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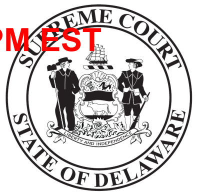

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANTS' REPLY BRIEF AND OPPOSITION TO CROSS-APPEAL

OF COUNSEL:

MICHAEL A. PULLARA
(*pro hac vice* to be filed)
1111 Hermann Drive, Suite 21A
Houston, Texas 77004
(713) 569-9758

and

AJAMIE LLP
Thomas R. Ajamie
(*pro hac vice* to be filed)
Texas State Bar No. 00952400
Pennzoil Place, South Tower
711 Louisiana, Suite 2150
Houston, Texas 77002
(713) 860-1600

Carmella P. Keener (#2810)
COOCH AND TAYLOR, P.A.
1007 N. Orange Street, Suite 1120
The Nemours Building
Wilmington, DE 19801
(302) 984-3816
ckeener@coochtaylor.com

Attorneys for Plaintiffs Below/Appellants and Cross-Appellees Alan R. Bell, Michael T. Bowers, and Om Parkash Kalra

Dated: January 3, 2023

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SUMMARY OF ARGUMENT AS TO CROSS-APPEAL

Denied. Cross-Appellant has not included a Summary of Argument as to its cross-appeal. Any "contingent cross-appeal" assertions included in AT&T's response to Appellants' Summary of Argument (including "contingent cross-appeal" assertions in AT&T's response to Appellants' Summary of Argument paragraph "2") are denied.

ARGUMENT

I. AT&T HAS FAILED TO REFUTE THAT THE TRIAL COURT ERRED WHEN IT FAILED TO FIND THAT AT&T BREACHED THE GOVERNANCE PROVISION AND THE PROTECTED INFORMATION PROVISION OF THE PARTNERSHIP AGREEMENT.

A. The MNSA Superseded All Previous Agreements and is an Expression of the Executive Committee's Will.

1. Plaintiffs' Claims are Direct, Not Derivative in Nature.

It is undisputed that the Salem Partnership Agreement stated that "[e]xcept as otherwise provided in this Partnership Agreement, complete and exclusive power to conduct the business affairs of the Partnership is delegated to the Executive Committee." *See* §4.3 (A208) ("the Governance Provision") (emphasis added). It is undisputed that the Salem Executive Committee, acting at the behest of the majority partner, granted authority to a majority partner affiliate to manage and operate the partnership's nonwireline cellular system in accordance with the terms of the Management and Network Sharing Agreement (the "MNSA").[1] It is undisputed that AT&T did not manage and operate the partnership's nonwireline cellular system in accordance with the terms of the MNSA. It is undisputed that AT&T violated the will of the Executive Committee as expressed in the MNSA and that it unilaterally substituted its own will in place thereof. Thus, the central issue

[1] *See* Op.I 23; A286; Tr. I (Wages) (A1722-A1723).

of this appeal is whether AT&T can avoid direct liability for breach of the Governance Provision by claiming that its *ultra vires* acts are a breach of the MNSA only and not also a material breach of the Governance Provision.

According to the trial court, the only reason AT&T's "pervasive disregard" of the MNSA did not give rise to a claim for material breach of the Governance Provision was because the Executive Committee had – by unwritten understanding, a 1995 Resolution, and the MNSA itself – delegated "expansive authority" to AT&T to manage the Partnership's business. According to the trial court, as a consequence of this delegation AT&T was vested by the Executive Committee with absolute authority to act on behalf of the Partnership and, therefore, anything AT&T did on behalf of the Partnership – up to and including pervasive breach of the MNSA – was done with the implicit approval of the Executive Committee.[2] Thus, according to the trial court, AT&T could be sued derivatively by the Plaintiffs for breach of the MNSA (*even though* all of AT&T's acts on behalf of the Partnership were implicitly approved by the Executive Committee) but could not be sued directly by the

[2] In their Opening Brief (hereinafter "*Op.Br.*), Plaintiffs stated, "AT&T never argued that the 1995 Resolution was an alleged source of its delegated authority." *Op.Br.* 10 and *Op.Br.* 20 n.26). AT&T did not deny this statement of fact in its Response. Thus, Plaintiffs' arguments regarding the irrelevance of the 1995 Resolution are a reply to a defense that AT&T never asserted. It was the Vice Chancellor himself who first suggested that the 1995 Resolution was a source of delegated authority. *See*, *e.g*., Op.I 18, 99-101,148, and 156. Plaintiffs preserved their objection to this *sua sponte* defense by filing a Motion for Reargument. A3158-3172.

Plaintiffs for breach of the Governance Provision (*because* all of AT&T's acts on behalf of the Partnership were implicitly approved by the Executive Committee).

In their Opening Brief, Plaintiffs rebutted the trial court's erroneous finding that, on the bases of unwritten understandings and superseded resolutions, the Executive Committee had delegated "expansive authority" to AT&T to manage the Partnership business. AT&T proffered nothing in its Response (hereinafter "*Ans.Br.*") to refute these arguments. Accordingly, in the absence of a hypothetical "expansive authority cocoon" wherein everything AT&T does is implicitly approved by the Executive Committee, the only source of authority for AT&T to act on behalf of the Partnership is the MNSA.

The MNSA expresses the entire will of the Executive Committee with respect to the subject matter of the agreement.[3] It supersedes all prior agreements among the parties relating to that subject matter.[4] It grants AT&T authority to manage and operate the Partnership business and delineates in detail how AT&T is to exercise that authority. Nowhere (in the MNSA or otherwise) is AT&T granted authority to

[3] *See* A298, ¶H.

[4] *Ibid*. *See also UPM-Kymmene Corp. v. Renmatix, Inc.*, 2017 WL 4461130, at *8 (Del. Ch. Oct. 6, 2017) ("[A] new contract, as a general matter, will control over [an] old contract with respect to the same subject matter to the extent that the new contract is inconsistent with the old contract or if the parties expressly agreed that the new contract would supersede the old one."). The MNSA contains a comprehensive integration clause explicitly stating that the new contract "supersedes all prior agreements among [the parties] related to the subject matter…." A298.

disregard these limitations or to breach any material terms of the MNSA. Nevertheless, that is exactly what AT&T did – it substituted its choices for the choices made by the Executive Committee and unilaterally exercised powers that had been delegated exclusively to the Executive Committee.[5]

AT&T's disregard of Executive Committee choices and misappropriation of Executive Committee powers breached both the MNSA and the Governance Provision. With respect to the MNSA, the wrongful acts gave rise to direct and derivative claims against AT&T in its capacity as manager. With respect to the Governance Provision, AT&T's usurpation of Executive Committee power gave rise to a direct claim against AT&T in its capacity as the majority general partner.

AT&T asserts that "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 breach of the Management Agreement." *Ans.Br.*, pp. 18-19.[6] This is wrong.

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[5] *See, e.g.,* Op.II 11-12 ("Despite having written the MNSA, ATT pervasively disregarded it. Instead of using the metrics specified in the Management Agreement to allocate revenue and expense to the Partnership, AT&T's accountants allocated revenue and expense using their own judgment about what would be 'fair and reasonable'…. AT&T never followed the Shared Revenue Formula…. AT&T also disregarded the requirement in the [MNSA] that AT&T apply a premium to Shared Revenues and a discount to the Partnership's share of 'Sales and Marketing Expenses'….") (citations omitted).

[6] This assertion is factually erroneous. The trial court declined to award damages for breach of the MNSA because Plaintiffs had not asserted a derivative claim under the MNSA. *Ergo*, any damages that the trial court did award arose from outside the MNSA. It is undisputed that the trial court awarded two specie of damages for

The same *ultra vires* acts breached multiple agreements and gave rise to multiple theories of recovery. There is nothing in the MNSA or the adopting resolution that amends, rescinds, or novates the Partnership Agreement generally, the Governance Provision specifically, or the minority partners' right to sue for breach. Adoption of the MNSA by the Executive Committee did not constitute an election of remedies by the minority partners.

Obviously, if the Partnership had executed the MNSA with an unaffiliated third party, the minority partners' only remedy for breach would have been a derivative action against that third party. But the entity that forced the Executive Committee to bestow upon it the benefits and burdens of the MNSA was a general partner in the Partnership. As such, AT&T voluntarily chose to subject itself to the rights and obligations of both the MNSA and the Partnership Agreement (inclusive of the Governance Provision and the Dissociation Remedy).

Nevertheless, the trial court is effectively treating AT&T as though it were an unaffiliated third-party manager. Under this rationale, Plaintiffs are prevented from asserting a claim for breach of the Governance Provision and are limited to asserting a derivative action for breach of the MNSA. The natural consequence of this ruling

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breach of the Partnership Agreement; *that is*, (i) Plaintiffs' share of net revenue derived from AT&T's sale of handset insurance and (ii) Plaintiffs' share of net revenue derived from AT&T's sale of Partnership Information to various government entities.

is to encourage unscrupulous majority partners to circumvent governance provisions by causing their partnerships to execute management agreements with majority partner affiliates. The majority partner can then breach both the management agreement and partnership agreement with impunity knowing that they have effectively insulated themselves from any claim for breach of the Governance Provision. This is not good policy.

AT&T claims that by identifying and proving its pervasive breaches of the MNSA, Plaintiffs are attempting to assert an unpled derivative claim. This is not correct. As noted above, the MNSA represents the will of the Executive Committee. Plaintiffs proved that AT&T breached the MNSA in order to prove that AT&T breached the Governance Provision by substituting its will for the will of the Executive Committee.

2. AT&T's Breach of the MNSA Warranted Dissociation.

AT&T argues that, because Plaintiffs did not assert a MNSA-based derivative claim, the damages resulting from its pervasive breaches of the MNSA cannot be considered to establish *either* breach of the Partnership Agreement *or* the proportionality of the remedy. However, the Partnership Agreement does not require a judgment for (or even evidence of) material damages in order to trigger the Dissociation Remedy. Rather, the Partnership Agreement focuses entirely on the

materiality of the "covenant, representation or warranty" breached by the defaulting partner.[7] *See* §§8.1 and 8.2 (A213-214):

> 8.1 Material Default. If a Partner for any reason breaches any material covenant, representation or warranty of this Partnership Agreement, and the breach is not cured within thirty (30) days after written notice of the breach is provided to the defaulting Partner by the Executive Committee, then the Partner shall be considered in material default….
>
> 8.2 Sale on Material Default. Each Partner who commits an uncured material default or causes a dissolution contrary to Section 91, shall be required to sell its Ownership Interest, and subject to any required FCC consent, to transfer to the other Partners pro rata its Ownership Interest, if any, for an aggregate amount equal to the balance of its capital account….

The trial court erred in looking to the materiality of the damages, rather than materiality of the breach. In a general partnership – where one partner dominates and every general partner can create unlimited joint and several liability in every other general partner – the most material of all provisions is the Governance Provision. In this context, the Dissociation Remedy is seen – not as a device for

[7] With regard to whether materiality has anything to do with the size of the financial losses suffered by plaintiffs as a result of Defendants' breaches, *see Knetzger v. Centre City Corp*., 1999 WL 499460, at *4 (Del. Ch. June 30, 1999) (holding that removal of a general partner was proper in view of its breach of fiduciary duty in connection with an unauthorized loan of partnership money, even though the money was paid back to the partnership and it suffered no monetary loss).

obtaining recompense from a defaulting partner – but as a mechanism to enforce the partners' agreement regarding entity governance.[8]

The Salem partners agreed (i) that "complete and exclusive power to conduct the business affairs of the Partnership" was delegated to the Executive Committee and (ii) that the minority partners would always have a seat on the Executive Committee. *See* §4.3 (A208):

> [I]f one Partner owns or is entitled or authorized to vote at least fifty percent of the Ownership Interest of the Partnership, then such Partner shall be entitled to elect two members of the Executive Committee and to remove those members and the other Executive Committee member shall be elected, and may be removed, only by majority vote of the other Partners present or represented at the Partner meeting….

Thus, when AT&T acted unilaterally on behalf of the Partnership and not through the Executive Committee, it disenfranchised the minority partners from any knowledge of or role in entity governance. As a result, AT&T was able to do with impunity the kind of *ultra vires* acts that the Governance Provision was designed to prevent and redress.

AT&T argues that damages resulting from its *ultra vires* acts can only be obtained by derivative action against New Cingular Wireless of Nevada, LLC (*that*

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[8] The Material Default Provision states that any Partner who commits a material default "shall be liable to the Partnership for, and shall indemnify the Partnership against, all resulting damages, losses, expenses and claims" and that the exercise of rights provided in §8.2 "shall not relieve the Partner of such liability or indemnification…." *See* §8.1 (A213-214).

is, the counterparty with whom the Partnership contracted in the MNSA). But this argument ignores the fact that New Cingular Wireless of Nevada is a shell corporation with no employees. Everything that was done with the assets of the Partnership – including every *ultra vires* act – was done by an AT&T affiliate *other than* New Cingular Wireless of Nevada. Traditional business activities (including the misallocation of revenue and expense to the Partnership) were performed by AT&T Mobility. Non-traditional business activities were performed by a plethora of other companies, some of which were created specifically to exploit network-related opportunities.

The irrationality of AT&T's argument is most poignantly demonstrated by the trial court's award of damages for breach of the Partnership Agreement. According to AT&T, when assessing the proportionality of a Dissociation Remedy the trial court may not even consider damages resulting from breach of the MNSA. But the trial court did make a damage award relating to (i) AT&T's sale of Partnership Information to government entities; and (ii) AT&T's sale of handset insurance to Partnership customers. In both instances the trial court quantified the award by calculating the Partnership's share of AT&T's net revenues and multiplying the result by the minority partners' percentage interest. In neither instance was the *ultra vires* act done by the AT&T-affiliate manager (New Cingular Wireless of Nevada) or the AT&T-affiliate majority partner (AT&T Mobility Wireless Operations

Holdings, LLC). With respect to sale of Partnership Information, the acts were done by AT&T Corp. With respect to the sale of handset insurance, the acts were done by Peachtree Insurance (an AT&T-owned Bahamian insurance company). Nevertheless, the trial court awarded Plaintiffs money damages against the AT&T-affiliate majority partner for *ultra vires* acts done by non-party AT&T affiliates.

Thus, notwithstanding the Vice Chancellor's explicit refusal to *either* award judgment for *or* give proportionality consideration to MNSA-related damages, the trial court's Partnership Information and handset insurance judgments are *in fact* MNSA-related damages. Revenues from the sale of Partnership Information or sales of handset insurance were "Shared Revenues" as that term was defined in the MNSA.

> "Shared Revenue" shall mean the aggregate revenue generated by Subscribers of Owner's Business and Manager's Business utilizing Owner's System and Manager's System, and any other revenues generated by the Entire Network….

See A299. As such, those revenues were subject to division pursuant to the MNSA sharing formula, and AT&T's failure to allocate them was a breach *inter alia* of the MNSA. *See* A290. In its judgment, the trial court "shared" these revenues with the Plaintiffs but did so – not on the basis of the MNSA sharing formula – but on the

basis of AT&T's discredited "2% of 2%" funnel analysis.[9] There is no rational distinction between the Shared Revenue that the trial court chose to award and the Shared Revenue that the trial court chose to deny. All of it was generated by AT&T using Partnership Assets in violation of the will of the Executive Committee. All of it was damage resulting directly from AT&T's violation of the Governance Provision.

Plaintiffs have demonstrated that the Executive Committee's adoption of the MNSA (inclusive of the comprehensive integration clause [*see* A298]) operated to revoke any preexisting grant of "expansive authority" to AT&T. Plaintiffs have proved that, by breaching the MNSA, AT&T breached the Governance Provision. According to the Vice Chancellor, Plaintiffs are therefore entitled to the award of dissociation damages.[10] *See* Op.I 172; *see also* Op.I 103 n.39. Nevertheless, AT&T

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[9] Throughout this decade-long litigation, AT&T ridiculed the materiality of every newly discovered revenue stream by claiming that Plaintiffs' interest therein was "only 2% of 2%"; *that is*, that the Partnerships were credited with 2% of AT&T's total subscribers and the Plaintiffs owned 2% of the Partnerships. Thus, the trial court's judgment reinforces and rewards AT&T's MNSA-breaching NPA-NXX accounting paradigm by assuming (on the basis of that paradigm) that the Partnerships were only entitled to 2% of any AT&T revenue stream.

[10] The trial court recognized that, as of the date of its Contract Ruling, "it is impractical to implement the dissociation remedy as written." Op.I 3. In lieu of reconstituting the Partnership and dissociating AT&T therefrom, the Court proposed that (if the Dissociation Remedy was awarded) "plaintiffs would receive as damages the entire amount by which the judicially determined fair value of the Partnership exceeds the price AT&T paid in the Freeze-Out." Op.I 4; *see also Op.Br.* 31.

dismisses the dissociation remedy as grossly inequitable. According to AT&T, there is insufficient proportionality between the dollar value of Plaintiffs' damages and the dollar value of dissociation damages.[11] But this is a cynical and self-serving argument.

Throughout the relevant period, AT&T owned 98.119% of the Partnership and the minority partners owned 1.881% of the Partnership. Op.I 2. According to AT&T's logic, for the damages to the minority partners to be proportional to the value of the majority partner interest, <u>the minority partner damages would have to be worth 52.16 times the total value of all minority partner interests</u> (*i.e.*, 98.119% / 1.8815). Assuming a Partnership value equal to that determined by the Vice Chancellor, the minority partner damage *alone* would have to be proportional to $700,608,521 in order to trigger dissociation of the majority partner (*i.e.*, $714,039,606 x 98.119%).[12] *See* Op.II 131. This proportionality analysis and the massive amounts of minority partner damage it requires to justify majority partner

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[11] In a prior case involving a similar dissociation remedy, Vice Chancellor Laster declined to enforce the remedy because the defendant's breach of the partnership agreement "did not cause the plaintiffs quantifiable damages." S*ee B&L Cellular v USCOC of Greater Iowa, LLC*, 2014 WL 6882207 *2 (Del. Ch. Dec. 8, 2014). In the instant case, however, the Vice Chancellor found and awarded damages for breach of the Partnership Agreement that were both non-nominal and quantifiable.

[12] This would imply proportional majority partner damages in the amount of $36.543 Billion (*i.e.*, $700,608,521.48 x 52.16).

dissociation writes the remedy out of existence for the minority partners but not for the majority partner.[13]

AT&T agreed to the Dissociation Remedy when it joined the Partnership. At no time did AT&T ever attempt to amend the Partnership Agreement to revise or eliminate the remedy.[14] Dissociation represented the minority partners' only check on a majority partner who enjoyed a monopoly on information and a massive imbalance of power. It is not unfair to require a majority partner not to commit material breaches of the Governance Provision. It is not unfair to require a majority partner not to disenfranchise the minority partners. And it is not unfair to require that a majority partner submit to an agreed-upon remedy when they commit such *ultra vires* acts for their sole benefit and profit.

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[13] *E.g.*, if the minority partners had sold Partnership Information and handset insurance in the same manner and for the same consideration as AT&T did and if the minority partners had (like AT&T) kept all the money for themselves, the damage to AT&T would have been $2,077,950 (*i.e.*, $39,838 * 52.16). This is more than 50% of the value of all minority partner interests in the Salem Partnership.

[14] At the time AT&T joined the Partnership, it was being sued by minority partners in the Galveston Partnership for material breach of the Galveston Partnership Agreement. The Galveston minority partner plaintiffs sought to dissociate AT&T from the partnership pursuant to the terms of an essentially identical Dissociation Remedy provision. *See* A1646-47.

B. Plaintiffs Have Not Waived Any Aspect of Their Damages Argument.

AT&T contends that the 25% premium on revenue and 10% discount on sales and marketing expenses mandated by the MNSA cannot be awarded because "Plaintiffs never asked the trial court to calculate damages in that way." *Ans.Br*. 36. According to AT&T, Plaintiffs did not 'fairly present' the issue of premium or discount and, as a result, have waived any right to recover on those bases. But this argument ignores the fact that it was AT&T that sponsored the MNSA; it was AT&T that claimed the MNSA as its principal source of authority to act; and it was AT&T that proved up the MNSA as the Partnership's operative reality for purposes of valuation. All issues related to the MNSA were tried by consent – including whether future cash flows should be adjusted to include a 25% premium on revenue and a 10% discount on sales and marketing expenses.

To appreciate the absurdity of AT&T's waiver argument it is necessary to consider AT&T's strategic use of the MNSA during a decade of litigation. In briefs, hearings, discovery responses, depositions, interviews with the Special Master, and expert reports, AT&T claimed explicitly and implicitly (i) that the MNSA was the contractual source of its authority to act on behalf of the Partnership; and (ii) that NPA-NXX was the agreed-upon way to allocate Partnership revenue and expense. It was not until Eric Wages collapsed in the crucible of cross-examination that the truth was revealed: The MNSA was the only existing allocation agreement approved

by the Executive Committee; the MNSA had never been amended to allow an NPA-NXX accounting paradigm for allocation of revenue and expense; and AT&T had never complied with the MNSA. At that moment, the contract AT&T had been using for the sole purpose of defeating the Dissociation Remedy became, for purposes of valuation, the key constituent element of the Partnership's operative reality.

AT&T cites *Protech Mins., Inc. v. Dugout Team, LLC,* -- A.3d --, 2022 WL 4004606, at *6 (Del. Sept. 2, 2022), in support of its claim that Plaintiffs waived their right to recover under the MNSA. In *Protech* the "Appellants presented no evidence" below in support of their appellate argument and "chose not to provide the Superior Court with a full copy of the Trust Agreement." *Id.* This is not even remotely analogous to the instant litigation. The MNSA was admitted into evidence (JX0217, A287) and made the subject of extensive witness examination.[15] For example, the Vice Chancellor himself interrogated Eric Wages about MNSA Exhibit A (A299) – the specific provision that contains the 25% revenue premium and 10% expense discount.

> THE COURT: The person presenting the document, please go to the last page, Exhibit A, and just have that alone on the screen.

[15] Plaintiffs relentlessly and unsuccessfully sought discovery regarding traffic – the fundamental metric for allocating revenue under the MNSA. *See*, *e.g.*, Plaintiffs' Second Sets of Interrogatories to the AT&T Defendants, *e.g.*, A426, A482, A522-A523. AT&T objected to this discovery and, at its request, the discovery was quashed and made the subject of a protective order.

> So this, Mr. Wages, looks to me like essentially a way of allocating revenue and expense among the partnerships.
>
> Did you-all follow this? Was there, like – was this the steps you-all took?
>
> THE WITNESS: Yes, back during the period that these were entered into. I would have to study it closer about all aspects of it, but yes, that would have been the way that things were done when they were entered into.
>
> THE COURT: What do you mean by "when they were entered into"?
>
> THE WITNESS: As things changed over time – and I don't know about relevant time periods sitting here right now of these cases – but there could have been aspects of this that changed over time.
>
> THE COURT: And am I – I had the impression from Mr. Pullara's questions, though, that there weren't updated service agreements, that essentially this service agreement remained in place the whole time. Is that right, or am I off on that?
>
> THE WITNESS: That's very possible. I can't answer that question sitting here today.

*See Tr.*II (Wages) 383:2-384:4 (A1825-26). Thus, AT&T was not surprised by the MNSA. Rather, they were surprised that Plaintiffs were able to use the MNSA to prove (i) that NPA-NXX was an illegitimate method for allocating revenue and expense; and (ii) that Plaintiffs were entitled *both* to participate proportionately in Shared Revenue and to receive a 25% revenue premium and a 10% expense discount.

AT&T objects that Plaintiffs did not provide expert witness testimony to calculate the effect of a 25% revenue premium and a 10% expense discount. This is silly. A trial court does not need expert assistance to perform simple mathematical calculations.[16] The parties' experts each projected revenue and expense as a part of their DCF analyses. The Vice Chancellor was able to (and in fact did) use these projections to calculate entity value both with and without the MNSA premium/discount. *See* Op.II 131. What the trial court did not do was explain why it was rational, reasonable, logical, and fair to not award entity value on a basis consistent with the Partnership's operative reality.

AT&T's argument regarding waiver is predicated on a misallocation of the burden of proof and a misappreciation of the Vice Chancellor's responsibility and authority. This breach of fiduciary duty claim is subject to an Entire Fairness standard. Accordingly, AT&T had the initial burden to prove that it paid a fair price when it purchased the assets of the Partnership. Op.II 2. AT&T failed to meet this burden (Op.II 3) and, as a consequence, the trial court became charged with the

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[16] Expert testimony is not necessary to assist the finder of fact with basic arithmetic. *United States v. Grizaffi,* 471 F.2d 69, 74 (7th Cir.1972) ("Testimony of an accounting expert was excluded when it became evident that he would do no more than make basic arithmetical computations with figures supplied to him by counsel. It is a proper exercise of discretion for a court to exclude expert testimony concerning matters clearly within the realm of jurors' comprehension.") (citing *United States v. Alker,* 260 F.2d 135, 155 (3rd Cir. 1958)).

responsibility and authority to arrive at its own independent estimate of fair value. *See, e.g., Weinberger v. UOP*, 457 A.2d 701, 714 (Del. 1983) (In an entire fairness setting, the Court tested fairness of price by the standard applied in appraisal proceedings). 8 *Del. C.* § 262(h) "unambiguously calls upon the Court of Chancery to perform an independent evaluation of 'fair value' at the time of a transaction… [and] vests the Chancellor and Vice Chancellors with significant discretion to consider 'all relevant factors' and determine the going concern value of the underlying company." *Golden Telecom Inc. v. Global GT LP,* 11 A. 3d 214, 217-18 (Del. 2010). Plaintiffs presented sufficient relevant evidence to permit the court to calculate entity value inclusive of the revenue premium and expense discount. Op.II 131. The fact that the trial court was able to (and did in fact) make this calculation is dispositive proof that Plaintiffs fairly presented the issue and the evidence.

Finally, there is serious question whether AT&T – an obstructionist litigant whose hands are dirtied by a decade of deceit about the operational reality of the Partnership – is entitled to assert the equitable defense of waiver. *See In re Coinmint, LLC.,* 221 A.3d 867, 892 (Del. Ch. 2021) (classifying waiver, estoppel, and laches as equitable defenses). AT&T seeks to estop Plaintiffs from recovering under the specific agreement that governed allocation of Partnership revenue and expense. In its place, AT&T proposes to substitute its outdated and self-serving NPA-NXX

accounting paradigm. Assuming *arguendo* that waiver occurred, it was a direct consequence of AT&T's wrongful conduct – and "equitable relief will be denied to a party who has engaged in inequitable conduct related to the matter in which he is seeking such relief." *NHB Advisors, Inc. v. Monroe Capital LLC*, 2013 WL 690624, at *2 (Del. Ch. Dec. 27, 2013).

II. PLAINTIFFS HAVE DEMONSTRATED THEIR ENTITLEMENT TO DAMAGES FOR BREACH OF THE MNSA, AND THIS COURT'S CORRECTION OF THE TRIAL COURT'S ERROR IN THIS REGARD DOES NOT ENTITLE AT&T TO RAISE AS A CONTINGENT CROSS-APPEAL AN ISSUE IT HAS NOT PRESERVED

A. The Trial Court Properly Found that AT&T Breached its Fiduciary duties.

The trial court correctly found that the Partnership's operative reality included the right to receive revenue and pay expenses pursuant to the terms of the MNSA (inclusive of the 25% premium and 10% discount provisions). The trial court also found that AT&T's books and records disregarded that operative reality and were entirely made up, based on the long-outdated NPA-NXX accounting paradigm, instead of allocating expenses and revenues – as it was required to do – on traffic. *See* MNSA Ex. A (A299).

B. The Trial Court Failed to Award the Relief Warranted by its Findings.

As Plaintiffs detailed in their Opening Brief (*Op.Br.* 35-28), the trial court erred in failing to award the relief that its factual findings warranted. The trial court calculated a DCF value inclusive of the 25% premium and 10% discount. "If the cash flow projections were adjusted to comply with the Premium Provision and include a 25% premium for Shared Revenues and the 10% discount for Sales and Marketing Expenses, then the concluded value of the DCF model would have been

$920,830,852.18." Op.II 131.[17] However, the trial court did not apply the revenue premium or expense discount in its calculation of entity value and did not explain its failure to do so. "For purposes of a remedial damages calculation following a proven breach of fiduciary duty, valuing the Partnership at $714,039,606.48 is a responsible estimate." *Id.*

C. AT&T'S Purported Cross-Appeal, Contingent in Nature, is Not Fairly Preserved or Presented, and Should Be Summarily Dismissed.

AT&T asserts a cross-appeal contingent upon whether this Court increases the award to reflect the MNSA premium and discount. *Ans.Br*. 44. If the Court increases the award on this basis, then AT&T is sincere about the appellate point and the Court is asked to rule. If the Court does not increase the award on this basis, then AT&T is not committed to the appellate point and the Court is asked to ignore it.

The ostensible reason for the contingency is "to ensure that the new damage award does not become unreasonable." *Ans.Br*. 44. However, AT&T did not assert this contingent appellate point regarding the Dissociation Remedy. If the Court grants the economic equivalent of dissociation but denies the MNSA adjustment, then (at AT&T's request) the Court will not rule on its contingent appeal – *even*

[17] This valuation does not accord any litigation asset value to the Partnership's claim against AT&T for past breaches of the MNSA. Op.II 131.

though the Dissociation Remedy will increase the award substantially more than a MNSA adjustment would have.

A contingent appeal is typically asserted where a cross appellant anticipates that an adverse ruling on a specific issue will create a new material issue that does not exist outside the context of the adverse ruling. For example, Plaintiffs are appealing the trial court's failure to find that AT&T violated the Governance Provision of the Partnership Agreement. The trial court held that "Dissociation damages would have been warranted if the plaintiffs had proven their claim for breach of the Governance Provision." Op.I 172. Thus, if this Court finds a breach of the Governance Provision, then (according to the Vice Chancellor) Plaintiffs are entitled to the Dissociation Remedy. A cross appellant – wary of an adverse judgment on Plaintiffs' appeal – might have asserted a contingent appeal of the Vice Chancellor's finding. AT&T did not do so.[18]

By contrast, AT&T's appeal is not contingent on an appellate ruling that creates a new material issue. AT&T is appealing from the trial court's refusal to tax affect the award. *Assuming arguendo* that this Court awards the MNSA adjustment (and thereby satisfies the contingency), it will not change the facts or law relevant

[18] AT&T asked this Court to affirm the judgment *inclusive of* the trial court's holding regarding Plaintiffs' entitlement to the Dissociation Remedy upon proof that AT&T violated the Governance Provision. *Ans.Br*. 55.

to the tax issue one iota. Essentially, AT&T is saying, "We're not serious about this appellate issue unless you make us pay more money."

AT&T appears to claim that the trial court erred by failing to tax affect the DCF analysis.[19] AT&T has failed to identify anywhere in the record this question (or anything approximating this question) was preserved. The reason for this failure is obvious: AT&T did not preserve this issue for appeal. Nevertheless, Plaintiffs will respond to this so-called cross-appeal subject to and without waiver of their objections.

According to AT&T, a Chancery Court must tax affect a DCF analysis even though the company at issue is a pass-through entity. *Ans.Br*. 44. Implicit in this argument is the assumption that the company at issue has sufficient reliable books and records to allow the Chancery Court to perform a traditional DCF. That is not the case here. As the trial court found, the books and records compiled by AT&T regarding the Partnership disregarded the operative reality of the MNSA and were entirely made up. Instead of allocating revenue and expense based on traffic (as required by the MNSA[20]), AT&T allocated revenue and expense based on

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[19] This characterization of AT&T's issue on appeal is Plaintiffs' own. AT&T did not state a Question Presented or identify where in the record that Question was preserved for appeal. In addition, AT&T did not articulate the Scope of Review or the Merits of its Argument. Plaintiffs object to these substantive violations of Del. Supr. Ct. Rule 14 and ask this Court to summarily dismiss AT&T's cross-appeal.

[20] *See* A299.

subscribers. Op.II 11-12. *See also Tr.II* (Wages) 383:2-384:4 (A1825-26). Instead of defining subscribers as any "user of wireless communications services, acquired and maintained by Owner or Manager and its Affiliates pursuant to an ongoing agreement for wireless communication services" (as required by the MNSA[21]), AT&T defined subscribers based on NPA-NXX. Op.II 10, 80-81. Instead of eliminating Affiliate incollect roaming revenue and Affiliate outcollecct roaming expense (as required by the MNSA[22]), AT&T continued to pay the Partnership for Affiliate incollect roaming and to charge the Partnership for Affiliate outcollect roaming. Op.I 19, 53-58; Op.II 33-34, 110 n.35. Thus, it was impossible for the Chancery Court to perform a traditional DCF because AT&T had failed to create or produce any of the necessary accounting records. Accordingly, in lieu of a traditional DCF, the trial court fashioned a damage award. And damage awards are not taxable. *See* Op.II 115-116.

In addition, implicit in AT&T's argument is the assumption that the equities between the parties are balanced. That is not the case here. The trial court determined that AT&T's breaches of fiduciary duty were so pervasive that it was necessary to give the Plaintiffs "the benefit of the doubt" at every juncture in the valuation process. Op.II 3, 99. In so doing, the trial court adopted the corollary

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[21] *See* A290.

[22] *See* A293.

principle that "uncertainties in awarding damages are generally resolved against the wrongdoer." *Ibid*. *See also Thorpe v. CERBCO, Inc.*, 1993 WL 443406, at *12 (Del. Ch. Oct. 29, 1993). Thus, any uncertainty regarding application of a tax rate to a damage award must, of necessity, be resolved against AT&T.

AT&T's argument derives entirely from *Delaware Open MRI Radiology Associates, P.A. v Kessler,* 890 A. 2d 290 (Del. Ch. 2006): "To 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." Ans.Br*. 45. In other words, AT&T argues that the trial court erred because it did not view the issue through a lens more solicitous of AT&T's bottom line. This is a natural consequence of the benefit of the doubt indulged in favor of Plaintiffs.

The Vice Chancellor cited the exact same passage to distinguish the approach in *Open MRI* from what he believed to be a more appropriate approach in a case featuring a dishonest fiduciary and a pass-through entity whose operative reality includes disregarding the entity's existence for purposes of federal income taxes.[23] As the trial court noted, "[t]he fact that the court applied a valuation principle previously does not create a rule of law." Op.II 114. The trial court correctly acknowledged that – whether or not the court tax affected the DCF – Plaintiffs would

[23] As a general partnership, Salem never paid any entity level income taxes on its revenues.

still be required to pay tax on any damages award. Op.II 115. Therefore, "not tax effecting the cash flows … does not mean that the plaintiffs will not pay tax on what they receive; it only means they will not pay effectively two levels of tax on the damages award when they only paid one level of tax before the Freeze-Out." Op.II 115-16.

Thus, the trial court correctly recognized and implemented the Partnership's operative reality as a pass-through entity.

> Under the Partnership's operative reality at the time of the Freeze-Out, the investors in the Partnership could expect to receive distributions into perpetuity from an entity that did not pay entity-level tax. An approach that permits a controller to apply a higher tax rate for purposes of a freeze-out results in a lower value for the interests held by the eliminated investors relative to the entity's operative reality. But the value of the entity's pass-through status does not disappear. Through the Freeze-Out, the controller retains that value and enjoys distributions from the entity without paying entity level-tax. Applying a tax rate to the pass-through entity for purposes of the valuation in the Freeze-Out thus transfers value from the eliminated minority to the controller. It enables the controller to profit from its wrongdoing, contrary to settled remedial principles.

Op.II 116. AT&T has never reckoned with this decisional paradigm, instead focusing only on whether the tax treatment is fair to an acquirer in a hypothetically pure accounting exercise untainted by wrongdoing. But the facts of this case, as proven and not challenged on appeal, mandate a different and fairer approach. As the trial court noted repeatedly, it was only obligated to arrive at a reasonable estimate of damages for breach of fiduciary duty and similarly obligated to not

reward a fiduciary for its actions "[o]nce disloyalty has been established." Op.II 118 (citations omitted).

AT&T meekly tries to distinguish a "valuation remedy" from a damages award by arguing that in valuation practice plaintiffs are only entitled to the economic value of their interest. *Ans.Br*. 46. But this ignores the trial court's determination that it was crafting an award of damages for breach of fiduciary duty and not simply performing an appraisal in a vacuum. Likewise, AT&T argues that not tax affecting future cash flows allows Plaintiffs to keep value they otherwise would have had to pay in taxes had they continued to receive distributions, thereby allowing them to "pocket more from damages than they would have from distributions." *Ans.Br*. 47. But this again ignores that the trial court was fashioning a damages remedy, not attempting to perfectly recreate what might have happened had the Freeze-Out not occurred. The trial court was endeavoring to prevent AT&T from profiting from its breaches of duty and, as has already been noted above, it rightly concluded that any level of tax effect applied to future cash flows in the appraisal process, coupled with the capital gains tax required to be paid on a damages award, would have rewarded AT&T and resulted in double taxation on Plaintiffs – an odd and unfair result to impose on non-breaching minority partners.

III. THE TRIAL COURT ERRED IN FAILING TO AWARD ATTORNEYS' FEES AND AT&T HAS FAILED TO DEMONSTRATE THAT PLAINTIFFS ARE NOT ENTITLED TO ATTORNEYS' FEES.

A. The Trial court Made Specific Findings of Bad Faith Litigation Tactics.

The bad faith exception to the American Rule is reserved for "extraordinary cases." *Lawson v. State*, 91 A3d 544, 552 (Del. 2014). But what could be more extraordinary than:

- A litigant who aggressively resisted discovery, even after the court had ruled against it on specific issues. Op.I 70.
- A litigant who attempted to portray as excessive and unfounded discovery that plaintiffs served at the direction of the trial court. Op.I 70 n.32.
- A litigant who raised "the largest forests of discovery objections, delays, and problems" the court had ever seen. *Ibid*.
- A litigant who repeatedly attempted to argue the merits of the case in the context of discovery disputes after repeatedly being told not to do so. *Ibid*.
- A litigant who demonstrated an "inability to understand things and [a] need to revisit issues" beyond anything the trial court had ever encountered. *Ibid*.
- A litigant who, having been admonished by the trial court against relying on overly broad, general objections in response to discovery prepared at the

direction of the court, did not comply with those rulings and did not make the required discovery. Op.I 73.[24]

- A litigant who, having been ordered to provide disclosures regarding a discovery issue that had been aggressively litigated for years, sought to evade the order and failed to make the disclosures in a timely manner. Op.I 84.[25]

- A litigant who, when ordered to file a disclosure setting forth specific information, intentionally did not provide the information specified and, at trial, attempted to use its own disobedience to justify excluding the disclosure from evidence. Op.I 70 n.32.[26]

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[24] "AT&T did not comply with those rulings. AT&T instead served responses cabined by a host of overly broad, general objections. AT&T objected to approximately 100 requests for admission, interrogatories, and requests for production [and] refused to provide documents in response to thirty-two requests for production. <u>AT&T effectively disregarded the court's instructions</u>." Op.I 73 (emphasis added).

[25] "The court issued a letter ruling that rejected AT&T's request and directed AT&T to comply. Dkt. 292. The letter ruling stated: "Paragraphs 14 through 16 [of the Supplemental Order] addressed specific requests for discoverable information. AT&T has been ordered to provide that information. It should already have done so." Op.I 84.

[26] *See also* Tr. II (Vice Chancellor Laster) at A1920-A1921 ("I read that [objection in AT&T's discovery response]. And what that suggests to me is that it was a contemporaneous admission from you-all that you weren't providing what I ordered you to provide.").

- A litigant who, when ordered to produce a witness for deposition, evaded the order by removing the case to federal court – nine years after the litigant filed the case in state court *and* fourteen days before trial. Op.I 86-87.

And what could be more extraordinary than all these acts of bad faith being committed by the same litigant in the same case?

AT&T is that litigant and this appeal is that case.

Obviously, the bad faith exception to the American Rule requires clear evidence that the alleged wrongdoer acted in "subjective bad faith." *Shawe v. Elting*, 157 A.3d 142, 149-150 (Del. 2017). This evidence, detailed above, is overwhelming. It is not interpretation or characterization by an interested party. It is the trial court's findings of fact.

B. Plaintiffs Are Entitled to Attorneys' Fees.

In their opening brief, Plaintiffs relied principally on the trial court's conclusions regarding AT&T's conduct in the litigation. Op.Br. 39-40.[27] Plaintiffs did so because AT&T did not appeal (and has now asked this Court to sustain)[28] these conclusions regarding its status as the most obstructionist litigant ever.

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[27] For example, the trial court held, "AT&T was the most obstructive litigant that this judge has ever seen, whether in private practice or on the bench." Op.I 70; Op.II 37.

[28] Without parsing out any factual findings as to which this Court should reverse, AT&T asks this Court to "affirm the trial court's judgment." *Ans.Br.* 55.

Nevertheless, AT&T contends that Plaintiffs did not submit evidence to support their claim of bad faith. This is wrong. The memorandum opinions are replete with evidence of AT&T's subjective bad faith. The problem is not a lack of evidence. The problem is that the trial court refused to take notice of its own findings of fact.[29]

AT&T makes much of the fact that Plaintiffs are the only party against whom sanctions were ever imposed. This is factually correct: Plaintiffs were sanctioned by the Vice Chancellor for failing to file timely responses to interrogatories. But if the trial court sanctioned Plaintiffs for the venial sin of failing to file 150 sets of interrogatory answers on time, why didn't the trial court ever sanction AT&T for its abject disobedience of multiple court orders? The answer is abuse of discretion. And that same abuse of discretion is manifest in the trial court's refusal to shift attorney's fees to AT&T.

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[29] Notwithstanding the litany of wrongdoing identified by the trial court in its memorandum opinions, the Vice Chancellor held, "Plaintiffs failed to make the showing required for the bad faith exception to apply. The plaintiffs did not point to any evidence. They only paraphrased the Court's comment about AT&T's conduct during discovery. The bad faith exception requires more." Op.II 133. Considering the evidence of bad faith recited by the trial court, this holding is unreasonable.

CONCLUSION

Plaintiffs respectfully request that this Court:

1. Sustain the trial court's factual findings;

2. Reverse the trial court's conclusion that AT&T did not commit material breaches of the Governance Provision and the Protected Information Provision and, on the basis of this reversal and the trial court's provisional conclusion regarding Plaintiffs' entitlement to Dissociation Damages in the event they proved a breach of the Governance Provision, render judgment for Plaintiffs in the entire amount of the Partnership's judicially determined fair value less the amount paid Plaintiffs in the Freeze-Out;

3. Reverse the trial court's refusal to value the Partnership inclusive of a MNSA-based 25% premium on revenue and a MNSA-based 10% discount on marketing and sales expenses and the trial court's determination of fair value, and, on the basis of these reversals and the trial court's provisional finding, (i) hold that the judicially determined fair value of the Partnership is $920,830,852.18; and (ii) remand this case to the trial court for proceedings consistent with this holding;

4. Dismiss AT&T's so-called cross-appeal or, alternatively, deny it in its entirety; and,

5. Hold that there is clear evidence that AT&T acted in subjective bad faith and, based on this holding, reverse the trial court's refusal to award attorneys' fees and remand this case for further proceedings consistent with this holding.

/s/ *Carmella P. Keener*
Carmella P. Keener (#2810)
COOCH AND TAYLOR, P.A.
1007 N. Orange Street, Suite 1120
The Nemours Building
Wilmington, DE 19801
(302) 984-3816
ckeener@coochtaylor.com

Attorneys for Plaintiffs Below/Appellants and Cross-Appellees Alan R. Bell, Michael T. Bowers, and Om Parkash Kalra

OF COUNSEL:

MICHAEL A. PULLARA
(*pro hac vice* to be filed)
1111 Hermann Drive, Suite 21A
Houston, Texas 77004
(713) 569-9758

and

AJAMIE LLP
Thomas R. Ajamie
(*pro hac vice* to be filed)
Texas State Bar No. 00952400
Pennzoil Place, South Tower
711 Louisiana, Suite 2150
Houston, Texas 77002
(713) 860-1600

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