IN THE SUPREME COURT OF THE STATE OF DELAWARE

IDT CORPORATION, HOWARD JONAS, and THE PATRICK HENRY TRUST,	)	No. 388, 2018
Defendants Below, Appellants,	)	
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' REPLY BRIEF

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INTRODUCTION

Plaintiffs cannot contort their quintessentially derivative claim into a direct claim. Under Delaware law, the claim they seek to assert belongs to Straight Path, not them. Plaintiffs lack standing to assert that derivative claim.

Plaintiffs themselves illustrate their claim's derivative nature, asserting that *Straight Path's* "Special Committee was forced to execute the Term Sheet with IDT" and thereby "sell *the Company's* IP Assets for $6 million" and settle *the Company's* Indemnification Asset "for $10 million and a portion of potential proceeds from speculative future use of the IP Assets." AB16.[1] Plaintiffs contend that the consideration *Straight Path* received in the Term Sheet transaction "was demonstrably unfair." *Id.* Plaintiffs acknowledge that their "entire claim is premised" on alleged "non-ratable side-benefits" Jonas received (AB15 n.6) when *Straight Path* monetized certain of its assets for allegedly unfair consideration in the Term Sheet transaction. Indeed, Plaintiffs do not dispute the Chancery Court's conclusion that if the subsequent Verizon merger had failed, "all that [would] remain is the cause of action *belonging to the Company* arising from the Term Sheet transaction." A996-97.

[1] "AB" refers to Appellees' Answering Brief. Other capitalized terms have the meanings stated in the OB or AB. All emphasis added unless otherwise noted.

Plaintiffs' only possible direct claim after the merger closed would be to challenge the *merger consideration*. Yet Plaintiffs admit they "do not allege Verizon paid an unfair amount" to acquire Straight Path. AB29. Recognizing this fatal problem, Plaintiffs insist that Straight Path's pre-merger liquidation of its assets for too low a price deprived Plaintiffs of what they self-servingly mislabel "merger consideration." In reality, they complain of Straight Path being deprived of *Term Sheet* consideration. The Term Sheet transaction they challenge was a pre-merger deal between Straight Path and IDT that was effective even if no merger took place. Indeed, the 2017 pre-merger sale of those Straight Path assets closed before the FCC even approved the 2018 Verizon merger and was not contingent on the merger. If "demonstrably unfair," the Term Sheet transaction reduced the Company's balance sheet – a classically derivative claim.

Plaintiffs' alternative argument, that *In re Primedia, Inc. Shareholders Litigation*, 67 A.3d 455 (Del. Ch. 2013), grants them standing to pursue a derivative claim belonging to Straight Path, is also meritless. Plaintiffs do not seek to challenge "a board's alleged failure to obtain value for an underlying derivative claim" that was sold to an acquiror. *Id.* at 477. On the contrary, Plaintiffs "do not allege Verizon paid an unfair amount" to acquire Straight Path (AB29), and Verizon's acquisition indisputably included Straight Path's legal claims. Instead of pursuing a *Primedia*-based claim, Plaintiffs seek to prosecute the underlying derivative claim themselves. No Delaware case authorizes that. Even if Plaintiffs alleged a *Primedia*-based claim (they have not), that claim would fail, including because Plaintiffs fail the requirements under *Primedia* that the derivative claim was material to the merger and that Verizon did not provide value for it.

A plaintiff's right to challenge a merger based on "a board's alleged failure to obtain value for an underlying derivative claim" – something Plaintiffs decided *not* to do here – underscores that Plaintiffs are wrong to suggest that Delaware law has some "massive loophole." AB6. Cashed-out stockholders harmed directly because an acquiror paid them insufficient merger consideration for their shares can challenge the amount they received from that acquiror – including if the acquiror failed to provide sufficient consideration for a company's legal claim sold in the merger. As this Court has recognized, however, in "many cases" – like this one – it is difficult for cashed-out stockholders "to allege that the value they are receiving in the merger is unfair simply as a result of the failure to consider value associated with their derivative suit." *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1251-52 (Del. 2016). That is not a loophole. Rather, it reflects the commonplace "reality" that "plaintiffs still received fair value in the merger." *Id.* at 1252. Plaintiffs have not alleged a viable *Primedia*-based claim for the same reason they do not allege a viable direct claim: they "do not" and cannot "allege Verizon paid an unfair amount." AB29.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE DERIVATIVE

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

A claim is derivative where the corporation "suffered the alleged harm" and thus "would receive the benefit of the recovery or other remedy." *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004). "Where all of a corporation's stockholders are harmed and would recover *pro rata* in proportion with their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative in nature." *Feldman v. Cutaia*, 951 A.2d 727, 733 (Del. 2008).

Plaintiffs allege that Straight Path's Board disposed of "valuable *corporate* claims" and sold "other assets" *belonging to the company* for "below fair value." AB24. These allegations describe circumstances where all Straight Path stockholders are harmed and "would recover *pro rata* in proportion with their ownership of [Straight Path's] stock solely because they are stockholders." *Feldman*, 951 A.2d at 733. Plaintiffs argue that Straight Path's Special Committee had intended "to preserve the value of the Indemnification Claim and IP Assets for the direct benefit of stockholders" (AB26), but this contention does not change the analysis: Straight Path's sale of those corporate assets for "below fair value" (AB24) would have lowered the Company's pre-merger balance sheet and caused harm that stockholders would recover *pro rata* in proportion with their ownership of Straight Path's stock solely because they are stockholders. It is a derivative claim. *Tooley*, 845 A.2d at 1035.

"The mere fact that the alleged harm is ultimately suffered by, or the recovery would ultimately inure to the benefit of, the stockholders does not make a claim direct under *Tooley*." *Feldman*, 951 A.2d at 733. Where stockholders alleged that compensation to senior management "diverted money" that "would otherwise have been paid to" stockholders as part of a liquidation plan, for example, the claim was derivative because (as here) it alleged a "balance sheet injury" to the company, indirectly "working a harm to the [company's] stockholders on a *pro rata* basis." *Akins v. Cobb*, 2001 WL 1360038, at *1, *6 (Del. Ch. Nov. 1, 2001) (Strine, V.C.). A derivative claim "does not change" into a direct claim by the "mere fact that the corporation is undertaking an end-game strategy." *Id.* at *6.

Plaintiffs ignore that "to prove that a claim is direct," they must demonstrate that they "can prevail without showing an injury to the corporation." OB25 (quoting *El Paso*, 152 A.3d at 1260); *see also Tooley*, 845 A.2d at 1038 ("[T]he stockholder must allege something other than an injury resulting from a wrong to the corporation."). Plaintiffs cannot prevail without showing an injury to Straight

Path: if Straight Path received fair value for its Indemnification Asset and IP Assets it monetized in 2017, then Plaintiffs' claim evaporates.

B. Plaintiffs' Claims Are Derivative Under *Kramer* Because They Allege Corporate Waste in the Lead-Up to a Merger

Plaintiffs try to avoid the foregoing precedent by labeling their claims a direct challenge to the Verizon–Straight Path merger, but their self-serving mischaracterization cannot change the substantive reality.

Stockholders may bring a direct claim challenging the fairness of a merger that cashes them out. *Parnes v. Bally Entm't Corp.*, 722 A.2d 1243, 1245 (Del. 1999). Thus, where "interested acquirors" "might have paid a higher price" for the company but for the defendant's alleged misconduct, the plaintiff states a direct claim. *Id.* at 1246. The reason for this rule is sound: when an acquiror underpays, the company is not harmed; rather, the stockholders are harmed by selling their stock for an unfair price. *Cf. In re Gaylord Container Corp. S'holders Litig.*, 747 A.2d 71, 80 (Del. Ch. 1999) (Strine, V.C.) (claim may be direct for actions "impeding the stockholders from divesting themselves of their personal property," in contrast to actions "impairing the value of the enterprise itself to the indirect detriment of all stockholders").

Plaintiffs, however, "do not allege Verizon paid an unfair amount" to acquire Straight Path. AB29. They cite allegations that purportedly challenge "the fairness of the 'sale process' and 'merger consideration'" (AB3-4), but those passages merely show Plaintiffs applying a self-serving label to their challenge to the *Term Sheet consideration*, mislabeling it "merger consideration." Straight Path entered the Term Sheet transaction with IDT one year before the merger in which stockholders sold their stock to Verizon. The challenged Term Sheet transaction did *not* cash Plaintiffs out. It did not divest them of any personal property. It was a sale of "corporate assets" for an allegedly "unfair price," which "states perhaps the quintessential derivative claim." A995.

Plaintiffs twist *Parnes* to avoid this fatal defect, arguing that the question is not whether an acquiror might have paid a higher price, but whether "stockholders 'might have' received more in connection with a sale." AB27. This Court squarely rejected that approach. The plaintiff in *Kramer* argued, like Plaintiffs here, that corporate waste in the lead-up to the merger "directly and adversely affected the merger consideration" and that stockholders were "'wrongfully deprived' of a 'portion of the Merger Sale proceeds'" because the wasted corporate assets "'could only come out of the Sale Proceeds.'" *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 352 (Del. 1988). The Court rejected the plaintiffs' argument and deemed the claim "entirely derivative" because it caused a "devaluation of stock" shared "collectively by all the shareholders." *Id.* at 353. In *Parnes,* this Court reaffirmed *Kramer*: a derivative claim "asserted in the context of a merger does not change its fundamental nature." *Parnes*, 722 A.2d at 1245.

Plaintiffs ask the Court to conclude that because both *Parnes* and this case involve a fiduciary who allegedly "acted disloyally by conditioning his support for an otherwise attractive sale of the company on the receipt of improper personal benefits," both must involve direct claims. AB28. That is wrong. The manner in which a fiduciary allegedly breached his duty does not determine whether the claim is direct or derivative – the relevant issue is who suffered the harm. *Tooley*, 845 A.2d at 1033. The "key difference" between *Parnes* and this case, as Plaintiffs acknowledge, is that in *Parnes* the defendant CEO "demanded the bribe from the acquiror" – meaning that the company was never harmed – whereas here, the controlling stockholder (not an officer or director) allegedly benefited from the company's sale of corporate assets sold by the corporation for less than fair value before the merger. AB27-28. The plaintiff in *Parnes* thus could "prevail without showing an injury to the corporation." *Tooley*, 845 A.2d at 1039. Plaintiffs here cannot.

Plaintiffs cannot distinguish *Kramer*. They argue that the challenged transaction there was not linked to the merger at issue. AB31-32. That is incorrect. The plaintiff in *Kramer* challenged, among other transactions, "golden parachute" agreements to "protect management in the event of a change of control" and "ensure that management would be in a position to respond to acquisition proposals" after "the investment community" had learned the company "was 'for sale'" and the company had engaged an investment banking firm "to search for a suitable buyer." *Kramer*, 546 A.2d at 350. The challenged transactions in *Kramer* thus were related to the company's prospective merger, and the Court considered and rejected the notion that the "clearly derivative" claims become direct "in the context of a cash-out merger." *Id.* at 354. This Court has since repeatedly recognized that the claims in *Kramer* were linked to the merger and that such a link does not make the claims direct. *See Feldman*, 951 A.2d at 733-34 (*Kramer* involved claims that fiduciaries "had improperly diverted a portion of the merger proceeds to themselves"); *Tooley*, 845 A.2d at 1038; *Parnes*, 722 A.2d at 1245.

Unable to distinguish *Kramer*, Plaintiffs' counsel argued to the Chancery Court that *Kramer* was "one of the silliest cases I've ever read," and that "it did mess up the law on direct/derivative" but "Tooley cleaned it up." A954. Contrary to Plaintiffs' version of events, *Tooley* reaffirmed *Kramer*, explaining that a "challenge to corporate transactions that occurred six months immediately preceding a buy-out merger," allegedly reducing stockholders' "share of the proceeds from the buy-out sale" was derivative, and the decision in *Kramer* "was the correct outcome." 845 A.2d at 1038.

This Court reaffirmed *Kramer* again in *Feldman*, holding that a cashed-out stockholder could not maintain a post-merger challenge to stock options allegedly "wrongly issued to management," even though he allegedly received "less for his shares in the Merger than he would have been if the options had not existed." 951 A.2d at 728-29. That claim was not direct because the "alleged diminution" of the plaintiff's "share of the Merger proceeds" was "the same damages that flow from the alleged harm under the predicate derivative claims." *Id.* at 729. The same is true here. If the merger had failed, "all that [would] remain is the cause of action belonging to the Company arising from the Term Sheet transaction." A996-97. The recovery Plaintiffs seek is for "the same damages that flow from the alleged harm" under that "predicate derivative" claim. *Feldman*, 951 A.2d at 729.

Plaintiffs rely on their contention that Straight Path's Special Committee had "decided to place the Indemnification Claim in a litigation trust" (AB2), and planned that "if the Company was eventually sold, Straight Path stockholders would receive two forms of consideration": a "proportional share of any recovery on the Indemnification Claim secured by the litigation trust," and "whatever the buyer paid to all stockholders." AB13. Plaintiffs' reliance on a contemplated litigation trust as purportedly "intended merger consideration" (AB18) suffers from several fatal defects.

First, the posited trust would not be "merger consideration." "Consideration" is something "bargained for and received by a promisor from a promisee." OB33 (quoting *Black's*). Plaintiffs fail to rebut this definition, or to provide a basis for regarding *the Company's* IP or Indemnification Assets as

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"merger consideration." Plaintiffs argue that consideration may take a form other than "the cash or stock paid or not paid by the ultimate acquiror" (AB30), but that argument merely identifies that a promisor may provide a promisee with consideration in different forms: their sole cited case on the issue concerns a "special cash dividend" that was "fundamentally cash consideration paid to [the acquired company's] shareholders *on behalf of" the acquiror*. *La. Mun. Police Emps.' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1191 (Del. Ch. 2007). *Crawford* follows the established definition of "consideration" and does not remotely support Plaintiffs' claim that the posited trust to retain an Indemnification Asset the Company always owned is "merger consideration." Acts that reduce the amount of merger consideration the acquiror pays can give rise to a *Parnes*-style direct claim because the corporation never feels that harm; only stockholders feel it when they are cashed out. By contrast, Straight Path's sale of the Indemnification and IP Assets in the Term Sheet transaction directly affected the Company, and affected stockholders only indirectly, *pro rata* and solely because they were stockholders.

Second, even the diversion of actual "merger consideration" would not transform Plaintiffs' derivative claim into a direct claim. In *Feldman*, this Court acknowledged that the plaintiff attacked the "wrongful diversion of part of the Merger consideration to the holders of the Challenged Stock Options." *Feldman*, 951 A.2d at 735. Even though the claim involved diversion of merger consideration from the plaintiff, who took less of the acquiror's payment in the merger due to the challenged stock options, this Court ruled the claim derivative because "it does not relate to the fairness of the merger itself and does not allege a harm that is distinct from that suffered by the 'corporation as a whole'" – where the stockholders' alleged harm is not "distinct" from the harm to the company, the claim is derivative. *Id.*; *see also Akins*, 2001 WL 1360038, at *6 (challenge to transaction that "decreased the consideration received by the target stockholders in a cash-out merger is not individual in nature unless the plaintiff alleges that the merger itself was unfair").

Third, the contemplated litigation trust never existed, as Plaintiffs' own allegations confirm. They allege that the Special Committee "was *considering* selling only Straight Path's Spectrum Assets to a third party or, alternatively, assigning the Indemnification Claim to a litigation trust" (A644-45), "took numerous steps towards creating a litigation trust" (A620), and "instructed its lawyers to *begin planning* for the establishment of a litigation trust" (A645). But Plaintiffs do not and cannot allege that such a trust was formed, that the Company ever transferred the Indemnification Asset, or that Plaintiffs ever possessed any interest in such a trust. Plaintiffs acknowledge that a litigation trust was merely a possibility, alleging the Term Sheet transaction foreclosed their "ability to realize value for the Indemnification Claim post-closing, through a litigation trust *or* *otherwise*." A655. Plaintiffs do not dispute that Straight Path had no "obligation to pledge the Indemnification Asset to a litigation trust." OB37-38 (citing cases). Like the plaintiffs in *Tooley*, Plaintiffs have "no claim at all" to a hypothesized litigation trust that "is nonexistent." *Tooley*, 845 A.2d at 1033, 1039 (plaintiffs' claim for "lost time-value" of money based on "delay in closing" of merger caused by fiduciary breaches failed to allege "that the plaintiffs have any rights that have been injured": "plaintiffs' right to any payment of the merger consideration had not ripened at the time" the fiduciaries caused the delay).

Fourth, the posited litigation trust has no bearing on the Company's sale of its IP Assets. While Plaintiffs contend that the "three-part breakup of the corporation" would have included "selling the IP Assets to the highest bidder" (AB25), they do not suggest that the pre-merger stockholders would have received such sale proceeds. Defendants stated that no case supports treating this derivative claim for alleged waste of the IP Assets as direct "merely by virtue of its being part of the same agreement as another transaction" as the Chancery Court did. OB30-31. Plaintiffs offer no response.

C. The Chancery Court's Approach Would Disrupt Delaware Law's Predictability and Fairness

It is "necessary" that the "standard to distinguish" direct and derivative actions "be clear, simple and consistently articulated and applied by our courts." *Tooley*, 845 A.2d at 1036. Plaintiffs' position would undermine this imperative.

Plaintiffs' theory that their claims are direct relies on the notion that a sale of the Company would have given stockholders both a "share of any recovery on the Indemnification Claim secured by the litigation trust" and "whatever the buyer paid to all stockholders." AB13. Plaintiffs admit that such a structure is "unusual and drastic." A575, A645. They admit it is "uncontroversial" that "a controller is under no obligation to sell his shares or vote in favor of a particular transaction." A764-65. And they "do not dispute that Howard Jonas had a right to say 'no'" to a proposed transaction structure he disfavored. AB34. They argue that Jonas was precluded from saying "no, ***unless*** you pay me disparate consideration" (AB35, original emphasis) – but that is not the test of whether a claim is direct or derivative. And Plaintiffs do not allege that Jonas said "no, *unless*" to their preferred transaction structure. Instead, they allege that Jonas's position was an *unqualified* "no" to that structure. *See* A649 (alleging Jonas "would not support *any* sale of Straight Path" involving litigation trust). That structure thus had "a zero probability of occurring due to the lawful exercise of statutory rights" and cannot be a basis for damages. *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 444 (Del. 1996). Further, Plaintiffs do not dispute that Jonas expressed *support* for other structures, including "selling Straight Path's wireless spectrum assets (instead of selling the entire company)." OB10-11, 13.[2]

[2] Plaintiffs counter – without record support – that an asset sale was

Plaintiffs attempt to impose through litigation their hypothesized preferred transaction structure despite Jonas's unequivocal opposition to it, while also reaping huge benefits from the Verizon merger – and admitting Verizon paid a fair amount (AB29). This runs against Delaware law, including the "need to prevent windfalls to plaintiffs who have accepted the benefits of a corporate transaction extinguishing their ownership of stock." *Gaylord*, 747 A.2d at 82. Cashed-out stockholders should, at a minimum, "be required to prove that the transaction eventually consummated, *taken in its entirety and not as to component parts or as to the steps . . . leading to it*, was unfair." *Id.*

In addition, permitting Plaintiffs to challenge the fairness of the Term Sheet transaction would permit them to assert a claim that Verizon acquired in the merger. *Lewis v. Anderson*, 477 A.2d 1040, 1044 (Del. 1984). Plaintiffs do not dispute the Chancery Court's statement that if the Verizon merger had failed, "all that [would] remain is the cause of action belonging to the Company arising from the Term Sheet transaction." A996-97. Nor do they dispute that Straight Path sold all of its legal claims (including this derivative claim) to Verizon. OB18, 41-42.[3]

"economically irrational" because the proceeds "would be taxed twice." AB12 n.5. Their tax preferences would not permit them to override Jonas's "no" vote.

[3] To argue "Defendants' view of the world will create a massive loophole," Plaintiffs analogize to a hypothetical scenario in which a company declares a "special dividend" to a controller before signing a merger agreement, but the dividend somehow "did not affect the amount the buyer was willing to pay."

Instead, Plaintiffs make the irrelevant point that "Verizon neither bid on nor succeeded to the Indemnification Claim." AB37. The Indemnification Claim is not the relevant claim. The relevant claim is Straight Path's claim for alleged waste of its corporate assets in the Term Sheet transaction, which Verizon acquired.

AB37. Plaintiffs do not explain why a buyer would pay the same amount regardless of a spontaneous outflow of company cash. In any event, unlike the dividend Plaintiffs hypothesize, which would not go to an acquiror in the merger, Verizon acquired the derivative claim.

II. PLAINTIFFS DID NOT, AND COULD NOT, BRING A ***PRIMEDIA*** CLAIM

Plaintiffs argue that if their claims are derivative, this Court could affirm on alternative grounds. Plaintiffs contend that Count IV of their Complaint preserves their argument that *Primedia* permits Plaintiffs to pursue the derivative claim for their own benefit even post-merger. AB40 (citing A663-65). At the threshold, this argument fails because the Chancery Court *dismissed* Count IV. Ex. A at 54. Plaintiffs' *Primedia* argument thus does not provide alternative grounds for this Court to affirm the Chancery Court; the argument seeks to *reverse* the dismissal of Count IV. Plaintiffs did not appeal the dismissal of Count IV, and their argument is not properly before this Court. In any event, *Primedia* does not save Plaintiffs' flawed claims, for many reasons.

A. Plaintiffs Have Not Alleged a *Primedia* Claim

Plaintiffs do not state any claim under *Primedia* because they do not seek to challenge "a board's alleged failure to obtain value for an underlying derivative claim" being sold to an acquiror. *Primedia*, 67 A.3d at 477; *see also* OB41, A809-10. This Court has not considered the issue, but the Chancery Court in *Primedia* reasoned that under certain circumstances, cashed-out stockholders may challenge a company's failure to obtain fair value for a derivative claim sold in a merger. *Primedia*, 67 A.3d at 477; *Houseman v. Sagerman*, 2014 WL 1600724, at

*11 (Del. Ch. Apr. 16, 2014); *cf. In re Massey Energy Co. Deriv. & Class Action Litig.*, 2011 WL 2176479, at *17 (Del. Ch. May 31, 2011) (Strine, V.C.).

The potential availability of a *Primedia*-style claim refutes Plaintiffs' notion that Delaware law creates some "massive loophole" (AB6, 37) by which a harm has no remedy. If Plaintiffs actually had been shortchanged in the Verizon merger because the Straight Path Board failed to negotiate fair value from Verizon for the Company's legal claim of unfair Term Sheet consideration, Plaintiffs could have, in theory, alleged such a claim. But they have not done so. They "do not allege that Verizon paid an unfair amount" in the merger (AB29), nor do they allege that Defendants negotiated the Verizon price or failed to negotiate value from Verizon for a derivative claim. Instead, Plaintiffs seek to "maintain standing" to pursue the derivative claim for their own benefit. That is not what *Primedia* allows.

B. Plaintiffs' Claims Would Fail Under the *Primedia* Elements

1. Plaintiffs Cannot Establish That the Value of the Derivative Claim Was Material to the Verizon Merger

Plaintiffs' argument that the claim is "plainly material in relation to the merger" (AB42) is meritless. Plaintiffs absurdly assign a 100% likelihood of success and full recovery on the Indemnification Asset (AB29) despite substantial obstacles showing that Straight Path was not underpaid for the Indemnification Asset. *Primedia* rejects Plaintiffs' approach of using a derivative claim's "face value," and instead requires analysis of the actual "prospects for recovery" on the claim, including the proof required, available defenses, possible "negative ramifications" for the company "as an entity," and "potential collection problems." *Primedia*, 67 A.3d at 483; *see also Massey*, 2011 WL 2176479, at *22 (finding "very large gap" between alleged losses and likely recovery).

If Plaintiffs had pleaded a *Primedia* claim, the flaws in the Indemnification Asset would compel dismissal since they are central to the requirement that the derivative claim be material to the merger. *Primedia*, 67 A.3d at 482-83; *see also Massey*, 2011 WL 2176479, at *28 (likely settlement outcome of $95 million or less "not material in the context of an $8.5 billion Merger"). OB15-16. Instead, Plaintiffs ignore the Indemnification Asset's risks and limitations, pretending the asset was actually worth *multiples* of the indemnitor's entire market cap – while alleging that no buyer did or would pay anything for the asset.

Plaintiffs have no cogent response to the serious obstacles Defendants have identified, including that (i) the FCC civil penalty related to *Straight Path's* conduct, (ii) Straight Path failed to satisfy two conditions precedent for seeking indemnification from IDT, (iii) Straight Path is not allowed to seek such indemnification for its civil penalty, (iv) Straight Path had no indemnifiable "liability," (v) IDT had limited ability to pay (A621), and (vi) Straight Path faced counterclaim risk endangering its main asset – the licenses it sold to Verizon. *See* OB15-16.

Yet Plaintiffs invoke these risks when they think it serves them. Plaintiffs say the Indemnification Asset would have forced IDT into bankruptcy (AB2) even as they ignore that the indemnitor's limited ability to pay severely limits the value of the asset even if the claim succeeded. Plaintiffs also contend Straight Path was pressured to execute a whole-company sale because if it kept the licenses, "the FCC reserved the right to take further action including terminating those licenses." AB11-12 n.5. But Plaintiffs misleadingly omit that the Consent Decree permits further FCC action *regardless* of whether Straight Path keeps or sells the licenses, and only if "new evidence relating to this matter" emerged. A302, A306. Thus, risk of "further action" from the FCC would be acute if Straight Path litigated against IDT claims concerning the conduct giving rise to the FCC's civil penalty against Straight Path and thus risked introducing "new evidence" relating to the Consent Decree. Straight Path's independent Special Committee recognized such counterclaim risk. A693, A695-99. Bidders increased their bids nearly 300% after the risk of reopened FCC investigation through indemnification litigation was resolved (A651-54), and the Merger Agreement mitigates such risk by recognizing that the Company had already resolved such indemnification claims. A474, A496.

As this litigation risk demonstrates, the "concept of maximizing the value of a derivative action does not necessarily mean litigating every possible claim," or even "insisting on settlement value for it." *Primedia*, 67 A.3d at 467. Claims can "have a negative risk-adjusted present value for the corporation, taking into account the potential benefits and detriments of pursuing those claims." *Id.*; *see also Massey*, 2011 WL 2176479, at *23 ("it is hardly clear that it is in its interest" of company to pursue claim that "could expose the entity, and thereby indirectly its stockholders, to severe financial harm").

Even if litigation over Straight Path's license-related conduct did not prompt the FCC to revisit the Consent Decree, it would show that the FCC's civil penalty was for *Straight Path's* conduct, not IDT's. Plaintiffs do not dispute the FCC's requirement that warehoused licenses "not being used to provide service for twelve months or more can be forfeited." OB7. Straight Path held the licenses for over two years before investor accusations emerged and the FCC began investigating Straight Path's license warehousing. By Plaintiffs' own account, the FCC was concerned with Straight Path "squatting" on licenses. A570; A639; A749; *see also* A318 (FCC Press Release). Market participants openly discussed that it arguably was "Straight Path's own fault that it did not maintain the level of performance acceptable to the FCC in 2013, 2014, 2015, and 2016." A298.

Further, Plaintiffs admit that the "purpose of the Spin-Off indemnity was to give Straight Path a clean slate as it became a publicly-traded company." AB10; *accord* A633. They do not dispute that shortly after spin-off, Straight Path's "clean slate" value in 2013 was approximately $73 million. OB6. Yet they contend that Straight Path's "clean slate" entitles it not only to reap billions in profits from the licenses it received from IDT, but also to obtain hundreds of millions in additional *profit* from IDT in the guise of a supposed "liability" that is in fact a direct function, and small percentage, of its enormous profit. Plaintiffs' interpretation defeats their own account of the "entire purpose" of the Spin-Off indemnification, since it puts Straight Path in a far superior position than a "clean slate." Plaintiffs' position is even more unsupportable given Straight Path's failure to seek IDT's consent to the Consent Decree, as contractually required for any IDT indemnification. Obviously, IDT would not have consented to Straight Path structuring its penalty as a function of the amount Straight Path receives in a sale, permitting Straight Path and the FCC to place an unquantified, unbounded downside risk on IDT if Straight Path was reserving the right to seek indemnification from IDT, while Straight Path would reap all of the corresponding upside from a sale.

2. Plaintiffs Cannot Establish That Verizon Did Not Provide Value for the Derivative Claim

Plaintiffs' argument that "Verizon plainly did not provide value for" the derivative claim (AB42) is meritless. Plaintiffs irrelevantly observe that Verizon and other bidders "were told they could not buy the IP Assets and Indemnification Claim." *Id.* Those are *not* the relevant assets. The relevant asset is the claim belonging to Straight Path arising from the Term Sheet transaction. *Cf. Massey*, 2011 WL 2176479, at *3 (plaintiff's argument "conflates the value of two different things": the events giving rise to the derivative claims, and the derivative claims themselves). Plaintiffs do not dispute that all of Straight Path's legal claims were included in the merger. OB18, 41-42.

Plaintiffs wrongly argue that Verizon "is blocked from pursuing" the derivative claim under *Bangor Punta Operations, Inc. v. Bangor & Aroostook Railroad Co.*, 417 U.S. 703 (1974). AB42-43. *Bangor Punta* holds only that where an acquiring stockholder purchases its interest from an original stockholder *who could not have asserted a derivative claim*, the acquiring stockholder is likewise barred from bringing a derivative claim. 417 U.S. at 710. *Bangor Punta* applies only where a purchaser acquires its shares from the selling shareholders and then turns around and sues "all of the selling . . . shareholders for mismanagement committed *by them* prior to the merger." *Lewis*, 477 A.2d at 1050 n.20; *see also Golaine v. Edwards*, 1999 WL 1271882, at *4 n.16 (Del. Ch. Dec. 21, 1999) (Strine, V.C.) (noting "limits of the *Bangor Punta* doctrine in the merger context" and that it applies "much less commonly" than contractual bars to bringing pre-merger corporate claims). If that were the case here, Plaintiffs also would be unable to bring the derivative claims, since it would mean that they had "participated or acquiesced in the allegedly wrongful transactions." *Bangor Punta,* 417 U.S. at 710.

Unlike *Primedia*, where the plaintiffs alleged "business ties" and "personal relationships" between the principals of the seller and the buyer, "a fellow private equity firm," *Primedia*, 67 A.3d at 487, Plaintiffs have not asserted any special relationship between Defendants and Verizon that would prevent Verizon from making an impartial business judgment about whether to assert the Company's claim for unfair Term Sheet consideration.

In sum, Plaintiffs do not and cannot "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," because "plaintiffs still received fair value in the merger." *El Paso*, 152 A.3d at 1251-52.

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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