IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALAN R. BELL, MICHAEL T. BOWERS, and OM PARKASH KALRA, Plaintiffs Below/Appellants and Cross-Appellees, v. AT&T MOBILITY WIRELESS OPERATIONS HOLDINGS LLC; NEW CINGULAR WIRELESS PCS, LLC; and AT&T MOBILITY LLC, Defendants Below/Appellees and Cross-Appellants.	No. 343, 2022 On appeal from: Court of Chancery of the State of Delaware Consol. C.A. No. 6886-VCL

APPELLEES' CORRECTED ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANTS' OPENING BRIEF ON CROSS-APPEAL

AKIN GUMP STRAUSS HAUER & FELD LLP

Z.W. Julius Chen
Kristen E. Loveland
Pratik A. Shah
2001 K Street, NW
Washington, DC 20006
(202) 887-4000

Maurice L. Brimmage
Laura P. Warrick
2300 North Field Street, Suite 800
Dallas, TX 75201
(214) 969-2800

FAEGRE DRINKER BIDDLE & REATH LLP

Todd C. Schiltz (DE Bar ID No. 3253)
222 Delaware Avenue, Suite 1410
Wilmington, DE 19801
(302) 467-4200

William M. Connolly
One Logan Square, Suite 2000
Philadelphia, PA
(215) 988-2700

Zoë K. Wilhelm
1800 Century Park East, Suite 1500
Los Angeles, CA 90067
(310) 203-4000

Attorneys for Defendants Below/Appellees and Cross-Appellants AT&T Mobility LLC, New Cingular Wireless PCS, LLC, and AT&T Mobility Wireless Operations Holdings LLC

Dated: December 9, 2022

TABLE OF CONTENTS

TABLE OF CITATIONS

<u>CASES</u>:

STATUTES:

OTHER AUTHORITIES:

NATURE OF PROCEEDINGS

This appeal arises from a decade of coordinated litigation involving thirteen wireless telephone partnerships formed in the 1980s to build and operate wireless networks in discrete geographic markets that were eventually integrated into Appellees/Cross-Appellants' ("AT&T") nationwide wireless business. From the outset, AT&T (or its predecessors or affiliates) managed the partnerships' day-to-day operations, devoting considerable resources to allocating revenues and expenses fairly across those and dozens of other market-level entities across the country.

In 2010, AT&T approved asset sale transactions resulting in partnership dissolution and cashing out the minority partners. Two groups of minority partners—the "Prickett Plaintiffs," who recently settled, and the "APR Plaintiffs," who are appealing—objected and brought several suits in the Court of Chancery ("trial court"). In Plaintiffs' view, AT&T breached its fiduciary duty of loyalty by paying less than fair value, and the trial court agreed in a 134-page opinion awarding Plaintiffs $9 million in damages for the Salem, Oregon partnership ("Partnership") alone. AT&T does not contest that under the trial court's ruling the APR Plaintiffs are entitled to $33 million for parallel breach of fiduciary duty claims across all of their actions, while the APR Plaintiffs assert that the final judgments should total $62 million—excluding interest, which would roughly double any damages award.

But even those numbers still are not enough for the APR Plaintiffs, who on appeal continue to press their swing-for-the-fences damages gambit: triggering the partnership agreements' dissociation provisions, which under their theory would result in a damages award of $475 million for just the Partnership, and potentially $2.65 *billion* in the aggregate for all partnerships still at issue (again, not counting doubling interest). After years of searching for a viable theory to support that staggering remedy, Plaintiffs landed on a claim that AT&T breached the *partnership agreement* by using allocation methodologies other than those outlined in a discrete *management agreement*. But the trial court, in a separate 174-page opinion, correctly rejected Plaintiffs' bootstrapping. As the record made clear, Plaintiffs were in substance suing over the manager's breach of the management agreement. That was the proper subject of a *derivative* claim on behalf of the Partnership, which Plaintiffs purposefully avoided because the remedy for a derivative claim lacks the billion-dollar dissociation payout.

In focusing their appeal on (waived) arguments concerning delegations of authority that predate the management agreement, Plaintiffs do not seriously challenge the trial court's key derivative-claim ruling. At most, Plaintiffs complain that a derivative claim would provide incomplete relief. But Plaintiffs' preference for increasing their damages award by several orders of magnitude is not a reason to revive their bid for the dissociation remedy, which, in any event, would be unconscionable under the trial court's reasoning.

As for the remaining appeal issues, this Court should decline Plaintiffs' request to enlarge the existing breach of fiduciary duty damages award by tens of millions across the partnerships on account of the management agreement—relief that Plaintiffs never sought below. Nor should this Court second-guess the trial court's denial of attorney's fees on the ground that Plaintiffs offered no evidence that AT&T litigated in bad faith. If this Court were to reopen the fiduciary duty damages award, however, it should take up AT&T's contingent cross-appeal on the tax rate to be applied in a discounted cash flow ("DCF") analysis when the entity being valued is a pass-through entity. The trial court acknowledged that its decision to apply a 0% tax rate to projected cash flows risked overvaluing the Partnership. Increasing the value of the partnership by over $200 million dollars (as Plaintiffs seek on appeal) would upset the trial court's careful balancing of DCF inputs, and render the tax-rate decision, and the damages award as a whole, unreasonable.

Accordingly, this Court—applying appropriately deferential standards of review—should affirm the judgment in full.

SUMMARY OF ARGUMENT

1. Denied. The trial court correctly found that Plaintiffs' claim for breach of the partnership agreement should have been asserted as a derivative claim for breach of the management agreement, to which the Partnership—not any individual partners—is a party. As Plaintiffs' opening brief confirms, proving the alleged breach of the partnership agreement depends entirely on a breach of the management agreement. But a claim for breach of the management agreement belongs to the Partnership, not the individual partners, making Plaintiffs' claim derivative. Plaintiffs never brought such a claim because, as they have confessed, it would not come with a billion-dollar dissociation remedy. Yet their opening brief does not meaningfully grapple with the trial court's dispositive derivative-claim holding. Plaintiffs instead build their appeal around a 1995 delegation of authority—"background" for the delegation under the management agreement—that supposedly violated the partnership agreement. Plaintiffs waived that argument by raising it for the first time in a motion for reargument below, but it is a red herring in any case. The 1995 delegation was no longer operative during the relevant period for Plaintiffs' claims, and it would not otherwise affect the trial court's derivative-claim ruling—even assuming (incorrectly) that the delegation breached the partnership agreement.

2. Denied. Plaintiffs' attempt to enlarge the breach of fiduciary duty damages award likewise fails. The trial court could not have abused its discretion by failing to adjust its DCF valuation to account for breaches of the management agreement when Plaintiffs never sought that enhancement. Regardless, the trial court's approach was reasonable. Adjusting the DCF inputs to account for such breaches would have conflated two different valuation baselines, and because Plaintiffs failed to develop the factual record on management agreement damages, the trial court did not even have the information to make any related adjustments. If this Court reopens the damages award, however, it should review the trial court's decision to apply a 0% tax rate to projected cash flows on the ground that the Partnership was a pass-through entity. Not taxing cash flows blinks the reality that partners still paid personal taxes on distributions. In this case, the 34.1% tax rate proposed by AT&T best reflects the operative reality of the Partnership—in particular, that the vast majority of distributions were ultimately subject to a corporate tax rate.

3. Denied. The trial court did not abuse its discretion in denying Plaintiffs' attorney's fees request. Rather than offer evidence of subjective bad faith, Plaintiffs merely paraphrase unflattering comments made by the trial court—comments which the trial court itself rejected as evidence of bad faith.

STATEMENT OF FACTS

A. Factual background.

1. The Partnership Agreement.

In 1986, one member of a group of investors won the right to build, maintain, and operate a wireless network in Salem, Oregon. B6. In 1988, a predecessor to AT&T (McCaw Communications of Salem, Inc.) acquired a majority interest in the group and, along with other members, formed the Partnership under Delaware law. *Id.* As the party contributing the rights to build, maintain, and operate the network, McCaw received a 50.1% majority interest in the Partnership. A219-221.

The Partnership's constitutive agreement ("Partnership Agreement") stated that "[t]he purpose of the Partnership is to engage in the business of constructing, owning, investing in and operating, directly or indirectly, nonwireline cellular telephones systems." A204. Section 4.3 of the Partnership Agreement—the "Governance Provision"—provided for a three-member "Executive Committee," with two majority-partner representatives and one minority-partner representative. A1342-1343. The Executive Committee had "complete and exclusive power to conduct the business affairs of the Partnership" and "full powers to pursue the Partnership Business." A208.

One of those powers was delegation. As amended in 1997, Section 4.4 of the Partnership Agreement provided:

> The Executive Committee may, to the extent it considers such action reasonable, delegate all or any portion of its responsibilities and authority *** to (a) the Chairman, a System General Manager, or other Partnership employees and (b) pursuant to written agreements, Partners and/or third parties (including Affiliates of Partners).

A224.

Section 4.8 of the Partnership Agreement reinforced the delegation power:

> All Partners recognize that the Partnership may enter into agreements from time to time with Partners and/or Partner Affiliates *for management services* in connection with design, development, construction and operation of the Partnership's nonwireline cellular systems, and with other persons, firms, or corporations which are Affiliates of Partners for goods and services related to the Partnership Business.

A224-225 (emphasis added); *see* A225 (providing that Executive Committee or "delegee" may approve management agreements).

Finally, Section 8.1 of the Partnership Agreement—the "Dissociation Provision"—provided that if a partner "breaches any material covenant *** of this Partnership Agreement" and does not cure that breach within thirty days of notice, a "material default" would occur. A213. The remedy was the forced transfer/dissociation of the defaulting partner's ownership interest to the other partners, as specified in the Partnership Agreement. A213-214.

2. Early Partnership operations.

From inception, everyone understood that the Executive Committee had delegated management authority over the Partnership to the majority partner. *See, e.g.*, B64 (testimony of minority partner). But the Executive Committee nonetheless formalized that unwritten delegation of managerial authority (to McCaw, at the time) in a unanimously approved "1995 Resolution." A233-237. The 1995 Resolution stated that "the Majority General Partner [*i.e.*, McCaw] is hereby delegated the full, complete and exclusive authority to manage and control the business of the Partnership." A237. Before approving the 1995 Resolution, the minority partner's Executive Committee representative asked several questions about the Resolution and related agreements that would address concern over "why there are not written agreements." A233-234.

A few days later, the Partnership entered into the Cellular System Operating Agreement, which specified that McCaw as "Manager" would "continue to operate and develop the System on behalf of" the Partnership. B10. Under that Agreement, McCaw was obligated to "provide strategic direction and guidance" and "overall management of the System" by "devot[ing] such resources and overhead as are necessary to assure the development and operation of the System" across nearly two-dozen enumerated areas. B11. In addition, "Manager shall have the authority to undertake, and may undertake, any and all other actions necessary or advisable to develop and operate the System which are not prohibited by law or regulation." B12.

3. The Management and Network Sharing Agreement.

In 2005, the Partnership entered into the Management and Network Sharing Agreement ("Management Agreement" or "MNSA")—the agreement central to this appeal. Adopted pursuant to the 1997 version of Section 4.4 of the Partnership Agreement, the Management Agreement replaced the Cellular System Operating Agreement and named New Cingular, an AT&T affiliate, as "Manager." A287, 298.

Article I—the "MNSA Services Provision"—broadly stated that "Manager shall provide strategic direction and guidance, management and operation of the Owner's Business and shall provide all services necessary to assure the commercially reasonable development and operation of the Owner's Business." A291. It also provided a non-exclusive list of services and operations. *Id.*

Article II—the "MNSA Authority Provision"—further provided that "Manager shall have the authority to undertake, and may undertake, any and all other commercially reasonable actions necessary or advisable to develop, manage, and operate the Owner's Business, which are not prohibited by law or regulation." A291. Among other things, the "authority includes the authority of the Manager, on behalf of Owner [*i.e.*, the Partnership], to enter into agreements, contracts, or arrangements with Manager and its Affiliates, pursuant to which Manager and its Affiliates provide tangible or intangible assets, goods, or services to the Owner." A292.

In addition to those provisions setting forth the obligations, responsibilities, and authority of the Manager, the Management Agreement contained provisions specifying how to determine revenues and expenses relating to the Partnership's business, which was integrated into AT&T's national wireless network. A294-295. Specifically, Article VI referred to methodologies, described there and in "Exhibit A," which set forth a formula to allocate a portion of nationwide pools of revenue (defined as "Shared Revenue") and expenses (defined as "Shared Expenses") to the Partnership. A294, 299. Exhibit A also contained a provision—the "MNSA Premium Provision"—which stated that "[i]nitially, Manager will apply a premium of 25% to [the Partnership's] share of Shared Revenues and a discount of 10% to [the Partnership's] share of Sales and Marketing Expenses." A299.

4. Partnership transactions.

In the ensuing years, AT&T considered whether to restructure its partnerships, including through transactions that would have the effect of eliminating minority partner ownership. In 2010 and 2011, after engaging PricewaterhouseCoopers ("PwC") to conduct valuations, AT&T initiated asset sale transactions for several partnerships, including the Partnership (valued at $219 million). A1354-1358. Certain minority partners across the partnerships accepted AT&T's offer to pay 5%

over their pro rata share of PwC's valuations. *Id.* As to the others, AT&T voted its majority interest in favor of asset sale cash-outs, and the partners were paid their pro rata share of the PwC valuation/asset sale price. *Id.* The partnerships' assets were transferred to an AT&T affiliate, and the partnerships dissolved. A1358-1359; A214.[1]

B. Procedural history.

1. Litigation proceedings.

Plaintiffs brought several suits in the trial court to challenge the asset sales; AT&T also filed declaratory judgment actions. A1318-1322. In total, the parties litigated fifteen actions involving thirteen partnerships in a coordinated fashion. *Id.*

Plaintiffs' claim that AT&T breached the Partnership Agreement's Governance Provision by breaching the Management Agreement did not emerge for nearly a decade. Plaintiffs' original claim for breach of the Partnership Agreement broadly stated that the majority partner could not deprive the Executive Committee of its authority to conduct the Partnership's business affairs, mostly relating to the

[1] The manner in which Partnership business was conducted and the circumstances surrounding the asset sale transactions were the subject of considerable dispute. AT&T disagrees with many of the trial court's findings, but because they are not material to the issues that Plaintiffs have raised, AT&T does not contest them for purposes of this appeal.

asset sale transactions. A388-390. Plaintiffs did not mention the Management Agreement.

After the trial court rejected Plaintiffs' theory that the Executive Committee had to approve the asset sales, B24, AT&T repeatedly sought to clarify the nature of Plaintiffs' claims—including through a successful motion to compel that resulted in the trial court sanctioning Plaintiffs, *see, e.g.*, B26-53; B54-57. In their responses, Plaintiffs still did not articulate any claims based on the Management Agreement. *See, e.g.*, B699. Nor did they do so in the stipulated pre-trial order or in their pre-trial brief. A1360-1364; A1149-1205.

The parties also engaged in extensive discovery. Most notably, AT&T objected to Plaintiffs' overly burdensome discovery requests concerning four categories of allegedly unallocated revenue, which led the trial court to appoint a Special Discovery Master. At the conclusion of a detailed two-year investigation, in which AT&T and its counsel were determined to have acted in good faith, the trial court adopted the Special Discovery Master's conclusion that discovery was unwarranted because the revenues were small, had been allocated to the partnerships, and were considered as part of PwC's valuation. *See* A1004-1146; Add.A.[2]

---

[2] "Add." citations refer to the exhibit letter and, where applicable, page number of the documents appended to Plaintiffs' opening brief.

A coordinated five-day trial—involving 3,187 exhibits, thirty-nine deposition transcripts, and seven live fact or expert witnesses, Add.B.6—was held in December 2020. In post-trial briefing, Plaintiffs argued (for the first time) that the majority partner breached the Partnership Agreement's Governance Provision by breaching the Management Agreement. A2873-2884. In addition to defending on the merits, AT&T argued that Plaintiffs had never presented that claim, which in any event was a derivative claim that Plaintiffs could bring only on behalf of the Partnership. A3048-3068.

2. The Contract Decision.

In September 2021, the trial court issued a decision ("Contract Decision") on Plaintiffs' breach of contract claims, specific to the Partnership. The trial court agreed that Plaintiffs' "contentions regarding the [Partnership Agreement's] Governance Provision are really a derivative claim for breach of the Management Agreement," which was "never asserted" or "pursued." Add.B.103. With the "backdrop" of the parties' longstanding course of conduct, the trial court found that the MNSA Services and Authority Provisions made it "difficult to imagine an aspect of the Partnership's business that the [Executive Committee's] delegation of authority did not encompass." Add.B.100. The trial court declined "to stake out a bright line view on" Plaintiffs' contrary theory because "AT&T's view better fits the facts of this case." Add.B.102. The provisions of the Management Agreement "regarding the assignment and allocation of revenue and expense reflect AT&T's commitments as to how it would exercise its delegated authority, rather than limitations on that authority," and thus a "failure to comply with those provisions *** would give rise to a breach of the Management Agreement" that must be pursued derivatively. Add.B.102-103. Because Plaintiffs failed to do so, their principal challenge failed.

Although that holding was "sufficient to dispose of the claim for breach of the [Partnership Agreement's] Governance Provision," the trial court nevertheless concluded—"solely for purposes of analysis" of all issues—that AT&T allocated revenues and expenses to the Partnership in a manner inconsistent with the Management Agreement. Add.B.103-134. Still, the trial court made clear that AT&T's "Partnership Accounting Group made significant efforts to identify and assign or allocate revenue and expense," using a consistent set of methodologies that applied across all partnerships. Add.B.47-51. For example, "AT&T operated under the principle that a 'tie goes to the minority partner'" and compensated regional business directors in a manner that "ensur[ed]" accuracy. Add.B.48-49.

Turning to Plaintiffs' other contract claims, the trial court found that AT&T did not breach the Partnership Agreement's "Protected Information Provision," because the Executive Committee had authorized AT&T to share relevant information on behalf of the Partnership, and any related Management Agreement-based claim had to be brought derivatively. Add.B.156-157. At the same time, the trial court found that AT&T breached the Partnership Agreement's "Title Provision." Add.B.146-154. The unallocated revenues associated with that breach, however, were "small" and "negligible." Add.B.152, 154. Consequently, the trial court reasoned that awarding the monetary equivalent of dissociation as damages "would be unconscionably disproportionate." Add.B.158-174.

Plaintiffs moved for reargument, asserting for the first time that the delegation of the Executive Committee's authority pursuant to the 1995 Resolution breached (the pre-1997 version of) Section 4.4 of the Partnership Agreement. A3158-3172. The trial court denied the motion for the reasons stated in AT&T's opposition, including waiver. Add.C.2. The trial court then entered an agreed-upon order applying the Contract Decision's rulings to the other twelve partnerships. Add.D.

3. The Fiduciary Decision.

In a March 2022 decision ("Fiduciary Decision") addressing Plaintiffs' breach of fiduciary duty claims (again, specific to the Partnership), the trial court found that AT&T had not proven the entire fairness of the asset sales. Add.E.38-97. On damages, the trial court "adopt[ed] the plaintiffs' basic approach" of determining "the value of their interests in the Partnership at the time of the" transaction, using a DCF model. Add.E.98-99. Emphasizing that it would "select[] reasonable inputs that result in a responsible estimate, but give[] the plaintiffs the benefit of the doubt," the trial court set values for a dozen-plus variables—including a tax rate of 0% that admittedly risked overvaluing the Partnership—and arrived at an implied valuation of $715 million and a damages award of over $9 million.[3] A99-131. That valuation, which the trial court measured against several other "reality check" data points, "eliminate[d] to the extent possible the ability of AT&T to profit from its breach." Add.E.3, 128-131.

4. De-coordination, final judgment, and appeals.

During briefing on (still-pending) disputes over the application of the Fiduciary Decision to the twelve other partnerships, the trial court de-coordinated litigation of the actions and entered a final judgment with respect to the Partnership. Add.G. The APR Plaintiffs and the Prickett Plaintiffs filed separate notices of appeal, and AT&T cross-appealed. Pursuant to a settlement, the Prickett Plaintiffs and AT&T have dismissed their appeals with respect to each other. This appeal therefore pertains only to the APR Plaintiffs, and the live disputes concern only eleven of the original thirteen partnerships.

---

[3] The parties subsequently agreed that certain mathematical corrections to the DCF model should result in a $695 million valuation and a damages award of just under $9 million, which the trial court incorporated into its final judgment. Add.G.3.

ARGUMENT

I. The trial court did not clearly err in holding that Plaintiffs' Management Agreement-based breach of contract claim should have been asserted as a derivative claim.

A. Question presented.

Whether the trial court clearly erred in concluding that Plaintiffs' claim for breach of the Partnership Agreement's Governance Provision failed because in substance it was an unasserted derivative claim for breach of the Management Agreement.

B. Scope of review.

As the trial court found, the resolution of the question presented "depend[s] on the facts of the case." Add.B.102. This Court reviews factual findings for clear error and will not set them aside "unless they are clearly wrong and the doing of justice requires their overturn." *Bäcker v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 94 (Del. 2021). The same standard applies to mixed questions of law and fact. *Delmarsh, LLC v. Environmental Appeals Bd.*, 277 A.3d 281, 290 n.56 (Del. 2022).

C. Merits.

Plaintiffs' breach of contract claim, though nominally for breach of the Partnership Agreement's Governance Provision, is entirely a claim for breach of the Management Agreement. Although one might wonder why Plaintiffs have insisted on tethering the Management Agreement to the Partnership Agreement, Plaintiffs have openly acknowledged that their goal is to trigger the dissociation remedy—

potentially worth $2.65 billion in total before interest—found *only* in the Partnership Agreement. To quote Plaintiffs' counsel at the post-trial argument: "I want to focus on the partnership agreement because that's the one that gets me the dissociation remedy[.]" B704.

That strategy failed. Appreciating the true nature of Plaintiffs' claim, the trial court appropriately entered judgment for AT&T because "plaintiffs' contentions regarding the [Partnership Agreement's] Governance Provision really are a derivative claim for breach of the Management Agreement," which Plaintiffs "never asserted." Add.B.103. Plaintiffs do not meaningfully contest that derivative-claim ruling, and they cannot demonstrate any error—much less clear error—that would warrant reversal.[4]

1. Any breach of contract claim based on the Management Agreement should have been brought derivatively.

a. Plaintiffs' claim that AT&T breached the Partnership Agreement's Governance Provision necessarily depends on a breach of the Management Agreement.

The lynchpin of the trial court's derivative-claim ruling is that Plaintiffs' claim for breach of the Partnership Agreement amounts to nothing more than a claim for

---

[4] In a footnote, Plaintiffs also assert that a breach of the Partnership Agreement's Governance Provision establishes a breach of the Partnership Agreement's Protected Information Provision. Opening Br. 31 n.31. Plaintiffs' claim regarding the Protected Information Provision fails for the same reason as its claim regarding the Governance Provision.

breach of the Management Agreement. Add.B.103. Plaintiffs confirm as much in framing their question presented and the alleged breach in terms of the Management Agreement: "Whether AT&T breached the Governance Provision [of the Partnership Agreement] by *** *breaching the MNSA*." Opening Br. 11 (emphasis added).

The Partnership Agreement itself shows why Plaintiffs cannot pursue a standalone breach of its Section 4.3 Governance Provision. Although the Governance Provision stated that the Executive Committee shall have "complete and exclusive power to conduct the business affairs of the Partnership," A208, the Partnership Agreement also granted the Executive Committee discretionary authority to delegate its power. As amended in 1997, Section 4.4 provided that the Executive Committee "may, to the extent it considers such action reasonable, delegate *all or any portion* of its responsibilities and authority" to, among others, "third parties (including Affiliates of Partners)." A224 (emphasis added). Relatedly, Section 4.8 authorized the Committee to "enter into agreements from time to time with *** Partner Affiliates for management services," with the "expectation of all the Partners" that such agreements could be approved and amended by the Executive Committee's "delegee." A224-225; *see* Add.B.11. Given those terms and Delaware's "policy of giving 'maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements,'" Add.B.160 (quoting

6 DEL. CODE § 15-103(d)), Plaintiffs have long struggled to develop a viable claim for breach of the Governance Provision. *See* pp. 11-12, *supra*.[5]

Tellingly, Plaintiffs have never claimed that the *adoption* of the Management Agreement constituted an improper delegation of authority under the Partnership Agreement's Governance Provision. Instead, Plaintiffs have argued that the *breach* of the Management Agreement automatically results in a breach of the Governance Provision. In framing its argument in those terms, however, Plaintiffs' claim for breach of the Governance Provision necessarily collapses into whether the Management Agreement was breached. The Governance Provision has no role to play in the analysis, except as a hook for Plaintiffs to invoke the dissociation remedy. Indeed, under the header "AT&T's Breaches of the Relevant Governing

[5] Because Plaintiffs did not articulate their Management Agreement-based theory until after trial, AT&T argued waiver. A3048-3052. Although the trial court declined to find Plaintiffs' argument procedurally barred, it did find the issue "difficult," the record "mixed," and that AT&T had a "valid objection" that Plaintiffs never affirmatively pursued their theory. Add.B.134-143. Having prevailed on the merits of Plaintiffs' claim for breach of the Partnership Agreement's Governance Provision on other grounds, AT&T does not challenge the trial court's waiver ruling in this appeal. *See In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 67 (Del. 1995).

Likewise, because the trial court's derivative-claim ruling was "sufficient to dispose of the claim for breach of the Governance Provision," AT&T does not challenge in this appeal the trial court's decision to analyze "solely for purposes of analysis" whether AT&T allocated revenues and expenses to the Partnership in a manner inconsistent with the Management Agreement. Add.B.103-134. AT&T reserves the right to litigate that issue in the future.

Documents," Plaintiffs focus on the Management Agreement alone, never once mentioning the Governance Provision. Opening Br. 8-9. Accordingly, the trial court was not clearly wrong to find that, given the facts of the case, Plaintiffs' claim for breach of the Governance Provision is "in substance" indistinguishable from a claim for breach of the Management Agreement. Add.B.103.

b. A claim for breach of the Management Agreement is derivative under this Court's *Tooley* line of precedent.

As the trial court concluded, consistent with this Court's precedent, Plaintiffs' claim for breach of the Management Agreement must be brought derivatively, which Plaintiffs failed to do. Add.B.101-103. Whether a claim is derivative depends on two questions: "(1) who suffered the alleged harm"; and "(2) who would receive the benefit of any recovery or other remedy"? *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004); *see also El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1255-1256 (Del. 2016) (asking same two questions in partnership context). To show that a claim may be brought directly by a partner, rather than derivatively on behalf of a partnership, a plaintiff must "demonstrate[] that he or she has suffered an injury that is *not dependent* on an injury to the [entity]." *Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1263 (Del. 2021) (emphasis added).

Plaintiffs' Management Agreement-based claim plainly fails that test. Plaintiffs concede that the Management Agreement is a contract entered into between the Partnership and the Manager. *See* A287; Opening Br. 26. As the trial court underscored, under Delaware law, a general partnership "is a separate legal entity which is an entity distinct from its partners." Add.B.101 (quoting 6 DEL. CODE § 15-201(a)). Likewise, property acquired by the Partnership, including a contractual right, "is property of the partnership and not of the partners individually." *Id.* (quoting 6 DEL. CODE § 15-203). It follows that the Partnership—the counterparty to the Management Agreement—would be the party that not only suffers any injury arising from the Manager's breach, but also receives the benefit of any remedy. *See* A296-297. Plaintiffs' claim for breach of the Management Agreement is therefore a classic derivative claim under *Tooley*.[6]

Even in Plaintiffs' own telling, it is difficult to see how the *Manager's* breach of the Management Agreement could result in a *partner's* breach of the Partnership Agreement. To quote Plaintiffs, "[t]he Manager was not at any time a partner in the Partnership" and "[t]he majority partner is not a party to the MNSA." Opening Br. 26. Those distinctions reinforce the derivative nature of Plaintiffs' claim. "It is a general principle of contract law that only a party to a contract may be sued for breach of that contract." *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*,

[6] It would make no difference if Plaintiffs could show that they also suffered harm from the alleged breach of the Management Agreement. *See Brookfield*, 261 A.3d at 1264-1265, 1267-1280 (overruling *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006)).

817 A.2d 160, 172 (Del. 2002). Here, the Management Agreement's signatories are not even parties to this claim against the majority partner.

c. Plaintiffs skirt the trial court's conclusion that their claim is derivative.

Plaintiffs do not meaningfully address the trial court's conclusion that a claim based on breach of the Management Agreement is derivative. Add.B.103. As a procedural matter, Plaintiffs appear to make a waiver argument that "AT&T never asserted that claims based on the MNSA were derivative in nature." Opening Br. 28 n.28. But as soon as Plaintiffs raised their Management Agreement-based theory for the first time in post-trial briefing, AT&T responded that such a theory gave rise to a never-pursued derivative claim. *See* A3055 ("Plaintiffs could have attempted to pursue a derivative claim for breach of the Management Agreements, but they never pressed such a claim.").

As to the merits, Plaintiffs' main contention is that a derivative claim would not provide them adequate compensation. Opening Br. 28-31. But the notion that Plaintiffs should be able to bring a direct claim because it (supposedly) gets them the dissociation remedy they have "been seeking all along," B704, or because they believe a derivative claim will provide "incomplete relief," Opening Br. 28-29, runs headlong into this Court's precedent.

In *El Paso*, a plaintiff lost standing to pursue a derivative claim he had litigated through trial on behalf of a limited partnership because, pre-judgment, the partnership was acquired in a merger by the indirect owner of the general partner (who was a subject of plaintiff's claim). 152 A.3d at 1250; *see also In re El Paso Pipeline Partners, L.P. Derivative Litig.*, 132 A.3d 67, 74 (Del. Ch. 2015) (describing merger details). Notwithstanding the merger, the Court of Chancery concluded that the plaintiff could proceed with his claim directly, in part because "dismissal would leave the unaffiliated limited partners without recompense for the general partner's prior unfair dealing." *El Paso*, 152 A.3d at 1251.

This Court reversed. It acknowledged the plaintiff's arguments regarding "the possible extinguishment of claims" and the "record evidence suggesting bad faith conduct by persons controlling the limited partnership." *El Paso*, 152 A.3d at 1251. But it still held that "plaintiff's claims were and remain derivative in nature." *Id.*; *see also Matthew v. Laudamiel*, 2012 WL 605589, at *21 (Del. Ch. Feb. 21, 2012) (refusing to "transform derivative claims into direct claims").[7]

Critically, in reaching that conclusion, this Court rejected the idea that the plaintiff would be left without recourse: "Under our law, equity holders confronted

---

[7] In a barely explained footnote, Plaintiffs cite one Court of Chancery case for the proposition that direct claims can be substituted for entity-level claims under certain circumstances. Opening Br. 30 n.29 (citing *Goldstein v. Denner*, 2022 WL 1797224, at *17 n.16 (Del. Ch. June 2, 2022)). But of the four Delaware cases the *Goldstein* court relied on, three were decided before *Tooley* and the fourth relied significantly on this Court's decision in *Gentile*, which has since been overruled by *Brookfield*. *See Stevanov v. O'Connor*, 2009 WL 1059640, at *6 (Del. Ch. Apr. 21, 2009); *see* note 6, *supra*.

by a merger in which derivative claims will pass to the buyer have the right to challenge the merger itself as a breach of the duties they are owed." *El Paso*, 152 A.3d at 1251. That is exactly what Plaintiffs have (successfully) done here: They challenged the sale of the Partnership's assets as a breach of fiduciary duty, and have recovered nearly $9 million, plus interest. Add.E.133. In total, the remaining Plaintiffs are seeking $62 million, a number that will roughly double when interest is added, across all partnerships for their parallel breach of fiduciary duty claims.

Although Plaintiffs would prefer the contract-based dissociation remedy—$475 million for the Partnership alone, Add.B.171, and potentially $2.65 billion across all relevant partnerships (all before interest)—that preference does not render Plaintiffs' substantial recovery "illusory." Opening Br. 28-30. Nor does that preference justify transforming their derivative claim into a direct claim. Such a recovery is even less justified considering that the remedy for breach of the Management Agreement is limited to "the amount of any fees or costs paid *** to Manager" by the Partnership. A297 (formatting omitted).

2. Plaintiffs' new arguments concerning the 1995 Resolution's delegation of authority are beside the point and incorrect.

Plaintiffs spend the bulk of their opening brief arguing that the trial court clearly erred by discussing the Partnership's pre-Management Agreement practices on its way to concluding that Plaintiffs' breach of contract claim is really a derivative claim for breach of the Management Agreement. In Plaintiffs' view, the Executive

Committee's delegation of authority in the 1995 Resolution was broader than Section 4.4 of the Partnership Agreement allowed, and because the trial court referred to that Resolution as part of the "backdrop" for the Management Agreement delegation a decade later, the Management Agreement delegation was narrower than the trial court believed. Opening Br. 11-28. That reasoning fails at every step.

a. Plaintiffs waived the argument that the 1995 Resolution breached Section 4.4 of the Partnership Agreement.

As an initial matter, Plaintiffs waived their argument that the 1995 Resolution breached Section 4.4 of the Partnership Agreement. *See* SUP. CT. R. 8. Plaintiffs chide the trial court for "fail[ing] to consider (or even cite)" Section 4.4 in its Contract Decision. Opening Br. 14. But Plaintiffs gave the trial court no reason to do so. They cited Section 4.4 just once in their post-trial briefing: in a footnote from the statement of facts, for the unexceptional proposition that "[t]he Partnership Agreements permitted the Executive Committees to delegate responsibilities and authority pursuant to operating agreements for the development, design, construction and operation of the Partnership's system." A2854 & n.11.

Plaintiffs all but admit their waiver by providing a list of other references to Section 4.4 in the record that, with one exception, have no connection to any alleged breach of that provision. *See* Opening Br. 14 n.14. The single exception—Plaintiffs' motion for reargument, A3158-3172—does not help Plaintiffs. AT&T opposed the motion on the ground that a Section 4.4 argument was not "raised before" and hence "cannot be raised in reargument," A3179, and the trial court "denied [the motion] for the reasons articulated by the defendants in their opposition," Add.C.2; *see also inTEAM Assocs., LLC v. Heartland Payment Sys., Inc.*, 2016 WL 6819734, at *2 (Del. Ch. Nov. 18, 2016) (argument presented for first time in motion for reargument waived). Because that argument was waived below, it is not properly before this Court either. *Nieves v. All Star Title, Inc.*, 21 A.3d 597 (Del. 2011) (declining to consider merits of arguments raised for first time in motion for reargument below).

b. The Management Agreement—not the 1995 Resolution—is the relevant delegation of authority.

Waiver aside, Plaintiffs' argument is a red herring for three reasons.

First, the relevant period for Plaintiffs' claims is 2008-2011. *See* Add.B.86 ("[P]laintiffs have represented that they are suing only based on conduct that took place from 2008 forward[.]"). During that period, the source of the Executive Committee's power to delegate was the *amended 1997 version* of Section 4.4, not the (allegedly breached) original version of Section 4.4. Likewise, during that period, the scope of delegated authority was memorialized in the *Management Agreement*, not the (allegedly breaching) 1995 Resolution. *Cf.* Opening Br. 19-20 ("[T]he 1995 Resolution was annulled by the 2005 Resolution."). Thus, to the extent the scope of the Executive Committee's delegation bears on the trial court's ruling, it is the amended 1997 version of Section 4.4 and the Management Agreement—not the original version of Section 4.4 and the 1995 Resolution—that govern Plaintiffs' claim. There is no inconsistency between the Management Agreement and Section 4.4's language permitting the Executive Committee to delegate "*all or any* portion of its responsibilities and authority *** [to] third parties (including Affiliates of Partners)," A224 (emphasis added), and Plaintiffs have never argued otherwise.

Second, the derivative nature of Plaintiffs' claim does not depend on the expanse of the Manager's delegated authority. It depends on the fact that Plaintiffs' claim for breach of the Partnership Agreement's Governance Provision is indistinguishable from a claim for breach of the Management Agreement, which belongs to the Partnership. *See* pp. 18-23, *supra*.

The trial court left open the possibility that a different set of facts involving a different delegation of authority "might" lead to a different outcome (though it did not explain how such a claim could be squared with *Tooley* and its progeny). Add.B.103 n.39. But the trial court did not find it necessary to pass upon that question, Add.B.102, and the facts of this case do not provide this Court with a reason to do so either. Unlike in the hypothetical posited by the trial court, where an agreement specifies nothing more than how a partner will allocate revenue and expense, the MNSA Services and Authority Provisions gave the Manager broad powers, including to "manage[] and operat[e] *** the [Partnership]'s Business," and to undertake "*any and all* other commercially reasonable actions necessary or advisable to develop, manage, and operate the [Partnership]'s Business." A291 (emphasis added).

Plaintiffs' effort to cram the Management Agreement into the trial court's hypothetical is unconvincing. Plaintiffs read the Management Agreement to be narrower than the 1995 Resolution. Yet even if that were correct—and it is not[8]—the Management Agreement did not require any "agglomerate[ion]" or "merg[ing]" of authority with the 1995 Resolution in order to be "expansive." Opening Br. 26-28. The MNSA Services and Authority Provisions are expansive on their own.

Third, the record refutes Plaintiffs' assertion that the 1995 Resolution infected the trial court's ruling. In determining that the Executive Committee had delegated "expansive authority" to the Manager during the relevant period, the trial court primarily relied on the MNSA Services and Authority Provisions. Add.B.99-103.

That conclusion is not altered by the trial court's references to "essentially undisputed" evidence, including Plaintiffs' testimony and the 1995 Resolution, showing "that AT&T always managed the day-to-day business of the Partnership." Add.B.97. The trial court did not find that such evidence supplied or expanded the

[8] Like the Management Agreement, the 1995 Resolution delegated the Executive Committee's "authority to manage and control the business of the Partnership." A237. Although Plaintiffs submit there is a difference in delegation because the Management Agreement refers to the undertaking of "commercially reasonable" actions, Opening Br. 27-28, Plaintiffs have not explained how that wording makes any practical difference.

Management Agreement's scope of delegation. Rather, such evidence served only as a "backdrop" for what the Management Agreement's plain terms independently conveyed. Add.B.99-100; *see also* Add.B.91-92 (explaining that "background facts cannot be used to alter the language chosen by the parties within the four concerns of their agreement"). Accordingly, even if the scope of delegated authority were as critical to the direct/derivative question as Plaintiffs seem to think, and even if all of the Partnership's pre-Management Agreement history were disregarded, the outcome would be the same.

c. The 1995 Resolution's delegation of authority was valid.

Assuming this Court needs to reach the issue, the 1995 Resolution's delegation of authority was valid under the pre-1997 version of Section 4.4. At a minimum, that version of Section 4.4 had long since been modified through the parties' course of conduct.

As this Court has recognized, "a written agreement does not necessarily govern all conduct between contracting parties until it is renounced in so many words." *Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico, Inc.*, 297 A.2d 28, 33 (Del. 1972). Instead, "parties have a right to renounce or amend the agreement in any way they see fit," including "by their conduct." *Id.*; *see also Moeller v. Wilmington Sav. Fund Soc'y*, 723 A.2d 1177, 1179 n.7 (Del. 1999) ("[A] course of conduct can amend a contract as effectively as a written modification."). That is so even if the agreement states that amendments must be written. *See Pepsi-Cola Bottling*, 297 A.3d at 32-33 (course of conduct could amend agreement even though it stated no future changes would be valid unless reduced to writing); *XRI Inv. Holdings LLC v. Holifield*, 2022 WL 4350311, at *62 (Del. Ch. Sept. 19, 2022) ("[N]otwithstanding a contractual provision stating that a contract cannot be modified except in writing, a court may find that the parties modified their obligations orally, by conduct, or through waiver."). *Contra* Opening Br. 18 (arguing, without citation to authority aside from Partnership Agreement itself, that Agreement "could not be modified by course of dealing or pattern of conduct").

Here, the trial court found:

> From the earliest days of the Partnership, there was a settled understanding that AT&T operated the day-to-day business of the Partnership and had authority to build, maintain, and operate its cellular network as part of its wider network. In effect, there was an unwritten [agreement] *** that authorized AT&T to manage the Partnership.

Add.B.12 (footnote omitted); *see* Add.B.97-98 (discussing evidence).

Thus, what Plaintiffs overlook, when they complain that the 1995 Resolution was not authorized by the pre-1997 version of Section 4.4, is that the Partnership's course of conduct had modified any limitations on delegation found in that version of Section 4.4. The 1995 Resolution—which was unanimously approved by the Executive Committee, including by its minority partner representative, A233, 235—simply formalized that unwritten understanding. *See* Add.B.99 ("Originally, the delegation to AT&T was unwritten. Then, in the 1995 Resolution, the Executive Committee formally delegated managerial authority to AT&T.”). Accordingly, to the extent relevant, the 1995 Resolution’s delegation of authority was valid.[9]

3. Plaintiffs are not entitled to the dissociation remedy, which would impose a grossly inequitable result.

In a single concluding paragraph on breach of contract, Plaintiffs maintain that a reversal on the merits—unwarranted for all the reasons explained—would entitle them to the economic equivalent of dissociation. Opening Br. 31. Plaintiffs overreach. Because the only breach of the Partnership Agreement that Plaintiffs proved (regarding titling of certain assets) could not support dissociation damages, the trial court never faced a realistic possibility of ordering that relief. It therefore did not address questions relating to whether the Partnership might be revived to allow the remedy to be enforced as set forth in the Partnership Agreement. Add.B.169 n.61. Nor did it evaluate the “impediment” of providing the Executive

---

[9] Beyond course of conduct, the original language of Section 4.4 is capacious enough to support the 1995 Resolution. Plaintiffs make much of the “develop[], design, construct[] and/or operate[] *** the System” phrasing in Section 4.4, A209, and compare it to the 1995 Resolution’s delegation of authority over the “the business of the Partnership,” A237. *See* Opening Br. 12-16. But the development, design, construction, and operation of the system *was* the Partnership’s business. And as the Cellular System Operating Agreement adopted contemporaneously with the 1995 Resolution shows (*see* pp. 8-9, *supra*), those categories of delegated authority ran the gamut. *See* A3180-3182 (AT&T’s opposition to motion for reargument); Add.C.2 (adopting reasoning of opposition).

Committee notice of default and the opportunity to cure, or the fiduciary duties that would inform the Executive Committee's "sole discretion." Add.B.166 & n.60.

The trial court's comment that "[d]issociation damages would have been warranted if the plaintiffs had proven their claim for breach of the [Partnership Agreement's] Governance Provision," Add.B.172, is not an alternative holding. Elsewhere, the trial court elaborated that "[i]f the plaintiffs had shown that AT&T had committed a breach that deprived the minority partners of meaningful value *** then dissociation damages *could* be warranted." Add.B.5 (emphasis added). In that regard, the trial court found "that AT&T engaged in significant administrative efforts to allocate revenue and expense to the Partnership in accordance with the same principles that AT&T used to allocate revenue and expense to AT&T's other market-level entities," and that "plaintiffs failed to develop the factual record necessary to estimate how compliance with the agreed-upon methodologies would have affected the value of the Partnership." *Id.* Because of Plaintiffs' failure of proof, "the impact [of any breach] is unclear" and there is no way of knowing whether they were deprived of meaningful value, such that dissociation damages could be appropriate. *Id.*

The trial court also cautioned that "dissociation damages *** easily could become so large as to be unconscionable." Add.B.4. As an extreme example, the trial court posited that if "the fair value of the Partnership was 50% higher than [AT&T's

$219 million valuation], then an award of compensatory damages would yield $2.06 million to the plaintiffs, while an award of dissociation damages would yield $109.5 million." *Id.* In the subsequently issued Fiduciary Decision, the trial court valued the Partnership at roughly $700 million, Add.E.131, an increase of *more than 200%* from AT&T's valuation. Thus, granting dissociation here—a $475 million award for this Partnership alone and potentially $2.65 billion across all partnerships before interest—easily would be unconscionable under the trial court's own reasoning.

II. This Court should not upset the reasonable balance the trial court struck in fashioning the breach of fiduciary duty damages award.

A. Question presented.

Whether the trial court's damages award for breach of fiduciary duty exceeds the bounds of reason.

B. Scope of review.

A trial court's damages award in an entire fairness case is reviewed for abuse of discretion. *International Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 440 (Del. 2000). "In determining damages, the powers of the Court of Chancery are very broad in fashioning equitable and monetary relief under the entire fairness standard[.]" *Id.* This Court, in turn, "defer[s] substantially to the discretion of the trial court in determining the proper remedy *** to be awarded for a found violation of the duty of loyalty." *Id.* at 439. "An abuse of discretion occurs when a court has exceeded the bounds of reason in light of the circumstances, or so ignored recognized rules of law or practice so as to produce injustice." *McNair v. State*, 990 A.2d 398, 401 (Del. 2010).

C. Merits.

Having fallen short on dissociation, Plaintiffs seek to enlarge their damages award in the entire fairness case. According to Plaintiffs, the trial court abused its discretion by not adjusting its DCF valuation of the Partnership to account for pre-dissolution breaches of the Management Agreement's allocation methodologies and

Premium Provision, which provides for a 25% premium to "Shared Revenues" and a 10% discount to "Sales and Marketing Expenses." A299; *see* Add.B.30; Add.E.12; p. 10, *supra*. Plaintiffs waived that argument, which lacks merits in any event. Lacking any evidence supporting a Management Agreement-based remedy, the trial court awarded reasonable damages based on a responsible estimate of Partnership value, using inputs that risked overvaluing the Partnership and giving Plaintiffs the benefit of the doubt.

1. The trial court could not have abused its discretion by not awarding relief Plaintiffs never sought.

Plaintiffs contend that the trial court erred in "refusing" to award breach of fiduciary damages based on the Management Agreement's allocation methodologies. Opening Br. 32. The trial court could not have refused any such request, however, because Plaintiffs never asked the trial court to calculate damages in that way. And because Plaintiffs did not "fairly present[]" the issue below, they have waived it. SUP. CT. R. 8.

Plaintiffs' experts did not adjust projected cash flows based on the Management Agreement methodologies. Nor did their experts ask the trial court to apply the MNSA Premium Provision to argue for any increase to valuation-based damages arising from any pre-dissolution breaches. Indeed, there are no references anywhere in Plaintiffs' expert reports to the MNSA Premium Provision's 25% premium or 10% discount. *See* B65-239; B240-446.

Consistent with that evidence, Plaintiffs' pre- and post-trial briefing likewise did not seek such an enhancement. A1149-1205; A1206-1272; A2844-2914; A2915-3010. In particular, their briefing on breach of fiduciary duty does not reference the value of past breaches or the 25% premium or the 10% discount. On the contrary, Plaintiffs appear to have baked any Management Agreement-related damages into *other* parts of their damages model, which were said to address AT&T's alleged accounting failures. *See, e.g.*, A2991-2995 (arguing that AT&T did not follow the Management Agreement and that, in light of accounting deficiencies, "Mr. Musey determined the most reasonable way to project subscriber revenue was to use the number of subscribers AT&T attributed to the Partnerships as his baseline, *** project subscriber growth from that baseline using Census population data and AT&T DMA churn, and multiply his projected subscribers by AT&T's national ARPU") (footnote omitted). Plaintiffs now argue that the trial court should have "valu[ed] the Partnership based on the MNSA" *instead* of using AT&T's "accounting paradigm." Opening Br. 38. But this Court's waiver precedent does not permit Plaintiffs to change their damages model on appeal. *See Protech Mins., Inc. v. Dugout Team, LLC*, --- A.3d --- , 2022 WL 4004606, at *6 (Del. Sept. 2, 2022) (holding that appellants did not preserve argument for appeal where they "did not argue or present any evidence below").

If there were any doubt regarding Plaintiffs' waiver, it evaporates with their citation to "A2875-A2881," Opening Br. 32, as the "clear and exact reference to the pages of the appendix where [they] preserved [the damages] question in the trial court," SUP. CT. R. 14(b)(vi)(A)(1). That citation is to a portion of Plaintiffs' post-trial brief on their *contract* claim, where Plaintiffs presented their *merits* argument concerning AT&T's alleged breach of the Management Agreement. That argument has no connection to—and cannot preserve an appeal over—a *damages* argument on a *fiduciary duty* claim. *See Protech*, 2022 WL 4004606, at *6 n.59 (rejecting attempt to tie waived argument regarding certain contract provisions to references made "within the context of a separate argument").

2. The trial court properly exercised its discretion and fashioned a responsible damages award.

At any rate, Plaintiffs cannot surmount the discretion afforded to the trial court and the deferential standard of review. Here, the trial court spent thirty-five pages explaining the applicable damage standards and its rationale—"adopt[ing] plaintiffs' basic approach to damages," "select[ing] reasonable inputs" for a DCF model while "giv[ing] the plaintiffs the benefit of the doubt," and arriving at a $695 million valuation of the Partnership that "address[es] the wrong" and "favors the plaintiffs." Add.E.3, 97-131. Although AT&T disagrees with aspects of the trial court's damages analysis (and has lodged a contingent cross-appeal in the event that this Court decides to reopen the damages award, *see* pp. 44-51, *infra*), from an appeal standpoint there is nothing unreasonable about the trial court's damages award taken as a whole.[10]

Indeed, Plaintiffs challenge neither the trial court's decision to employ a DCF model, nor any particular facet of the DCF analysis. Instead, Plaintiffs seize on a few sentences from the concluding "Remedial Calculation" section of the Fiduciary Decision, Add.E.128-131, and argue that the trial court was obligated to adjust its cash flow projections in light of the MNSA Premium Provision and to account for the value of a derivative Management Agreement claim. That argument misses the mark in several respects.

First, Plaintiffs misunderstand the import of the trial court's statements. The $920 million approximation of the Partnership's value under the Management Agreement was part of an exercise intended to confirm that the DCF model produced a "responsible estimate" of damages. Add.128-131. The trial court began by explaining that "[f]or purposes of awarding a damages remedy, the foregoing [DCF] inputs result in an implied valuation *** of $714,039,606.48"—a figure that is far closer to the $946 million sought by Plaintiffs than the $171 million to $224 million

---

[10] Because of Plaintiffs' clear waiver and the reasonableness of the trial court's damages ruling, AT&T does not appeal the trial court's "solely for purposes of analysis" statements regarding breach of the Management Agreement, and reserves the right to litigate that issue not only in the event this Court modifies the fiduciary damages at issue in this appeal but also in other actions. Add.B.103; *see* note 5, *supra*.

advocated by AT&T. Add.E.128; *see* note 3, *supra* (adjusting valuation to $695 million). The trial court then measured its valuation against other "reality check[s]": (i) the price of AT&T's announced deal with T-Mobile; (ii) Plaintiffs' expert's capitalization of Partnership distributions; and (iii) adjusting (unspecified) cash-flow inputs under the DCF model by the percentages stated in the MNSA Premium Provision. Add.E.128-131. In short, the trial court was simply pressure-testing the fairness of its DCF model.

The trial court was *not* laying out a menu of damages options. Even ignoring the fact that Plaintiffs never presented a Management Agreement-adjusted DCF model as an option, it would not have been appropriate simply to modify the DCF-based inputs by the MNSA Premium Provision. Doing so would have conflated two valuation baselines—the Partnership's actual financial results, and the Partnership's proportionate share of "Shared Revenues" and "Shared Expenses" as allocated under the Management Agreement. Those baselines are not interchangeable. For one thing, the Management Agreement required AT&T to share a small portion of most of the revenue generated over its entire network with the Partnership, while the trial court's DCF model is premised on allocating revenue to the Partnership based on subscriber "NPA-NXX," *i.e.*, the area code and next three digits of the subscriber's telephone number. Add.E.7-10, 13-14, 80-81, 103-104. For another, the Management Agreement eliminates roaming revenue that arises when a non-Partnership AT&T

subscriber roams on the Partnership's network, while the DCF model (to Plaintiffs' benefit) does not. *Compare* A293 ("Subscribers of Manager's Business shall have the right to Roam on Owner's System, without any direct charges."), *with* B590 (showing Partnership received intra-company roaming revenue).

Consequently, the DCF-based damages award did *not* reflect what Partnership revenues, expenses, and cash flows would have looked like if they had been derived from the Management Agreement-based allocation methodologies relating to "Shared Revenues" and "Shared Expenses." A294-295; *see* Add.B.41 ("AT&T did not follow the specified allocation methodologies [in the Management Agreement]."). It was therefore reasonable for the trial court to separate its DCF valuation from any Management Agreement adjustments when fashioning its damages award. *See Bomarko*, 766 A.2d at 440-441 (underscoring that "assessing damages *** unavoidably requires the court to make judgments concerning liability and other contingencies," and affirming "use[] [of] generally accepted valuation methodology but with a few appropriate modifications," including giving no "effect" to certain contingencies). That the trial court took the extra step of using a DCF figure with rough Management Agreement adjustments *to check the reasonableness of its valuation* does not constrain its discretion.

Second, the trial court's decision is made all the more reasonable because it did not have the evidence necessary to calculate the Partnership's value using only

Management Agreement inputs. For good reason: Consistent with their decision to proffer a DCF-based damages model in lieu of a Management Agreement-based model, Plaintiffs "*failed to develop the factual record* necessary to estimate how compliance with the [Management Agreement] methodologies would have affected the value of" the Partnership. Add.B.5 (emphasis added). The trial court therefore made the sensible choice of looking to the available information in the record—*i.e.*, AT&T's accounting, which the trial court accepted as "extensive," "careful," and "accurate[] reflect[ions] [of] the revenue and expense that AT&T identified and assigned or allocated to the partnership," Add.B.14—as a source for "[r]esponsible estimates," Add.E.99-101. The trial court did not commit reversible error by declining to cut Management Agreement figures from whole cloth.

Anticipating that obstacle to their appeal, Plaintiffs preemptively argue that the trial court prevented them from developing the valuation record. Opening Br. 35-36. In particular, Plaintiffs take issue with the trial court adopting the Special Discovery Master's recommendation not to permit particularly burdensome discovery over "small" amounts of revenue relating to "Connected Devices," which were allocated to the partnerships and folded into PwC valuations. A1052-1084; Add.A.3 (adopting report "as a final decision of the court"). Plaintiffs, however, do not actually assert that the Special Discovery Master's recommendation or the trial court's rulings were incorrect.[11] Nor do Plaintiffs explain how information regarding "increase[s] in network mobile data traffic" was "evidence necessary to calculate MNSA-related damages." Opening Br. 35-36.[12]

Third, even if the trial court could have made the Management Agreement-related adjustments that Plaintiffs seek on appeal, the dispositive question remains whether the damages award exceeds the bounds of reason. In that regard, it is notable that the trial court chose DCF inputs that *favored Plaintiffs*. Add.E.3, 99. By the trial court's own admission, certain inputs in the DCF analysis "risk[ed] overstating the value of the Partnership." Add.E.118; *see* Add.E.107 (adopting average-revenue-per-user figure that "favors the plaintiffs" because it "results in an abrupt increase *** at the beginning of the projection period"). Indeed, the trial court's decision not to tax the Partnership's projected tax flows had "significant implications for the

---

[11] Neither the Management Agreement allocation methodologies nor the information needed to apply those formulas was subject to the protective order. *See* B59. In fact, Plaintiffs never sought discovery on those issues.

[12] The Management Agreement formulas are keyed to subscriber levels and minutes of usage, A299—a different category of network traffic than "mobile data traffic." *See* A288 (defining "MOU" and "Gross Subscriber Addition"); A289 (defining "Outcollect Roaming Traffic" and "Outcollect Roaming MOU"); A291 (defining "System Traffic"). Moreover, to the extent "mobile data traffic" was relevant to a Management Agreement damages model, it was a minimal part of overall revenues. A1052-1084. And reflecting their failure of proof, Plaintiffs asked only about revenues related to an *increase* in mobile data traffic, not overall data. Opening Br. 35. In any event, AT&T produced information responsive to Plaintiffs' requests. *See* A967-968.

damages award" that benefited Plaintiffs. Add.E.112. Such overvaluation should be factored into—and validates—the reasonableness of the damages award.

3. If this Court reopens the damages award, it should take up AT&T's contingent cross-appeal regarding taxation.

If this Court holds that the DCF valuation of the Partnership must be increased by a $200 million Management Agreement-based adjustment, that necessarily would impact the overall reasonableness of the damages award, which already favors Plaintiffs for the reasons just discussed. To ensure that the new damages award does not become unreasonable, this Court should consider AT&T's contingent cross-appeal, which asks whether the trial court abused its discretion in refusing to tax affect projected cash flows in its DCF model. Add.E.112-118; *see* B695-698 (AT&T post-trial brief). This Court should hold that the trial court was required to apply *some* tax rate greater than 0%—here, the 34.1% tax rate proposed by AT&T that comports with the operative reality of the Partnership.

a. A pass-through entity's cash flows must be discounted in light of taxes.

According to the trial court, cash flows in a DCF analysis need not be tax affected at all if the entity being valued is a pass-through entity. The greater weight of Delaware case law holds otherwise. As the Court of Chancery explained in *Delaware Open MRI Radiology Associates, P.A. v. Kessler* ("*Open MRI*"), which concerned the valuation of another type of pass-through entity as part of an entire fairness case:

> [I]n th[e] context when minority stockholders have been forcibly denied the future benefits of S corporation status, they should receive compensation for those expected benefits and not an artificially discounted value that disregards the favorable tax treatment available to them. But the minority should not receive more than a fair S corporation valuation. *Refusing to tax affect at all produces such a windfall*[.]

898 A.2d 290, 328 (Del. Ch. 2006) (emphasis added). Applying a 0% tax rate produces a windfall because each shareholder still owes taxes on his proportional interest in the S corporation, and "[t]o ignore personal taxes would overestimate the value of [that] corporation and would lead to a value that no rational investor would be willing to pay to acquire control." *Id.* at 328-329.

The same is true of the Partnership and Plaintiffs here. No doubt, the pass-through status of the Partnership provides a benefit that should be considered and appropriately quantified as part of a valuation. But because personal taxes are still paid on Partnership distributions, it would overestimate the value of the Partnership to assume otherwise.

The trial court appeared to understand that adopting a 0% tax rate would result in an overvaluation, but chose to rely on *In re Radiology Associates, Inc. Litigation*, 611 A.2d 485 (Del. Ch. 1991), which "declined to deduct any taxes from a pass-through entity's cash flows." Add.E.112, 118. The reasoning of *Radiology*

Associates, however, lacks persuasive force and has not gained favor in Delaware courts. In that case, the Court of Chancery held that "under an earnings valuation analysis, what is important to an investor is what the investor ultimately can keep in his pocket." 611 A.2d at 495. That much is fair. The problem is that the amount that an investor keeps in his or her pocket is net of personal taxes, even if there are no entity-level taxes. Thus, to the extent that *Radiology Associates* states an appropriate rationale, it is not correct "that ignoring taxes altogether is the only way that the discounted cash flow analysis can reflect accurately the value of [a pass-through entity's] cash flows to its investors." *Id.*; *see Open MRI*, 898 A.2d at 328 (parting ways with *Radiology Associates* "at the level of implementation, rather than at the level of principle").

None of the remedial-based justifications for accepting *Radiology Associates*' overvaluation is persuasive either. The principle that uncertainties in awarding damages are generally resolved against the wrongdoer, Add.E.118, does not change the fact that a valuation "remedy" should reflect "the amount that estimates the [Partnership's] value to" Plaintiffs. *Open MRI*, 898 A.3d at 328. For the same reason, any concern over double taxation—first as part of the DCF analysis and then again on the damages award, Add.E.115-116—is misplaced. The reason the trial court conducted a DCF analysis was to determine the value of the Partnership and the amount of underpayment to Plaintiffs. *See* Add.E.99 ("This decision uses a DCF model to determine the value of what the plaintiffs held.”). Whether Plaintiffs pay taxes on damages—something that would have occurred in *Open MRI* as well—does not affect the value of the Partnership any more or less than the taxes that Plaintiffs paid on the amounts they were given in exchange for their minority interests.

Even if damages were an appropriate lens through which to determine value, applying a 0% tax rate would not result in Plaintiffs retaining the same amount in damages as they would have retained from passed-through distributions, assuming the Partnership never dissolved. *Contra* Add.E.116. Plaintiffs’ damages awards will be taxed as capital gains, at 15%. *See NCA Argyle LP v. Commissioner*, 119 T.C.M. (CCH) 1364, at *5, *9 (T.C. 2020), *as corrected* (Nov. 17, 2020) (finding that taxpayer appropriately classified legal settlement as capital gain where claim was for breach of fiduciary duty following repudiation of joint venture and damages were based on reasonable value of taxpayer’s interests in joint venture); B650 (capital gains rate at the time of the transaction was 15%). By contrast, Plaintiffs’ distributions would have been taxed as federal income, likely on the order of 40%. B650. Thus, if no tax rate is applied to the DCF cash flows from which damages are derived, Plaintiffs will pocket *more* from damages than they would have from distributions. And to the extent equivalence is the goal, a 0% tax rate does not achieve it.

Finally, whether AT&T retains the value of a pass-through entity or receives a step-up in tax basis for Partnership assets is not relevant. Add.E.116. It is unclear how those factors would affect the valuation of the Partnership. Indeed, tax benefits are synergies, which Delaware courts exclude from valuation. *See, e.g.*, *Fir Tree Value Master Fund, LP v. Jarden Corp.*, 236 A.3d 313, 328 (Del. 2020) ("[T]he court should exclude any synergies or other value expected from the merger[.]") (internal quotation marks omitted).

Regardless, any synergistic benefits would be dwarfed by a 0% tax rate. For example, the step-up in tax basis for the Partnership's assets was between $1.49 million and $1.76 million. B19. Those amounts include the step-up attributable to acquiring all minority interests at the time (3.08%), not just those held by Plaintiffs (1.881%); the step-up for Plaintiffs' interests alone would have been approximately $1 million—*i.e.*, (1.881/3.08)*1.76=1.09. Comparatively, applying even the standard *Open MRI* tax rate of 29.4%, which (as discussed below) is a more conservative rate than other options, would reduce the trial court's $8.96 million award to Plaintiffs by $3.85 million.[13] Accordingly, if this Court reopens the damages award, the 0% tax rate should not stand.

---

[13] Applying the 29.4% *Open MRI* tax rate to the trial court's $695,487,000 valuation reduces the total value by $204,473,178 (*i.e.*, $695,487,000*0.294). Plaintiffs owned 1.881% of the Partnership, so their damages award would be reduced by $3,846,140 (*i.e.*, $204,473,178*0.01881).

b. AT&T's proposed tax rate reflects the operative reality of the Partnership.

Because it was necessary for the trial court to apply *some* tax rate to cash flows, the question becomes the appropriate rate. In the case of the radiology practice at issue in *Open MRI*, the Court of Chancery determined that the appropriate tax rate to apply in valuing the S corporation was 29.4%—a synthetic rate that would provide the same amount of net cash to similarly situated pass-through entity investors with a dividend or personal income tax rate of 40%. *See* 898 A.2d at 329-330; Add.E.113. Since then, the Court of Chancery has adhered to *Open MRI* with some regularity, applying tax rates consistent with the operative realities at issue. *B&L Cellular v. USCOC of Greater Iowa, LLC*, 2014 WL 5342715, at *3 (Del. Ch. Oct. 20, 2014); *see, e.g.*, *Owen v. Cannon*, 2015 WL 3819204, at *23-25 (Del. Ch. June 17, 2015).

That methodology comports with "precedent favoring adopting tax rates consistent with the operative reality of the company under consideration." *Dell, Inc. v. Magnetar Global Event Driven Master Fund LTD*, 177 A.3d 1, 38 (Del. 2017). In fact, the Court of Chancery previously did just that in an appraisal action involving AT&T:

> Consistent with the Companies' operative reality, AT&T's effective tax rate will be used. AT&T paid the Companies' taxes as part of its unitary tax return. Each entity was then assessed a portion of that tax payment. Petitioners argue that the Companies paid no taxes and that a zero percent tax rate should be used. Such an approach would assume

> incorrectly that no taxes were due on the Companies' earnings and fail to reflect their operative reality as part of AT&T.
>
> Petitioners argue that if a tax rate is applied, it should be AT&Ts effective corporate tax rate. Taylor calculated a blended state and federal statutory rate. PWC used the effective rate suggested by Petitioners. Using AT&T's actual effective tax rate correctly reflects the operative reality of the entities. PWC and Harris calculated effective rates of 32.4%, and 33.76%, respectively. Given that Petitioners have largely abandoned Harris's conclusions, PWC's effective tax rate calculation of 32.4% will be used.

In re AT&T Mobility Wireless Operations Holdings Appraisal Litig., 2013 WL 3865099, at *4 (Del. Ch. June 24, 2013) (paragraph notations omitted).

AT&T followed the same principle here in arguing that a 34.1% tax rate comports with the operative reality of the Partnership. That rate—which falls below AT&T's blended marginal-state corporate tax rate (39.9%) but above *Open MRI*'s synthetic rate (29.4%)—is consistent with AT&T's forecasts. *See* B536 (AT&T expert report). It also reflects the fact that the Partnership's owners paid taxes on distributions, in the form of either personal income and self-employment taxes (in the case of individual partners) or corporate taxes (in the case of AT&T). Critically, 98.1190% of the interest in the Partnership was held by AT&T, and the vast majority of distributions were ultimately taxed at a corporate rate. *See* A1337, 1339. Thus, rather than use AT&T's effective tax rate (as in the appraisal action, where AT&T paid taxes on all earnings), it was appropriate for AT&T to adjust its effective tax downward to account for the small percentage (1.881%) of ownership that may have paid taxes at a lower rate. *See Dell*, 177 A.3d at 20 ("[T]he court strives to value the *corporation* itself, as distinguished from a specific fraction of its *shares* as they may exist in the hands of a particular shareholder[.]") (internal quotation marks omitted).

The trial court did not consider AT&T's 34.1% tax rate or discuss the operative realities underlying that figure, believing instead that AT&T's expert had used a blended corporate tax rate of 38.5% tax rate. Add.E.95-96. Thus, assuming this Court vacates the damages award, it should instruct the trial court to align its treatment of taxes with prevailing Delaware law and the facts of this case, or at a minimum apply the *Open MRI* tax rate as courts have typically done.

III. The trial court did not abuse its discretion in declining to award attorney's fees.

A. Question presented.

Whether the trial court exceeded the bounds of reason in holding that Plaintiffs failed to demonstrate by clear evidence that AT&T acted with subjective bad faith.

B. Scope of review.

This Court reviews a denial of attorney's fees for abuse of discretion and "may not substitute its own notions of what is right for those of the trial judge, if [that] judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness." *Versata Enters., Inc. v. Selectica, Inc.*, 5 A.3d 586, 608 (Del. 2010) (alteration in original).

C. Merits.

The trial court did not abuse its discretion in denying Plaintiffs' attorney's fees request. To override the American Rule against fee-shifting under the "bad faith exception," a movant bears the burden to "demonstrate by *clear evidence* that the other party acted in *subjective bad faith*." *Shawe v. Elting*, 157 A.3d 142, 149-150 (Del. 2017) (emphases added). The exception is reserved for "extraordinary cases," not simply acts that are objectively unreasonable or harmful. *Lawson v. State*, 91 A.3d 544, 552 (Del. 2014); *see Versata*, 5 A.3d at 608 (affirming denial of attorneys' fees even though non-movant took actions recognizing they would harm movant).

Plaintiffs did not come close to meeting that demanding standard. In support of their attorney's fees request below, Plaintiffs offered less than a page of argument, citing no evidence and pointing instead to the trial court's comment from a discovery conference about AT&T's conduct. A3008. The trial court reasonably denied that request, concluding that "[t]he bad faith exception requires more" than "paraphras[ing] the court's comment." Add.E.133

On appeal, Plaintiffs continue to rely on the trial court's comments. As such, Plaintiffs do not address the *evidentiary* deficiency that prompted the denial of fee-shifting, and effectively invite this Court to substitute its judgement for that of the trial court. It would be especially odd for this Court to displace the trial court's no-bad-faith finding, when the only basis Plaintiffs have offered for doing so is the trial court's own comments.[14]

In any event, the trial court's finding falls within the heartland of reasonableness. Discovery was contentious, but the Special Discovery Master—appointed to solve the most intractable disputes in the case—reported that AT&T

---

[14] The additional colloquy quoted by Plaintiffs in their opening brief (at 40) does not suggest a discovery order violation. Instead, it concerned AT&T's attempts to provide Plaintiffs with information that implicated national security concerns, the disclosure of which might violate federal law. A1919; *see also* Add.B.86-87 (recounting opposition by United States and removal proceedings). At trial, AT&T objected to a line of questioning regarding the produced information because of an inability to respond adequately, and the objection was overruled. A1919-1923.

"acted in good faith." A1145-1146 n.416; *see* Add.A.3. Meanwhile, all agree that "*Plaintiffs* *** were the only parties sanctioned" for litigation misconduct in this case. Opening Br. 40 n.41; *see* B26-53 (identifying discovery abuses); B54-55 (ordering $71,809.29 payment to AT&T). Plaintiffs characterize the sanctions order against them as "compelling evidence of abuse of discretion" on attorney's fees, Opening Br. 40-41 n.41, but it is hard to understand how an order concerning Plaintiffs' conduct could prove AT&T's bad faith. The trial court acted well within the bounds of reasonableness in denying Plaintiffs' request.

CONCLUSION

For the reasons set forth above, this Court should affirm the trial court's judgment. In the event that this Court vacates the judgment in any respect—including with respect to breach of fiduciary damages, in which case this Court should resolve AT&T's contingent cross-appeal—this Court should remand.

AKIN GUMP STRAUSS HAUER & FELD LLP

Z.W. Julius Chen
Kristen E. Loveland
Pratik A. Shah
2001 K Street, NW
Washington, DC 20006
(202) 887-4000

Maurice L. Brimmage
Laura P. Warrick
2300 North Field Street, Suite 800
Dallas, TX 75201
(214) 969-2800

FAEGRE DRINKER BIDDLE & REATH LLP

By: */s/Todd C. Schiltz*
Todd C. Schiltz (DE Bar ID No. 3253)
222 Delaware Avenue, Suite 1410
Wilmington, Delaware 19801
Telephone: (302) 467-4200

William M. Connolly
One Logan Square, Suite 2000
Philadelphia, PA
(215) 988-2700

Zoë K. Wilhelm
1800 Century Park East, Suite 1500
Los Angeles, CA 90067
(310) 203-4000

Attorneys for Defendants Below/Appellees and Cross-Appellants AT&T Mobility LLC, New Cingular Wireless PCS, LLC, and AT&T Mobility Wireless Operations Holdings LLC

Dated: December 9, 2022