complaint filed by Plaintiffs on August 29, 2017 (A618-67)
Consent Decree	Consent Decree among FCC, Straight Path, and Straight Path Spectrum, LLC, dated January 11, 2017, resolving FCC Enforcement Bureau Investigation No. EB-SED-16-00022575 (A301-17)
Defendants	IDT Corporation, The Patrick Henry Trust, Howard Jonas, and Davidi Jonas
Evercore	Straight Path's financial advisor
FCC	Federal Communications Commission
IDT	IDT Corporation
IDT Defendants	IDT Corporation, The Patrick Henry Trust, and Howard Jonas
Indemnification Asset	Straight Path's unasserted contractual indemnification claim against IDT Corporation
IP Assets	Straight Path's patents relating to internet communication
Jonas	Howard S. Jonas
Merger Agreement	Agreement and Plan of Merger among Straight Path, Verizon, and Waves Merger Sub I, Inc., dated as of May 11, 2017, and attached as Annex A to the Proxy Statement (A460-516)
Plaintiffs	JDS1, LLC and The Arbitrage Fund
Proxy Statement or Proxy	Straight Path Communications Inc. Definitive Proxy Statement dated June 30, 2017 (A320-551)
Separation Agreement	Separation and distribution agreement between Straight Path and IDT pursuant to which IDT spun off Straight Path on July 31, 2013 (A40-73)
Special Committee, or Committee	The special committee of the Straight Path Board, formed on or about February 6, 2017, and consisting of the three independent directors on the Straight Path Board: Gov. William F. Weld, K. Chris Todd, and Fred S. Zeidman

Straight Path, or the Company	Straight Path Communications Inc.
Term Sheet	Term Sheet between Straight Path and IDT, dated April 9, 2017, and attached as Exhibit B to the Merger Agreement (which is Annex A to the Proxy Statement) (A517-20)
Verizon	Verizon Communications Inc.

NATURE OF PROCEEDINGS

Plaintiffs allege a quintessentially derivative claim of harm to the Company: that Straight Path disposed of certain of its assets prior to a merger for an unfair price. To assert a direct claim, Plaintiffs would have had to challenge the merger itself. Yet Plaintiffs could not and did not do that – because stockholders received a more than fair price in the Verizon merger: $184 per share, representing a 486% premium to the closing price of the stock the day before the merger was announced (and a 3,500% return on the price of the stock at the time Straight Path was spun off approximately four years prior). Plaintiffs do not allege that the bidding process was ineffective, that the price Verizon paid was unfair to the stockholders, that any other bidder would have offered more than Verizon did, or that Plaintiffs would have preferred to keep their shares rather than receive the merger consideration on the terms Straight Path negotiated with Verizon. Indeed, Plaintiffs tout the "massive premium" stockholders received for their stock (A649-50), and there is no dispute that Plaintiffs were "in favor of the merger itself" (A987).

Unable to challenge the fairness of the merger but still intent on pursuing claims concerning Straight Path's pre-merger disposition of certain corporate assets, Plaintiffs moved the Chancery Court to expedite their claims, to litigate them before they lost standing to assert derivative claims if and when the merger

closed. The Chancery Court found no grounds for expedition and denied Plaintiffs' motion. Recognizing that they would lose their standing to pursue derivative claims if the merger closed, Plaintiffs argued their derivative claim for the pre-merger disposition of corporate assets is actually a direct claim, notwithstanding this Court's repeated and clear pronouncements that pre-merger stockholders cannot bring a direct claim unless they are challenging the merger itself.

The Chancery Court declined to decide Defendants' motions to dismiss until after the Verizon merger either closed or failed to close, reasoning:

> If the merger fails, *all that will remain is the cause of action belonging to the Company arising from the Term Sheet transaction*, and it will then be necessary to assess whether the Plaintiffs may proceed derivatively based on their pleadings.

A996-97 (emphasis added).

Notwithstanding the Chancery Court's recognition that Plaintiffs' claims were purely derivative at the time and would remain so if the merger failed (the Term Sheet transaction was not contingent on the merger), the Chancery Court nonetheless ruled after the merger closed that the claims somehow became direct claims, and thus that Plaintiffs had continued standing to sue despite no longer being stockholders of the Company. The Chancery Court thus declined to dismiss Plaintiffs' putatively direct claims.

Plaintiffs try to justify their claims as direct by asserting, on the one hand, that the March 2017 sale of Straight Path's IP and Indemnification Assets was "inextricably intertwined" with the 2018 Verizon merger (even though it was not part of or even contingent on any merger), while on the other hand isolating the Company's disposition of the IP and Indemnification Assets to avoid having to challenge the clearly fair merger price Plaintiffs received from Verizon for their shares.

None of Plaintiffs' gamesmanship changes the character of their claims: Plaintiffs contend that as a result of alleged misconduct, Straight Path wasted its valuable assets, selling them for less than they were worth. If the allegations were true, such actions would injure Straight Path by lowering its balance sheet; stockholders would be harmed only derivatively. Plaintiffs lack a legal basis to pursue claims that belonged to Straight Path. This is not a loophole; it is the law because Plaintiffs received fair consideration for their stock in the Verizon merger.

The Chancery Court itself recognized that the claims concern alleged waste of Company assets and thus belong to the Company. But the Chancery Court erred in later concluding that "the cause of action belonging to the Company arising from the Term Sheet transaction" (A996-97) somehow transformed into a direct claim belonging to the cashed-out stockholders upon the consummation of the merger. Such a proposition runs contrary to this Court's precedent as to whether

and how a stockholder asserts a direct claim challenging a merger, and undermines the consistency and predictability of Delaware law.

SUMMARY OF ARGUMENT

1. The Chancery Court erred in holding that (i) cashed-out stockholders stated a direct claim where they alleged that a pre-merger transaction allegedly disposed of corporate assets for too little consideration, and (ii) the cashed-out stockholders thus had standing to pursue the claim post-merger, even though they did not challenge the merger itself. Because the Company suffered the alleged harm, Plaintiffs' claims are derivative.

The Chancery Court misapplied this Court's precedent by mischaracterizing the alleged pre-merger waste of corporate assets as diversion of merger consideration from the pre-merger stockholders. Significantly, the Chancery Court recognized that Plaintiffs' claim was and would remain solely derivative had the merger failed – including because the challenged per-merger transaction was not conditioned on the merger closing. Following the Chancery Court's reasoning and permitting Plaintiffs' derivative claim to transform into a direct claim post-merger would disrupt settled principles of Delaware law, allowing post-merger stockholders to selectively challenge disfavored pre-merger transactions while declining to challenge the merger itself, thereby reaping the rewards of the merger while also continuing to wield the power to assert derivative claims that the acquiror reasonably would expect to have acquired.

STATEMENT OF FACTS

The IDT Defendants treat the allegations in the Complaint as true, except to the extent they are contradicted by documentary evidence. *See Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996); *Orman v. Cullman*, 794 A.2d 5, 16 n.9 (Del. Ch. 2002).

A. Straight Path's Business

Straight Path's main asset was a portfolio of spectrum licenses, issued by the FCC, that support prospective 5G networks using 39 GHz and 28 GHz wireless spectrums. A623-24, A627-28. Its other assets included a significant portfolio of tax losses including net operating losses exceeding $140 million (A193-94), a Gigabit Mobility Lab (A185), and an interest in certain intellectual property (patents) relating to internet communication (the "IP Assets") (A628-29).

IDT had spun off Straight Path pursuant to a Separation Agreement on July 31, 2013. A624. Straight Path stock began trading at approximately $4 to $6 per share, and by the time of its first 10-K filing, its market capitalization was approximately $73 million. A74 (reporting of 11,761,947 outstanding shares as of October 17, 2013, when stock closed at $6.18 per share). The Separation Agreement included mutual indemnity provisions, whereby Straight Path agreed to indemnify IDT for certain liabilities that post-dated the spin-off and IDT agreed to

indemnify Straight Path for certain liabilities that pre-dated the spin-off. A58; *see also* A630-31.

During the relevant period, Jonas owned 17.6% of Straight Path's equity, but controlled 71% of its voting power. A632. He also owned 11.3% of IDT's equity and served as IDT's Chairman. A231.

B. Straight Path's Consent Decree with the FCC

In the summer of 2016, the FCC launched an investigation (Investigation No. EB-SED-16-00022575, the "FCC–Straight Path Investigation") into whether Straight Path was in compliance with certain FCC rules in connection with the spectrum licenses Straight Path was holding. This investigation began amidst short-seller allegations that Straight Path or its predecessor failed to provide the requisite service to renew and hold the licenses. A636; A301. In light of the FCC's requirement that spectrum licenses that are warehoused by a company and not being used to provide service for twelve months or more can be forfeited, the short-sellers predicted that the FCC would terminate all of Straight Path's licenses. The FCC also initiated separate investigations against IDT (Investigation No. EB-SED-16-00022577, the "FCC-IDT Investigation") and its former employee who renewed the licenses (the "FCC-Rapaport Investigation") with respect to its activities during the period of its ownership of the licenses before Straight Path came to hold them.

On January 11, 2017, Straight Path settled the FCC–Straight Path Investigation and entered into a Consent Decree with the FCC. A637. The FCC described the Consent Decree as a fine for "Straight Path's failure to deploy wireless services as required under its FCC spectrum licenses," and the FCC's Chief of Enforcement announced:

> Squatting on spectrum licenses without any meaningful effort to put them to good use in a timely manner is fundamentally inconsistent with the public good . . . . Wireless spectrum is a scarce public resource. We expect every person or company that receives a spectrum license to put it to productive use.

A318; *see also* A639 (quoting press release).

The Consent Decree did not terminate all of Straight Path's licenses as the short-sellers had predicted would occur, and instead reaffirmed the validity of Straight Path's spectrum licenses, provided that Straight Path proceed with its prior plan to sell its licenses to a third party and remit 20% of the proceeds to the FCC as Straight Path had agreed to do. A637-38; *see also* A307-08. Straight Path also had the option of not selling the licenses on the contemplated timeline and paying the FCC a "Non-Transfer Penalty" of $85 million, or returning the licenses to the FCC.

C. Straight Path Explored Options To Sell Its Licenses

Since June 2016, Straight Path had been in discussions with parties interested in acquiring its spectrum assets. A375. After a January 31, 2017,

meeting with the Company's financial advisor, Evercore, the Board authorized Evercore to solicit formal bids for Straight Path's licenses. A375, 377. After sending first-round bid instructions on February 10 and until early March 2017, Evercore received indications of interest from several potential acquirors. A378.

D. Straight Path Formed a Special Committee To Address Its IP and Indemnification Assets

On February 6, the Board formed a Special Committee composed of Straight Path's three independent directors. A377. The Committee retained Shearman & Sterling LLP as legal counsel. A378. The Committee's initial purpose was to evaluate options to divest Straight Path's interests in the IP Assets. A377. The Committee intended "to explore other means of obtaining value for the IP Assets as such assets were not expected to be of material value to the potential whole-company bidders and possibly would be considered by such bidders as a liability." A377.

The Committee also "decided to evaluate Straight Path's rights and obligations" under the Separation Agreement pursuant to which Straight Path was spun off from IDT in 2013, including "the feasibility of asserting" an indemnification claim "against IDT in relation to the FCC consent decree and Straight Path's related liabilities." A377-40. Straight Path had never asserted any such claim against IDT, nor had it even provided IDT notice that Straight Path believed it had rights under the Separation Agreement pertaining to Straight Path's

settlement of the FCC–Straight Path Investigation through the Consent Decree. The Separation Agreement expressly required such prior notice in the event Straight Path believed it was going to incur a liability that would trigger any indemnification rights against IDT. Straight Path had resolved the FCC's investigation of the Company without IDT's involvement or approval. Nevertheless, the Special Committee decided to explore the prospect of asserting an indemnification claim against IDT even though no prior notice or approval had been provided or secured, and to consider what it could do with that Indemnification Asset.

E. Straight Path Asked Its Controlling Stockholder To Support a Sale of the Entire Company Instead of a Sale of the Licenses

The Consent Decree did not direct or incent Straight Path to pursue a whole-company merger with a third party. The Consent Decree incented (but did not require) Straight Path to sell its spectrum licenses. A307-08. As Straight Path's controlling stockholder since the Company was spun off from IDT, Jonas strongly supported such a transaction. A378-80. But the Company also wished to explore a sale of the entire company through a merger with a third party, which would divest Jonas of his controlling position, an outcome Jonas did not support. A378-80.

F. The Special Committee Decided To Separate the Indemnification Asset from a Sale of the Company

On March 8, the Special Committee "expressed and discussed concerns that bidders for Straight Path would not have interest in vigorously pursuing a potential indemnity claim against IDT and thus would not ascribe appropriate value to such claim in their bids to acquire Straight Path." A378. The Committee was considering three alternatives:

(1) "selling Straight Path's wireless spectrum assets (instead of selling the entire company)," which Jonas supported;

(2) "negotiating a settlement of the potential indemnity claim against IDT," which Jonas supported; or

(3) the "feasibility of separating Straight Path's potential indemnity claim against IDT for purposes of any sale of Straight Path."

A378. Jonas thus supported two of the three options (A379-81), but was not in favor of the third – which Plaintiffs concede would have been an "unusual and drastic" structure (A644-45).

On March 13, the Committee discussed with its counsel these issues and the "counterclaim risk" associated with asserting a claim against IDT. A379. The Committee considered the foregoing "various alternatives for preserving" the Indemnification Asset, "determined that it was in the best interests of Straight Path" that Straight Path's Indemnification Asset "be excluded from the potential

transaction," and directed Evercore to instruct bidders accordingly. A379. Evercore sent out second-round bid instructions on March 14. A379.

G. IDT Proposed To Resolve Mutual Indemnification Issues Between It and Straight Path and Expressed Interest in the IP Assets

On March 14-15, IDT spoke with the Special Committee to discuss the fact that the Separation Agreement "afforded IDT certain rights against Straight Path with respect to any responsibility Straight Path bore for the events leading to the FCC consent decree" and "proposed a meeting with the independent directors to explore the possibility of resolving these potential claims." A379. On March 15, IDT also conveyed that it was "interested in a potential transaction for the IP Group as part of a larger discussion to resolve any indemnification claim against IDT." A379.

H. Straight Path Anticipated Requiring a Voting Commitment from Jonas

On March 17, Straight Path's counsel reached out to Jonas and his counsel to discuss "the likelihood that bidders would require" Jonas "to enter into a voting agreement in support of the potential transaction" because his support would be "required in order for stockholder support to be obtained." A379. Jonas indicated that he was "prepared to support a transaction that involved a sale of only Straight Path's wireless spectrum assets – which were the only assets that had to be sold pursuant to the FCC consent decree" but "was not prepared to commit to support a

transaction that involved a merger or sale of Straight Path as a whole" instead of a sale of its spectrum assets. A380.

The Special Committee determined to arrange a further meeting to ask Jonas if he would instead support a sale of Straight Path as a whole and relinquish his controlling position in the Company. A380. On March 20, before the bidding process reached its third round and before the Board had approved any binding offer, Straight Path (through Shearman & Sterling LLP) spoke with Jonas's counsel about a prospective sale of the Company as a whole, and Jonas's counsel again advised that Jonas was not prepared to commit his vote in support of an undefined "potential transaction" with the "unusual and drastic" structure (A644-45) of selling the entire Company except for the Indemnification Asset, which would then be pursued against IDT after the merger. A380.

Plaintiffs do not (because they cannot) allege that Jonas ever expressed opposition to the other option the Company and the Special Committee had identified: a sale of Straight Path's spectrum licenses, rather than a sale of Straight Path itself. Plaintiffs do not allege that Jonas rejected any offer for Straight Path on the basis of any alleged precondition. And Plaintiffs do not allege that Straight Path ever declined a bid on the basis of any precondition set by Jonas.

I. The Special Committee and IDT Negotiated a Sale of Straight Path's IP and Indemnification Assets

On March 29, 2017, the Special Committee met with IDT representatives, including Jonas, "to discuss the indemnity claim and the assets of the IP Group." A381-82. IDT outlined "the various reasons why Straight Path did not have a viable claim for indemnification against IDT, the limitations on any damages such potential indemnification claims would have, and the various claims that IDT could pursue against Straight Path" – which counterclaim risk the Special Committee had previously indicated might be of concern to prospective buyers. A378, A381-82.

After "lengthy and detailed discussions" with IDT, the Committee, advised by their counsel, entered into an agreement with IDT by which Straight Path monetized the two non-spectrum assets the Committee was overseeing: the IP and Indemnification Assets. First, Straight Path sold its IP Assets to IDT for $6 million. The Committee agreed to that transaction on behalf of Straight Path. Second, the Committee and IDT agreed to settle the parties' claims against each other, including providing mutual releases of any indemnification claims, on terms that included (i) a $10 million payment from IDT; (ii) IDT's commitment to invest an additional $20 million in prosecuting the IP Assets and grant a perpetual right to 22% of all net proceeds flowing from those assets, which right the Committee

independently valued; and (iii) a release of IDT's counterclaims against Straight Path. A381-81; A517.

With respect to the Indemnification Asset in particular, Plaintiffs admit that the market did not assign a significant value to it. A645; A605. Any attempt to assert an indemnification claim against IDT for the amounts Straight Path agreed to share with the FCC under the Straight Path–FCC Consent Decree would have had to overcome multiple hurdles. For example:

> i. The Consent Decree concerned Straight Path's conduct in overseeing the licenses for four years, not IDT's conduct in renewing them many years prior. IDT's renewals were the subject of two separate FCC investigations, which were not terminated by the Straight Path Consent Decree. The FCC described the Consent Decree as a fine for "Straight Path's failure to deploy wireless services as required under its FCC spectrum licenses." A318; *see also* A639 (quoting press release).
>
> ii. Consistent with the Consent Decree's applicability to *Straight Path's* conduct (not IDT's), Straight Path did not provide IDT timely "written notice" of the FCC–Straight Path Investigation or obtain IDT's consent to the terms of the Consent Decree – both express prerequisites to any subsequent effort to seek indemnification from IDT. A60-61.
>
> iii. Straight Path was not legally permitted to seek indemnification from IDT for the civil penalty it agreed to pay the FCC because public policy bars indemnification for civil penalties. *See, e.g.*, *Johnson & Johnson v. Aetna Cas. & Sur. Co.*, 667 A.2d 1087, 1092 (N.J. Super. Ct. App. Div. 1995); *United States v. J & D Enters. of Duluth*, 955 F. Supp. 1153 (D. Minn. 1997).
>
> iv. Straight Path realized extraordinary profits from its sale of the spectrum licenses IDT had contributed to it in the 2013 spin off. (Straight

Path's entire value when it filed its first 10-K, based on its market capitalization, was less than $74 million.) Any attempt to characterize the spectrum licenses or amounts of profits that Straight Path agreed to pay the FCC as an indemnifiable "liability" under the Separation Agreement could not be squared with that reality.

v. Any attempt to seek indemnification from IDT for the amounts Straight Path had agreed to pay the FCC would have been limited, at a minimum, by IDT's limited ability to pay.

vi. Any attempt by Straight Path to pursue indemnification against IDT would have faced counterclaim risk from IDT based on Straight Path's conduct, and would have given rise to litigation discovery that endangered the Consent Decree, as the FCC reserved the right to reopen its investigation of Straight Path and its licenses if any new facts emerged. A306.

Against that backdrop, in exchange for a mutual release of claims, the Special Committee negotiated the Term Sheet and monetized its IP and Indemnification Assets. The Special Committee negotiated to receive cash from IDT in excess of $10 million, and a perpetual interest in the IP Assets for which IDT had paid $6 million to Straight Path and in which IDT committed to investing another $20 million to monetize.

In connection with IDT's and Straight Path's settlement discussions, Plaintiffs do not allege that IDT or Jonas ever insisted on a settlement below fair value – or on any settlement amount in particular – nor do they allege IDT or Jonas acted wrongfully in negotiating the settlement price. Rather, the Special Committee valued the Indemnification Asset – taking into account, among other

things, IDT's many available defenses, the potential recoverable damages, the counterclaims that the Company would face in the middle of a sale process if it decided to litigate the claims, and the cost of litigating all the claims. The Committee also considered the value of resolving claims that if litigated could endanger the Company's core asset, its spectrum license portfolio, for which third parties had submitted expressions of interest as high as $800 million. A380-82. (The Consent Decree provided that the FCC could reopen its investigation if new facts emerged with respect to Straight Path's ownership of the licenses. A306.

On April 5, the Special Committee held a telephonic meeting with its counsel "to consider the settlement in principle with IDT and the sale of the assets of the IP Group." A382. After "taking into account both the potential gain in the event that Straight Path were to pursue an indemnification claim against IDT and the costs and risks to the merger transaction, the special committee voted to proceed with such settlement and sale" and executed the term sheet on April 6. A382. On April 9 the parties added a provision that no further documentation was required to consummate the settlement. A385.

J. Bidders Were Notified of the Term Sheet and Jonas's Voting Agreement, and Bidding on Straight Path Intensified

On April 2, Evercore sent third-round bid instructions, which "indicated that Straight Path had reached an agreement in principle with IDT to sell the IP Group and to settle the indemnity claim." A382. The potential acquirors, including

Verizon, were thus informed that the indemnification claim would be released and buyers would be free of counterclaim risk from IDT, and the licenses would be protected from the risks that litigating (instead of resolving) the indemnification claim and counterclaims posed to the licenses and potential acquirors. Plaintiffs do not allege that acquirors were instructed to exclude from their purchase price any derivative claims the Company could assert, including Plaintiffs' instant claims, all of which were ultimately included in the Merger Agreement. A465, A484.

Potential acquirors submitted increasing bids for the Company. On April 6, AT&T submitted a bid of $951 million ($57.00 per share, up from its first-round bid of $602 million), and Verizon submitted a bid of $1.028 billion ($61.57 per share, up from its first-round bid of $550 million). The next day, AT&T bid $1.2 billion ($71.81 per share) and Verizon bid $1.262 billion ($75.50 per share). A383-84; *see also* A378.

K. IDT Rejected Straight Path's Attempt To Renegotiate the Term Sheet

On April 8, the Special Committee discussed the feasibility of obtaining "additional settlement consideration from IDT" for the Indemnification Asset even though IDT and Straight Path already had agreed on terms and executed the Term Sheet. A385; *see also* A651. IDT objected to the demand to change the terms to which the parties had agreed, informing Straight Path that if it breached the terms of the executed agreement, IDT would be forced to seek legal redress. A385. The

Committee decided not to renege on the Straight Path-IDT agreement, determining that "it was not worth taking any risk of holding up the prospective merger in light of the vastly improved offers for Straight Path," which "would greatly benefit stockholders." A385.

L. Bidding for Straight Path Intensified, and AT&T Initially Prevailed with a $1.6 Billion Offer

On April 9, Straight Path's Board unanimously agreed to accept AT&T's offer to acquire the Company for $1.6 billion, representing an almost 300% premium on Straight Path's value. A386-89. Straight Path and AT&T executed a merger agreement to that effect, and Straight Path and AT&T issued a press release the following day announcing the execution of their merger agreement.

M. Verizon Submitted a Topping Offer After the Straight Path–AT&T Merger Was Announced and Prevailed with a $3.1 Billion Offer

On April 20, *after* the Straight Path-AT&T merger agreement had been executed and announced, Verizon submitted to Straight Path a stock-for-stock acquisition offer reflecting a total enterprise value of $1.8 billion. A387. On May 1, AT&T and Verizon traded further counteroffers, and on May 3, Straight Path announced that it was accepting Verizon's then-standing offer reflecting a total enterprise value of $2.3 billion. A389-90. On May 5, AT&T matched Verizon's $2.3 billion offer. A390. On the same day, Verizon countered with two alternative topping offers with varying conditions: a "base" offer at $3.1 billion and an

"enhanced" offer at $3.3 billion. A390. Jonas expressed his preference for Straight Path to accept Verizon's enhanced offer of $3.3 billion, but Straight Path concluded that it would pursue Verizon's "base" offer of $3.1 billion. A390-91.

The consideration that Straight Path's stockholders received based on the offer that Straight Path accepted represents a 486% premium to the closing price of the Company's common stock on January 11, 2017, the day before the Company announced the sale process. A392. The merger was subject to FCC approval. A497.

N. Plaintiffs Elected Not to Challenge the Merger and Permitted It To Go Forward if the FCC Approved It

Plaintiffs filed this action on July 5, 2017. They did not challenge the wildly successful Verizon merger. A987. Instead, they challenged only the terms of the pre-merger sale (through the Term Sheet) of Straight Path's IP and Indemnification Assets to IDT, on the theory that Straight Path received too little for them, seeking additional payment for the IP and Indemnification Assets. A651.

Plaintiffs immediately moved for an expedited trial, premised on their expectation that the Court would find their claims to be derivative. On July 24, after full briefing and oral argument, the Court denied Plaintiffs' motion for expedited proceedings and reserved judgment as to whether Plaintiffs' claims were derivative.

On August 14, 2017, Defendants moved to dismiss the original complaint. Recognizing deficiencies in their claims, Plaintiffs filed an Amended Complaint on August 29. Defendants moved to dismiss the Amended Complaint on September 24, and the Chancery Court held oral argument on November 2.

On November 20, 2017, the Chancery Court issued a letter opinion and order. Observing that the Verizon merger "has yet to close, and the Plaintiffs do not seek an injunction; to the contrary, they are in favor of the merger itself" (A987), the Chancery Court ruled that Defendants' motions to dismiss were not ripe until the Verizon merger closed, and stayed the case, reasoning:

> If, as the parties agree is likely, that merger goes through in short order, my stay will be lifted, the direct claims, if viable, will be ripe, and any derivative claims will fall away. If the merger fails, all that will remain is the cause of action belonging to the Company arising from the Term Sheet transaction, and it will then be necessary to assess whether the Plaintiffs may proceed derivatively based on their pleadings.

A996-97.

O. The FCC Overruled Objections to the Straight Path-Verizon Merger, and Verizon Closed on Its Acquisition of Straight Path

The Merger Agreement was contingent on FCC approval. Multiple parties filed objections to the Verizon merger with the FCC, arguing among other things that approving the merger would place too much spectrum under Verizon's control and complaining that Straight Path would receive a windfall payment if the merger

was approved, even though Straight Path had violated FCC rules by warehousing its spectrum and not providing service over its spectrum for years. A1001, A1010. In January 2018, the FCC ruled on the objections and approved the proposed merger. The merger did not close until February 28, 2018 – almost one year after Straight Path and IDT entered the Term Sheet transaction.

After approving the merger, the FCC issued a press release again announcing that the FCC–Straight Path Consent Decree had "resolved an investigation into allegations that *Straight Path* failed to use the spectrum it was awarded, and thus violated the Commission's buildout and discontinuance rules" and that the FCC was approving the Company's merger with Verizon. A1042 (emphasis added).

On March 2, 2018, Plaintiffs notified the Chancery Court that Verizon's acquisition of Straight Path had closed. A998. On June 25, the Chancery Court ruled on the pending motions to dismiss. The Chancery Court dismissed Plaintiffs' derivative claims for lack of standing, but denied the motions to dismiss the remaining claims, ruling that Plaintiffs' challenge to the pre-merger disposition of Straight Path's assets could proceed as a direct claim because, the Chancery Court reasoned, it was "sufficiently intertwined with the sale of the company and the assets received by stockholders therefrom." Ex. A at 2. The Chancery Court acknowledged that its opinion permitting the claim to go forward relied on

reasoning that "has not been directly addressed by prior case law" (A1046), and on July 26, the Chancery Court certified its motion to dismiss opinion for interlocutory appeal. This Court accepted the interlocutory appeal on August 3 (A1052).

ARGUMENT

I. QUESTION PRESENTED

Whether former stockholders challenging the fairness of a pre-merger sale of corporate assets have stated a direct claim for injury post-merger when they do not challenge the fairness of the merger itself. Preserved at A703-11, A801-13.

II. SCOPE OF REVIEW

"Whether a party has standing is a question of law that is subject to de novo review." *El Paso Pipeline GP Co., v. Brinckerhoff*, 152 A.3d 1248, 1256 (Del. 2016).

This Court's resolution of the question presented – whether Plaintiffs have stated a proper post-merger direct claim – will determine Plaintiffs' standing because "it is black-letter law that a plaintiff loses standing to sue derivatively when," like Plaintiffs here, "she ceases to be a stockholder following a merger." Ex. A at 25 (citing *Lewis v. Anderson*, 477 A.2d 1040, 1049 (Del. 1984)). Thus, if Plaintiffs' claims "are deemed derivative, the lawsuit ends." Ex. A at 26 (citing *Golaine v. Edwards*, 1999 WL 1271882, at *4 (Del. Ch. Dec. 21, 1999)).

III. MERITS OF ARGUMENT

A. Plaintiffs' Claims Are Derivative Because They Allege Harm to the Company

The analysis to distinguish direct actions from derivative actions "must be based solely on the following two questions: Who suffered the alleged harm – the

corporation or the suing stockholder individually – and who would receive the benefit of the recovery or other remedy?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004). In order "to prove that a claim is direct, a plaintiff must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation." *El Paso Pipeline GP Co*, 152 A.3d at 1260 (Del. 2016) (internal quotation marks omitted). Plaintiffs bear the burden of establishing their standing to bring a direct claim. *Id.* at 1260 n.57.

Plaintiffs cannot prevail on their claims that Straight Path received too little for its IP Assets and Indemnification Asset without showing an injury to the Company. Plaintiffs' claims are based on allegations that, prior to the merger, Defendants caused Straight Path to dispose of its IP Assets and Indemnification Asset for too low a price. A651 (Compl. ¶¶ 88-89). Under this Court's test, because Straight Path owned the assets that Plaintiffs now complain were sold for too low a price, it was Straight Path that was harmed if it did not receive their full value. *See, e.g.*, A651-652 (alleging Straight Path sold IP Assets for less than their true value); A652 (alleging value of Indemnification Asset was "exponentially higher than $10 million," including because the portion of the Indemnification Asset "relating to the 20% penalty would alone be worth nearly $135 million"). Any recovery for such harm must go to Straight Path, and any recovery by

individual stockholders would be proportionate to their ownership interest in Straight Path. As this Court has made clear: "The necessity of a *pro rata* recovery to remedy the alleged harm indicates that [the] claim is derivative." *El Paso Pipeline*, 152 A.3d at 1264.

B. Because Plaintiffs Do Not Challenge Verizon's Acquisition of Straight Path, Their Claims Are Not Direct Under *Parnes*

1. Plaintiffs' Claim of Pre-Merger Corporate Waste Is Derivative, as in *Kramer*

Relying on *Parnes v. Bally Entertainment Corp.*, 722 A.2d 1243 (Del. 1999), the Chancery Court concluded that "the Complaint here states direct claims challenging the fairness of the Verizon merger," Ex. A at 30, even though Plaintiffs' claims relate solely to Straight Path's 2017 pre-merger sale of its IP and Indemnification Assets and expressly did not challenge the Verizon merger. In reaching that conclusion, the Chancery Court misapprehended the seminal precedent and misapplied *Parnes* to this case.

Parnes recognizes a limited path to pleading a direct claim in the context of a merger transaction, where stockholders are being forced to sell their shares, and where the stockholder "directly challenges the fairness of the process and the price in the . . . merger." *Parnes*, 722 A.2d at 1245. That was consistent with the rule later stated in *Tooley*: Where a stockholder is forced to give up his stock for an unfair price, the *corporation* is not harmed; the corporation is indifferent as to who

owns its stock. But the *stockholder* is harmed. Such allegations thus give rise to a direct claim, not a derivative one.

The plaintiff in *Parnes* thus stated a direct claim because she alleged that the acquiring company was not paying a fair price for the company's stock: "Other interested acquirors, including ITT Corporation, 'might have paid a higher price for [the company's stock] . . . but were discouraged from bidding because they were unwilling to participate in illegal transactions'" demanded by the company's chairman and CEO. *Id.* at 1246 (quoting complaint). A *Parnes* direct claim thus must challenge the fairness of the merger. *See Golaine*, 1999 WL 1271882, at *7 ("*Parnes* can be straightforwardly read as stating the following basic proposition: a target company stockholder *cannot* state a claim for breach of fiduciary duty in the merger context unless he adequately pleads that *the merger terms* were tainted by unfair dealing.") (emphasis added). Indeed, that is precisely what the *Parnes* Court made clear: "A stockholder who directly attacks the fairness or validity of a merger alleges an injury to the stockholders, not the corporation, and may pursue such a claim even after the merger at issue has been consummated." *Parnes*, 722 A.2d at 1245. By contrast, a plaintiff who "took no direct action to restrain or to attack the merger" will "lose standing" to assert claims for harm to the company. *Parfi Hldg. AB v. Mirror Image Internet, Inc.*, 954 A.2d 911, 936 & n.95 (Del. Ch. 2008) (Strine, V.C.) (quoting *Bokat v. Getty Oil Co.*, 262 A.2d 246, 249 (Del.

1970)). There is no suggestion in this Court's precedent that plaintiffs can choose *not* to challenge the merger at issue yet successfully contend that they satisfy the standard for one who "directly attacks the fairness or validity of a merger." *Parnes*, 722 A.2d at 1245.

Plaintiffs here could not plausibly allege that the massive premium they received from Verizon for their stock was unfair. In fact, they alleged the opposite, conceding that Verizon's merger offer was beyond fair and that Verizon (or any other bidder) would *not* have paid more for the Company with or without the IP Assets or the Indemnification Asset. A645. As the Chancery Court recognized, Plaintiffs were "in favor of the merger itself." A987.

Plaintiffs cannot accept and retain the tremendous benefits of the Verizon merger and meanwhile invoke *Parnes* to challenge Straight Path's pre-merger sale of the IP Assets and Indemnification Asset. *Parnes* permits direct claims only for allegations of wrongdoing in the merger itself. The Court specifically distinguished pre-merger transactions and held that where plaintiffs allege that transactions constituted corporate waste or mismanagement in the lead-up to a merger, their claim is "a classic derivative claim," even if they allege that such "wrongful transactions associated with the merger . . . reduced the amount paid to . . . stockholders" in the merger. *Parnes*, 722 A.2d at 1245.

The Court's detailed analysis of its decision in *Kramer v. Western Pacific Industries, Inc.*, 546 A.2d 348 (Del. 1988), addressing "the differences between a derivative claim for mismanagement related to a merger and a direct claim for unfairness in the merger terms," further makes this reasoning clear:

> a claim alleging corporate mismanagement, and a resulting drop in the value of the company's stock, is a classic derivative claim; the alleged wrong harms the corporation directly and all of its stockholders indirectly. *The fact that such a claim is asserted in the context of a merger does not change its fundamental nature.* In order to state a direct claim with respect to a merger, a stockholder must challenge the validity of the merger itself, usually by charging the directors with breaches of fiduciary duty resulting in unfair dealing and/or unfair price.

Parnes, 722 A.2d at 1245 (citing *Kramer*, 546 A.2d at 354) (emphasis added). The Court's analysis directly rejects the Plaintiffs' argument here: that their claim challenging Straight Path's disposition of its IP and Indemnification Assets somehow transforms into a direct claim because it is asserted in the context of a merger. The Plaintiffs here do not allege "unfairness of the merger terms" and do not "challenge the validity of the merger" as required to state a direct claim for the direct harm of selling their shares for an unfair price.

Plaintiffs' allegation that the Term Sheet transaction Straight Path's independent Special Committee agreed to "has the present effect of diminishing

the value of the consideration received in the sale transaction" (A664, A655), parallels the plaintiffs' allegations in *Kramer* that "wrongful transactions associated with the merger (such as the award of golden parachutes) reduced the amount paid to . . . stockholders," underscoring that the circumstances here present "a classic derivative claim." *Parnes*, 722 A.2d at 1245.

Notably, the Chancery Court did not distinguish Straight Path's sale of its IP Assets from any other act of corporate waste that remains a derivative claim under *Kramer*. Indeed, in its November 2017 opinion staying the case, the Chancery Court recognized: "Sale of corporate assets to a controller for an unfair price states perhaps the quintessential derivative claim . . . ." A995; *cf. El Paso Pipeline*, 152 A.3d at 1261 ("claims of corporate overpayment are normally treated as causing harm solely to the corporation and, thus, are regarded as derivative").

Yet, having recognized that Straight Path's 2017 sale of its IP Assets prior to the merger is classically derivative, the Chancery Court concluded that because Straight Path sold the IP Assets as "part of the same settlement agreement that released the indemnification claim," it was "reasonable to infer that IDT's acquisition of the IP Assets at an allegedly unfair price was part of the improper diversion of merger proceeds on which the Plaintiffs' direct claims are premised." Ex. A at 35 n.190. The IDT Defendants are not aware of any Delaware case stating that an otherwise derivative claim may be treated as direct merely by virtue

of its being part of the same agreement as another transaction, and the Court did not cite any such precedent or provide any other reason why Straight Path's sale of its IP Assets could support a direct claim by Plaintiffs.

Plaintiffs' claim based on Straight Path's sale of its Indemnification Asset is just as derivative as the claim based on the sale of the IP Assets. The Chancery Court's reasoning that the sale of Straight Path's Indemnification Asset was "intertwined with the sale of the company and the assets received by stockholders therefrom," Ex. A at 2, even if correct (and as detailed in the next paragraph, it is incorrect), does not meet the standard for a *Parnes* direct claim and thus is legally insufficient to convert this derivative claim into a direct one. Straight Path's sale of its IP and Indemnification Assets could have easily occurred in a non-merger context: "The fact that such a claim is asserted in the context of a merger does not change its fundamental nature." *Parnes*, 722 A.2d at 1245.

In addition, the sale of Straight Path's Indemnification Asset was not "intertwined with" the merger in any event: the Term Sheet transaction was not contingent on the acceptance of any merger offer. Indeed, the Term Sheet was negotiated, agreed to, and signed before the Verizon merger offer was even made, before any merger offer was accepted, and before the Merger Agreement was signed. A381-82. The sale of Straight Path's IP and Indemnification Assets closed

many months before the FCC even approved the merger over the objections of many parties.

2. The Chancery Court Erred by Confounding Diversion of Merger Consideration with "Effectively" Reduced Merger Proceeds that Result from Alleged Harm to the Company

Plaintiffs have no direct claim because they are not challenging the merger. The Chancery Court's contrary conclusion appears to lie in its misconception of merger "consideration." The Chancery Court correctly observed that in *Golaine*, Chief Justice Strine, writing as a Vice Chancellor, applied *Parnes* to ask whether the defendant's alleged misconduct harmed the target's stockholders "by improperly diverting consideration from them." 1999 WL 1271882, at *7. The Chancery Court in this case concluded that under *Parnes* and *Kramer*, the court should ask whether the defendant had "improperly diverted proceeds that would have, if the defendant directors had acted properly, ended up in the consideration paid to the target stockholders." Ex. A at 30.

Seeking to apply the precedent, however, the Chancery Court erred by reasoning that "any sale of Straight Path that did not preserve the indemnification claim could have *the effect* of depriving stockholders" of merger consideration (Ex. A at 31 (emphasis added)); that "the settlement agreement *effectively* deprived the company's stockholders of a claim potentially worth over half a billion dollars as part of the sale of the company" (*id.* at 33-34 (emphasis added)); that "if the

Special Committee had established the litigation trust, the stockholders would have *effectively* received a much higher total price in the Verizon sale" (*id.* at 34 (emphasis added)); and therefore that it is reasonable to infer that Jonas "improperly diverted merger consideration that otherwise would have gone to the stockholders" (*id.*).

The flaw in this reasoning is that, even crediting all of Plaintiffs' allegations, Jonas's alleged conduct did not divert any "consideration" from Plaintiffs. "Consideration" is something "bargained for and received by a promisor from a promisee." *Black's Law Dictionary* (10th ed. 2014). Plaintiffs do not, because they cannot, allege that Jonas's conduct with respect to the Indemnification Asset resulted in Verizon promising to pay, or paying, less money for Straight Path than Verizon otherwise would have paid. *Cf. Parnes*, 722 A.2d at 1246 (direct claim where other interested acquirors including the ultimate acquiror "might have paid a higher price" if not for defendant's conduct).

Chief Justice Strine, again writing as a Vice Chancellor, has explained in interpreting *Parnes* and *Kramer* that the question turns on whether company executives "act improperly and prevent stockholders from receiving a favorable offer," have "damaged the stockholders by causing the stockholders to lose a sales opportunity or to sell at too low a price," or have implemented a "plan to prevent stockholders from receiving a valuable sales offer" for their shares. *In re Gaylord*

Container Corp. S'holders Litig., 747 A.2d 71, 78, 80 (Del. Ch. 1999) (Strine, V.C.); *see also Akins v. Cobb*, 2001 WL 1360038, at *6 (Del. Ch. Nov. 1, 2001) (Strine, V.C.) (stockholders brought a derivative claim challenging compensation packages awarded by a company to members of senior management where plaintiffs did not allege that such benefits, during liquidation, "had any effect on the terms of the sales of the Operating Subsidiaries" or "that the price paid for the Operating Subsidiaries was unfair").

In concluding that Jonas's conduct nevertheless had "the effect" of reducing the funds subsequently available for distribution to Straight Path's stockholders, the Chancery Court was no longer asking the relevant question. In the key precedent, many forms of alleged misconduct had "the effect" of reducing the funds subsequently available for distribution to the target's stockholders post-merger – defendants engaged in merger-related conduct, in the Chancery Court's words "at the expense of" the target's other stockholders. (Ex. A at 36.) But the courts consistently recognized that the plaintiffs there stated only derivative claims because the conduct had not reduced *the consideration paid by the acquiror in the merger*. The same is true here.

In *Kramer*, for example, the Court recognized plaintiff's allegation that he was "wrongfully deprived" of a "portion of the Merger Sale proceeds," but reasoned that (a) although improperly incurred costs had *the effect* of reducing

distributed proceeds, the "alleged breaches of duty do not implicate the fairness of *the merger's* terms"; and (b) plaintiff's position was tantamount to permitting a derivative claim whenever a plaintiff could link a "monetary loss" resulting in reduced sale proceeds to a "cash-out merger." 546 A.2d at 353-54 (emphasis added). The *Kramer* Court thus held that the claim was derivative even though "the complaint did allege that wrongful transactions associated with the merger . . . reduced the amount paid to Western's stockholders." *Parnes*, 722 A.2d at 1245. In *Golaine*, the court distinguished between improperly accrued "acquisition costs" that would reduce distributed proceeds to stockholders post-merger and a reduction in "the consideration offered" for the merger; only the latter supports a direct claim. 1999 WL 1271882, at *4-6.

The Chancery Court also appeared to reason that the Company's sale of the Indemnification Asset should be treated differently than other acts of pre-merger corporate waste, and that it constitutes a diversion of "merger consideration" because Straight Path could have pursued an indemnification claim against IDT to try to recover losses Straight Path incurred upon consummation of the Verizon merger. Ex. A at 33-34. The Chancery Court did not, however, cite any Delaware case supporting such a basis for treating a pre-merger waste of corporate assets as a direct claim, and the IDT Defendants are not aware of any.

Significantly, the Chancery Court openly struggled to discern the principled distinction between derivative and direct claims in the post-merger context, commenting that the caselaw in this area is "often hard to reconcile" (Ex. A at 26) and "less than clear," and that "the distinction articulated in *Parnes* embodies the type of formulaic pleading requirement that Delaware law has generally rejected" (*id.* at 29). Contrary to the Chancery Court's view, however, this Court in *Tooley* reaffirmed the correctness of both *Kramer* and *Parnes*, explaining that claims as in *Kramer* that are "essentially for mismanagement of corporate assets" are derivative, whereas for claims to be direct under *Parnes*, "the injury to the stockholders must be 'independent of any injury to the corporation.'" *Tooley*, 845 A.2d at 1038 (quoting *Parnes*, 722 A.2d at 1245).

The distinction is a principled one that does not embody any "formulaic pleading requirement." Claims like those in *Kramer* and in this case are essentially for waste of assets and accordingly are derivative because, as the Chancery Court has recently explained in the analogous context of corporate overpayment claims, any reduction "in value of the corporation's stock is merely the unavoidable result (from an accounting standpoint) of the reduction in the value of the entire corporate entity, of which each share of equity represents an equal fraction." *Sciabacucchi v. Liberty Broadband Corp.*, 2018 WL 3599997, at *7 (Del. Ch. July 26, 2018) (quoting *Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006) and holding

that corporate overpayment claims, "in reality, are purely derivative"). Straight Path's sale of its IP and Indemnification Assets for too little would likewise reduce "the value of the entire corporate entity" – it is a purely derivative claim.

3. The Chancery Court's Approach Would Disrupt the Predictability and Fairness of Key Aspects of Delaware Law

While Plaintiffs use dramatic rhetoric to cast Jonas's position in a sinister light, he had the absolute right under Delaware law to vote his shares as he wished and not to support a transaction that would divest his controlling interest in the Company, and that Plaintiffs themselves describe as an "unusual and drastic" structure. A645. Jonas would not be violating any fiduciary duties by exercising his stockholder voting right to vote against a disfavored transaction structure – regardless of his reasoning. *See, e.g.*, *Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 845 (Del. 1987) (a stockholder is "under no duty to sell its holdings in a corporation, even if it is a majority shareholder"); *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Ringling*, 53 A.2d 441, 447 (Del. 1947) (a stockholder may decline to sell or vote in favor of a transaction for any reason, including "personal profit, … whims or caprice"); *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1040-41 (Del. Ch. 2012) (controlling stockholders, when acting as stockholders, do *not* have "a duty to engage in self-sacrifice for the benefit of minority shareholders"). Nor was Straight Path under any obligation to pledge the Indemnification Asset to a litigation trust. *See Ark. Teacher Ret. Sys. v. Caiafa*,

996 A.2d 321, 322 (Del. 2010) (rejecting claim that court "should place part of the merger consideration into a constructive trust in order to protect the value of its derivative claims" and explaining that "Delaware corporate fiduciary law does not require directors to value or preserve piecemeal assets in a merger setting"); *In re Countrywide Corp. S'holders Litig.*, 2009 WL 846019, at *9 (Del. Ch. Mar. 31, 2009) (decision not to create litigation trust prior to merger subject to business judgment rule).

Plaintiffs' attempt to effectively impose through post-merger litigation a transaction structure to which they had no right, and which they otherwise could not have realized, would upend established principles of shareholders' rights. *Cf. Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 444 (Del. 1996) ("Damages cannot be awarded on the basis of a transaction that has a zero probability of occurring due to the lawful exercise of statutory rights.").

Importantly, the Chancery Court initially determined that it was premature to rule on Defendants' motion to dismiss while the Verizon merger was still pending, reasoning: "If the merger fails, all that will remain is the cause of action *belonging to the Company* arising from the Term Sheet transaction, and it will then be necessary to assess whether the Plaintiffs may proceed derivatively based on their pleadings." A996-97 (emphasis added). In other words, a potential claim arising from the Term Sheet transaction plainly existed as a derivative claim – and would

have continued to exist as a derivative claim – even if the Verizon merger never took place.

To redefine such a derivative claim as direct only in the event that the Verizon merger actually takes place "undercuts the clarity and coherence that *Tooley* brought to the determination of what claims are derivative." *El Paso Pipeline*, 152 A.3d at 1266 (Strine, C.J., concurring). Clarity and coherence are important in distinguishing derivative claims from direct claims because following a merger, any "derivative claim – originally belonging to the acquired corporation – is transferred to and becomes an asset of the acquiring corporation as a matter of statutory law." *El Paso Pipeline*, 152 A.3d at 1265 (quoting *Ark. Teacher Ret. Sys. v. Countrywide Fin. Corp.*, 75 A.3d 888, 894 (Del. 2013)). Having certainty as to what claims are derivative thus gives parties certainty as to what is acquired in a merger, including the certainty that the acquiror will have the discretion to determine whether to pursue acquired derivative claims: "To make the general rule one where derivative plaintiffs can continue to sue after a merger would thus raise overall transaction costs and barriers to mergers, with obvious costs to public investors, with no gain substantial enough to compensate them." *El Paso Pipeline*, 152 A.3d at 1252. In this case, consistent with the statutory rule, "any derivative claims the Company could assert" were "ultimately included in the Merger Agreement" with Verizon. A699 (citing A465, A484); *see also* A812-13.

This concern is particularly pronounced here because litigating these claims (or litigating the underlying indemnification claims that Straight Path and IDT released prior to the merger) poses significant dangers to Verizon and the multibillion-dollar spectrum assets it acquired through the merger. Litigation of the derivative claim or the indemnification claim threatens to reopen the FCC's investigation of the licenses themselves – something that was closed and that Verizon controlled when it purchased all of Straight Path's assets, including its derivative claims. The value to Verizon of avoiding litigation of these claims is demonstrated by the fact that the Merger Agreement specifically recognizes that the Company had already resolved any threatened indemnification claims and requires the Company not to have any material post-closing indemnification obligations. A474, A496.

Challenging the merger itself is the only direct claim Plaintiffs could have pursued under *Parnes* because the merger is the transaction through which stockholders will give up their Straight Path shares (from which their standing to bring derivative claims derives). By strategically permitting the Verizon merger to close without directly challenging it, Plaintiffs have reaped merger-related benefits; having now secured those benefits, they seek to challenge a pre-merger transaction, to be litigated in isolation from the actual merger. Endorsing Plaintiffs' approach has broad inequitable implications because, in this and future

cases, it could result in the judicial imposition of specific, "unusual and drastic" transaction structures of which stockholders do not approve and to which they otherwise could and would object. *See* A692-94; A816-23.

Plaintiffs' lack of standing to bring post-merger derivative claims does not leave any genuine wrong without a corresponding remedy. In theory, Plaintiffs could have sought to challenge Straight Path's "failure to obtain value for an underlying derivative claim" being sold to an acquiror – i.e., the derivative claim they now seek to assert directly, which was sold to Verizon. *In re Primedia, Inc. S'holders Litig.*, 67 A.3d 455, 477 (Del. Ch. 2013). The "theory underlying *Primedia* is that stockholders are entitled to have their board negotiate for them consideration for assets that may be enjoyed by an acquirer." *Houseman v. Sagerman*, 2014 WL 1600724, at *12 (Del. Ch. Apr. 16, 2014); *see also Primedia*, 67 A.3d at 477 (permitting claims that "attack a merger directly if the target board agreed to a materially inadequate, and therefore unfair, price because the price did not reflect the value of certain assets – in this case, the Derivative Claims") (quoting *In re Massey Energy Co.*, 2011 WL 2176479, at *17 (Del. Ch. May 31, 2011)).

Plaintiffs elected not to assert such a claim. Instead, they are attempting to assert a derivative claim for their own benefit as if it was not sold to Verizon. But

it is undisputed that Straight Path's derivative claims were expressly included in the Merger Agreement (A699, A465, A484, A812-13).

> In many cases, it might be difficult to allege that the value [stockholders] are receiving in the merger is unfair simply as a result of the failure to consider value associated with their derivative suit. But that reality may also suggest that, even according full value to the potential recovery in the derivative suit (rarely a guarantee), the plaintiffs still received fair value in the merger.

El Paso Pipeline, 152 A.3d at 1251-52.

Plaintiffs' claims are nothing more than an attempt to plead around the critical barrier this Court correctly identified in *El Paso Pipeline*, and their claims are therefore properly dismissed as derivative claims that they no longer have standing to assert.

* * *

In sum, Plaintiffs could assert a direct claim only if they did not want to sell their shares at the price Verizon was paying and thus asserted a challenge to the fact that they were compelled to do so in the merger. The allegations here are the opposite: Plaintiffs very much wanted to – and did – sell their shares for the price Verizon offered. A987 ("the merger has yet to close, and the Plaintiffs do not seek an injunction; to the contrary, they are in favor of the merger itself"). The Plaintiffs thus did not challenge the merger under *Parnes*, and when the merger

closed, they lost standing to pursue their claims concerning the Company's 2017 sale of its IP and Indemnification Assets. The Complaint should therefore be dismissed.

CONCLUSION

For the foregoing reasons, Appellants respectfully submit that the Court should reverse the order of the Chancery Court, grant the IDT Defendants' motion to dismiss Plaintiffs' remaining claims with prejudice, and render judgment in favor of the IDT Defendants.

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