NO. 79884-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM
THE NINTH CIRCUIT COURT OF APPEALS

IN

J & J CELCOM, *et al.*, Appellants

v.

AT&T WIRELESS SERVICES, INC., *et al.*, Appellees

REPLY BRIEF OF APPELLANTS

Philip E. Cutler
Robert G. Nylander
Thomas W. Hayton
Kerissa Freeberg
Cutler Nylander & Hayton, P.S.
505 Madison Street, Suite 220
Seattle, WA 98104
(206) 340-4600

ORIGINAL

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A. INTRODUCTION

The Ninth Circuit said:

> If the Supreme Court of Washington holds that the asset sales would violate the duty of loyalty, and that the language in the partnership agreements is insufficient to contract around this duty under Wash. Rev.Code § 25.05.015(2)(c)(ii), then we must reverse the district court's grant of summary judgment on this issue. Otherwise, we will affirm.

J&J Celcom v. AT&T Wireless Services, Inc., __ F.3d __, 2007 WL 676007, *4. AT&T Wireless Services, Inc. ("AWS") does not deny that it made "sales" to itself. These "sales" violate the duty of loyalty and there is no language in the partnership agreements to satisfy RCW 25.05.015(2)(c)(ii) to except these "sales" from the duty of loyalty. This Court should so hold and rule for the Appellants, the Minority Partners.

B. ARGUMENT

1. AWS Breached its Duty of Loyalty under RCW 25.05.165.

The Minority Partners agree with AWS that *Bassan v. Investment Exchange Corp.*, 83 Wn.2d 922, 524 P.2d 233

(1974) is good law.[1] The Minority Partners agree with AWS' position that "[t]he duty to account for profits derived in conducting or winding up partnership business existed under the partnership statute that applied when *Bassan* was decided (*see id.*, at 925, *citing* RCW 25.04.210(1)), and that same duty appears in RUPA as well. RCW 25.05.165(2)(a)." AWS' Brief at 16. AWS really holds up no distinction for *Bassan*, except the non-difference that in *Bassan* the partner sold assets to the partnership and in this case the AWS "bought" the assets – the partner relied on an "appraisal" in both cases. An appraisal is not the equivalent of an accounting and *Bassan* so holds.

RCW 25.05.165(2)(a) and (b) provides the overarching rules for partnership transactions. One is the duty of loyalty, RCW 25.05.165(2)(a), (b), (c). Although the RUPA adds some

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[1] AWS has done a complete about-face from the argument it presented the 9th Circuit. There, AWS argued that *Karle* was the controlling law. 2005 WL 4662905 *38-39. Appellants distinguished *Karle* in their opening brief to this Court and AWS now seems to agree.

language to state that a partner may perform certain activities (RCW 25.05.165(5) and (6)), obviously those actions must be regulated by the duty of loyalty. Specifically, if a partner's conduct furthers the partner's own interest, that conduct must comport with the duty of loyalty and profits or benefits *derived by the partner* must be accounted for and *held as a trustee* by the partner.

As for transacting business with the Partnership, RCW 25.05.165(6) codifies section 404(f) of the Revised Uniform Partnership Act. Comment 6 to section 404 illuminates what subsection (f) authorizes. Comment 6 states:

> 6. Subsection (f) authorizes partners to lend money to and transact other business with the partnership and, in so doing, to enjoy the same rights and obligations as a nonpartner....It is unclear under the UPA whether a partner may, for the partner's own account, purchase the assets of the partnership at a foreclosure sale or upon the liquidation of the partnership. Those purchases are clearly within subsection (f)'s broad approval. It is also clear under that subsection that a partner may purchase partnership assets at a foreclosure sale, whether the partner is the mortgagee or the mortgagee is an unrelated third party. Similarly, a partner may purchase partnership property at a

> tax sale. The obligation of good faith requires disclosure of the partner's interest in the transaction, however.

Uniform Laws Annotated, Revised Uniform Partnership Act (1997), Section 404, Comment (6).

Thus, RCW 25.05.165(6) permits a partner to purchase the assets of the partnership at a foreclosure sale or tax sale, so long as the partner discloses his interest in the transaction to satisfy his duty of good faith. However, the "purchase" here was surely not a foreclosure or tax sale. AWS sold a financially viable company to itself, forcing out the Minority Partners. RCW 25.05.165(6) does not contemplate or authorize this kind of transaction as the freeze out violated AWS' duty of loyalty to the Minority Partners under RCW 25.05.165(1) and (2). Its "sale" to itself does not shield it from perfoming under its duty of loyalty obligations.

When AWS actually sold the Partnerships to Cingular, and did not account for its profits to the minority partners, it breached its duty of loyalty as expressed in RCW 25.05.165

and as informed by *Bassan*. As the Ninth Circuit characterized *Bassan*, *Bassan* holds that a partner may not reap a profit in a transaction with the partnership when the partnership agreement is silent as to that type of transaction even when "the price is fair and the amount of profit is reasonable." *J&J Celcom* at *3.

2. The Rules of Statutory Construction Weigh Against AWS' Argument.

a. The Duty of Loyalty Runs to the Partnership and to the Partners.

RCW 25.05 165 sections (1) and (2) require a duty of loyalty to the partnership *and to the partners*. AWS consciously ignores the latter duty and makes it out that if the "partnership" is served by smaller accounting fees, that is all that is required. That is wrong. The rights of the partners – including the Minority Partners – must be respected under the statute. The words of the statute cannot be ignored.

b. RCW 25.05.165 (5) and (6) Cannot Be Considered to Eliminate RCW 25.05.165 (1) and (2).

RCW 25.05.165 subsections (5) and (6) cannot eliminate the plain meaning of subsections 165 (1) and (2). Subsection 165 (1) enumerates fiduciary duties. Subsection 165 (2) requires that profits or benefits obtained by a partner from the partner be held "as trustee" (165 (2)(a)); that duty is part of the duty of "loyalty" (165 (2)). Although subsection 165 (5) and (6) state a partner may further his own interest and may transact business with the partnership, he must do so within the boundaries of his obligation of loyalty to the other partners, which boundaries do not disappear just because a partner acts in his own self-interest. If the boundaries did disappear, then there never could be a duty of loyalty.

AWS cannot hide behind part of the statute and claim that it is exempt from the statutory duty of loyalty. This Court requires that the whole statute be construed together:

> [W]e are duty-bound to give meaning to every word that the Legislature chose to include in a statute and to avoid rendering any language superfluous. *Wright v. Engum*, 124 Wn.2d 343, 352, 878 P.2d 1198 (1994) ("We do not interpret statutes so as to render any language

> superfluous.") (*citing Yakima County (West Valley) Fire Protection Dist. 12 v. Yakima*, 122 Wn.2d 371, 858 P.2d 245 (1993)). *See also Seattle v. McCready*, 123 Wn.2d 260, 280, 868 P.2d 134 (1994) (stating that it is "the settled practice of construing statutes to avoid superfluous language").

City of Seattle v. Williams, 128 Wn.2d 341, 349, 908 P.2d 359 (1995). If AWS had its way, the word "loyalty" and the requirement that profits be held "as a trustee" would be construed out of the statute. In order to give meaning to RCW 25.05.165 (1) and (2), AWS' argument must be rejected.

c. *Bassan* Defines the Duty of Loyalty in Washington.

The term "loyalty" in the partnership context is defined by *Bassan*. When there is no statutory definition of a word (such as "loyalty") found in a statute, the common law interpretation is presumed.

The duty of loyalty is defined in our common law by *Bassan* and was not changed by the RUPA. According to *Bassan* at 928, the duty of loyalty is violated when one partner makes a profit from a transaction which profit was not approved by the other partners:

> Consent was not given by the appellants as to the profit taken in that transaction and Investment Exchange Corporation should be held accountable to the partnership for the profits it there realized.
>
> Further:
>
> The duty of loyalty resulting from a partner's fiduciary position is such that the severity of a partner's breach will not be questioned. The question is only whether there has been any breach at all. *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928).

Bassan at 928.

Washington has long held that where the courts have used and defined a term, the legislature is presumed to have used it in the sense used in the common law:

> In this case, as in all others of statutory interpretation, a cardinal rule in determining the question presented is to ascertain the intent of the Legislature. It is a sound rule that whenever the Legislature uses a term without defining it, such term being well known to the common law, and there given a definite meaning, such use will be presumed to have been made in the sense in which it was understood at common law. Put in another way, where terms which were used in the common law are contained in a statute without an

> explanation of their meaning, or the sense in which they are to be construed, they will receive the construction placed upon them by the common law.
>
> 'Where a statute uses a word which is well known and has a definite sense at common law or in the written law, without defining it, it will be presumed to be used in that sense, and will be so construed unless it clearly appears that it was not so intended.' 1 Lewis' Sutherland Statutory Construction (2d Ed.) § 398.

Irwin v. Rogers, 91 Wash. 284, 287, 157 P. 690 (1916). Since it is agreed by the parties that *Bassan* is good law, and there is no legislative override of the use of the word "loyalty" in the RUPA, then *Bassan's* meaning governs.

3. AWS Did Profit and Was Planning to Sell at the Time of the Squeeze Out.

AWS did in fact profit from the transaction. It should not matter whether the exact buyer or the exact amount of AWS's profit was not known at the time of the transactions. AWS timed the transactions to suit its convenience. AWS repeatedly states that the Minority Partners could not prove that the Cingular deal was afoot at the time of the squeezeouts. That is beside the point. AWS did ultimately sell assets of the Minority Partnerships without accounting to the Minority Partners for the sale proceeds. However, there is no mystery to the fact that AWS was constantly placing itself in a position to sell itself to the highest bidder. AWS has admitted this in its SEC filings, including the Definitive Proxy Statement filed March 22, 2004. A copy of the relevant pages is attached in Appendix A. The final merger, not coincidentally, landed a huge windfall for AWS executives, also as spelled out in the Proxy Statement, Appendix A.

4. Corporate Freeze-out Statutes Are a Narrow Exception to Corporate Law and Not Analogous to Partnership Law

Corporate freeze-out statutes are the result of legislative action in the corporate arena. They reverse the prior law of corporations which required unanimous voters among corporate shareholders *see*, *generally*, Mary Siegal, *Back to the Future: Appraisal Rights in the 21st Century*, 32 Harv. J. on Legis., 79 (1995). While the Model Business Corporation Act includes freeze-out provisions, the Revised Uniform Partnership Act does not. Clearly this would be a place for the legislature to act, if it deemed wise to do so. It has not, and this analogy must fail.

5. Neither *Bishop of Victoria* Nor *Welch* Nor *Sinclair* Provide Support to AWS.

AWS attempts to argue that the holding in *Bishop of Victoria v. Corporate Business Park*, LLC, 137 Wn. App. 50 (2007)[2] supports its position. The facts of *Bishop of Victoria* are completely different from this case, and the legal conclusions drawn by Division II cannot be analogized to the present case.

In *Bishop of Victoria*, the property that was owned by the LLC had been through foreclosure and a receivership. The judgment was sold by the receiver to a company called Fisgard, which held money collected by the parishioners of the

[2]On May 8, 2007, as this brief was being written, this opinion was withdrawn and replaced. 2007 WL 1328817. The cites in this brief are to the version published in the advance sheets and cited by AWS.

Diocese of Victoria (not money fronted by the Corporation Sole of the Bishop of Victoria). Division II had already ruled in an unpublished opinion that the Court had previously concluded that

> (1) the judgment was not satisfied because Fisgard was clearly a separate entity from BV, and (2) Finley had no claims to the Lacey property and the receiver had full right to issue the deed to Fisgard under the trial court's order. *Bishop v. Finley*, 121 Wn. App. 1041, 2004 WL 1053215, 2004 Wn. App. LEXIS 974.

Bishop of Victoria at 58.

On the specific issue cited by AWS in its Brief at 11, the language regarding "adverse" positions is taken entirely out of context. To understand AWS's 7-word quote, it is necessary to read two full paragraphs in the opinion, at pages 63-64:

> C. BV's Actions to Satisfy the Foreclosure Judgment
>
> ¶ 39 After the trial court entered the foreclosure judgment, BV offered AG $1,000,000 to release it from its obligation to the judgment. Finley asserts that BV breached its fiduciary duty by this offer, but the settlement never occurred. Even if it had, BV's settlement offer was not adverse to CBP and cannot form a legally sufficient evidentiary basis for a breach of fiduciary duties, because, after the

proffered settlement, BV still would have been obligated to the judgment as a member of CBP. BV would have been individually released from the judgment, but CBP would not. "A partner does not violate a duty or obligation ... merely because the partner's conduct furthers the partner's own interest." RCW 25.05.165(5). This settlement offer is not sufficient evidence of a breach of fiduciary duty because, although it was in BV's interest, it was not adverse to CBP's interest.

> ¶ 40 In another attempt to satisfy AG's judgment, BV found a buyer for the Lacey Property that was willing to pay AG $7,500,000 USD, which would have eliminated CBP, Finley, and BV's debt to AG. This also cannot be the basis for a breach of fiduciary duty because the offer was not adverse to CBP.

This settlement offer (had it worked, and it did not) would have helped CBP because it would have taken it and Finley out of debt. CBP and Finley no longer had an interest in the property, they only had debt. There was nothing left for Finley or CBP to claim in the *Bishop of Victoria* case. It would have been a different story, perhaps, if the Partnerships in the present case had been in bankruptcy or receivership. They weren't. In the present case, there were substantial assets for all the

Partnerships.

The buyer in *Bishop of Victoria* was not a straw man for the Bishop. Since Fisgard had been held to be completely separate from the Bishop, it cannot be "an affiliated party" as AWS argues at 12 of its Brief. The "New" partnerships in the present case were a surrogate for AWS. The *Bishop of Victoria* case does not speak to the factual reality of the present case.

AWS also argues that like the Bishop, it was not "obligated to continue incurring indefinitely the vast majority of large costs that were being incurred for the sole benefit of passive minority partners." AWS Brief at 12. However, the decision in *Bishop of Victoria* is not based on fiduciary partnership principles. It is based on the contractual agreement of the parties. That was a factual issue specific to that case. There is no showing that it is replicated here. Neither Finley nor CBP nor the Bishop were required to make payments. The Bishop had made payments but stopped making them. That ultimately led to the foreclosure. Again, if there had been a bankruptcy of the cellular

Partnerships, this might have been a different case.

The case of *Welch v. Via Christi Health Partners, Inc.*, 281 Kan. 732, 133 P.3d 122 (2006), is not instructive for the present case. It is, of course, a Limited Partnership case. It comes from Kansas. It deals with factual and legal issues far removed from the present case. It is a mixed entity merger case with corporate, LLC, limited partnership and partnership law issues mixed together. In addition, the Kansas Court relied upon the fact that under the L.P. agreement there was a requirement of a unanimous vote in the case of merger, but (curiously) under the same agreement, the majority partner had untrammeled authority to modify the anti-merger section of the L.P. agreement:

> Our examination of the plaintiffs' contentions begins with the partnership agreement. MR Imaging Center, L.P., was formed by agreement of the plaintiffs and Via Christi on September 17, 1985, with Via Christi owning approximately 71% of the partnership, the plaintiffs with ownership of approximately 14% of the limited partnership, and the remaining 15% owned by parties not involved in the plaintiffs' action. Initially, the agreement did not permit merger on less than a unanimous vote. However, under the terms of the agreement, *Via Christi possessed the power, as 71% owner, to*

> *modify the merger section as well as other sections of the partnership agreement.* This is mentioned to emphasize the consensual nature of the agreement, the parties' understanding that modification through merger was possible, and that a provision against such modification could have been made part of the partnership agreement. Nevertheless, the partnership continued for a period of approximately 18 years until the merger effected by the general partner on July 31, 2003.

Welch at 142. (Emphasis added).

Most important for the present case, the Kansas Court committed several errors in interpreting partnership law. It wrongly applied corporate short form merger law to a non-corporate context.[3] It defined the word "fiduciary" out of the RUPA. *Welch* at 141. And it ignored the word "partner" in the list of "partnership and other partners" to whom the duty of loyalty owes under the RUPA.[4]

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[3]Although the short form merger is often called the "appraisal remedy" (*See*, *generally*, Siegel, *supra.*) under which the dissenting shareholder can challenge to buy-out tender and have a judicial appraisal action, the Kansas Court denied this remedy which must accompany the short form merger.

[4]Specifically in Washington RCW 25.05.165 (1) and (2).

The Kansas Court's greatest error, and the error seized on by AWS in its Brief, is the error of concluding that the defendant Via Christi Health Partners did not deal with the limited partnership "on behalf of a party having an adverse interest to the partnership" when Via Christi had established a straw man LLC (which it controlled) and then Via Christi conducted a forced merger between the LLC and the limited partnership. It defies all logic to do as the Kansas Court did (and as AWS argues) to say that there can be no inherent adversity in such a situation. When two parties want the same asset, there is an automatic adversity. This is specifically so when there is no real-world yardstick as to value (*e.g.* price of publicly traded stock). In the present case, AWS has not shown, and can not show that the "Old" Partnerships were better off to be put out of business by the "New" Partnerships, which kept the assets of the "Old" Partnerships and sold them to Cingular with no accounting back. That's adversity. This Court should not follow the errors of the Kansas Court.

AWS cites to *Sinclair Oil Corp. v. Levien*, 280 A.2d 717 (Del. 1971) at page 19 of its Brief. *Sinclair* provides no rational support to AWS' argument. It is a shareholders' derivative case; corporations case, not a partnership case. It does not base its decision on the Uniform Partnership Act; and the RUPA had not even been drafted when it was decided. It is a Delaware case; AWS argued stridently in the District Court and the Ninth Circuit that Washington law must be applied. *Sinclair* does not mention the partnership fiduciary duty of loyalty. There is no holding that the partnership duty of loyalty was not violated. The wrong alleged was that Sinclair had caused its captive subsidiary Sinven to pay out excess dividends. There is no mention that Sinclair somehow used this technique to wrest possession of some asset from Sinven.

6. To the Extent That AWS Argues That the RUPA Erases the Common Law at the Time of the Formation of the Partnership Agreements, the RUPA Unconstitutionally Impairs Partnership Obligations.

AWS requests that this Court find that, because RCW

25.05.165 (5) and (6) were interjected into partnership law by the RUPA, there is essentiall no way that AWS could have violated the duty of loyalty under the RUPA. AWS's argument, simply put, is so long AWS is performing self-dealing and self-serving acts, it is immune from the duty of loyalty by dint of these subsections.

This interpretation creates a situation that, if adopted by this Court, would unconstitutionally impair the Minority Partners' contracts. Section Ten of the Federal Constitution states, "[n]o State shall . . . make any . . . Law impairing the Obligation of Contracts." U.S. Const. Art. I, § 10, cl. 1.

> Any law which changes the intention and legal effect of the original parties, giving to one a greater or the other a lesser interest or benefit of the contract, impairs its obligation. In other words, the obligation of a contract is impaired when the legislative enactment changes the obligation in favor of one party against another, either by enlarging or reducing the obligation. Thus, in order for a statute to offend the constitutional prohibition against the enactment of laws impairing the obligation of contracts, the statute must have the effect of ... changing the substantive rights of the parties to existing contracts.

16 Am. Jur. 2D *Constitutional Law* § 49 (electronic ed. 2007). If this Court interprets the RUPA to nullify the duty of loyalty owed to other partners so long as the wrongdoer was performing acts of self-interest, then this would change the substantive rights of the parties from their original agreement, eliminating the partners obligation of loyalty to one another.

These partnership agreements were entered into long before the RUPA was enacted in Washington in 1998. Prior to the RUPA, parties that entered into a partnership agreement were governed by the Uniform Partnership Act.

As pointed out in the Brief of Appellants, under the Uniform Partnership Act,[5] there were two primary statutory duties for a partnership, codified in RCW 25.04.200[6] and RCW 25.04.210[7]

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[5] RCW chapter 25 .04, Laws of Washington 1945 ch. 137. The statute was repealed by the adoption of the revised Uniform Partnership Act, RCW 25.05.

[6] Uniform Partnership Act § 20. "Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability."

[7] Uniform Partnership Act § 21.

> Each partner has two primary duties to the partnership. The partner must relate relevant information regarding "all things affecting the partnership" to any other partner requesting the same. RCW 25.04.200. In addition, a partner must account to the partnership for any benefit or profit held by the partner relating to any aspect of the partnership. RCW 25.04.210.

Washington Partnership Law and Practice Handbook (Rev. ed. 1992), § 4.3.3 *Bassan* was concerned with the duty to account for the partnership for any benefit or profit held by the partner relating to any aspect of the partnership. AWS has argued long and hard that Washington law governs the partnership agreements. If one bargained for and got Washington law, one got *Bassan*. If this duty to account is found not to be subsumed under the duty of loyalty that partners owe to one another under the current RUPA, RCW 25.05.165(2)(a), then the RUPA unconstitutionally removed a right of the partners that was theirs when they entered into the contract.

7. AWS has not shown that the duty of loyalty was eliminated by the partnership agreements.

The Minority Partners showed, at pages 23-28 of their

Opening Brief that there was nothing in the Partnership Agreements that would excuse AWS from the duty of loyalty. AWS has not overcome that argument in its Brief at 26-29.

Admittedly, the voting requirements in the Partnership Agreements have to do with such things as sales. But those same voting requirements do not specifically, or even implicitly, release AWS from the duty of loyalty. There is nothing in the Partnership Agreements which lists "specific types or categories of activities that do not violate the duty of loyalty." RCW 25.05.15(2)(c)(i).

The acts complained of in the present case were not ratified before or after the squeeze out sales, as would be required by RCW 25.05.015(2)(c)(ii). Nothing in the Partnership Agreements authorized AWS to sell the assets of the Partnership to captive "New" partnerships, hold those assets for resale and sell them without accounting for the profits to the Minority Partners. Nothing excused AWS from the breach of loyalty seen in the totality of circumstances in this case.

C. CONCLUSION

This court should answer the Ninth Circuit in the affirmative, that under *Bassan* and RCW 25.05.165 the sales violate the duty of loyalty.

DATED this 10th day of May, 2007.

Philip E. Cutler (WSBA #5084)
Robert G. Nylander (WSBA #17264)
Thomas W. Hayton (WSBA #5657)
Kerissa Freeberg (WSBA #35789)
Of Cutler Nylander & Hayton, P.S.
Attorneys for all plaintiffs

Appendix A

http://www.sec.gov/Archives/edgar/data/1138234/000095012304003552/v96651dmdefm14a.htm#106 (last visited 5 May 2007).

AT&T Wireless Services Inc.
Definitive Proxy Statement dated March 22, 2004.

Background of the Merger (p. 8)

In April 2000, AT&T Corp. (which we refer to as "AT&T") made an initial offering of shares of AT&T tracking stock designed to track the performance of AT&T's wireless operations, which AT&T designated as the AT&T Wireless Group. Thereafter, on October 25, 2000, AT&T announced that it intended to spin us off as an independent company. On January 21, 2001, NTT DoCoMo, Inc. acquired shares of AT&T preferred stock designed to track the AT&T Wireless Group, representing an economic interest of approximately 16% in the AT&T Wireless Group, together with warrants to acquire additional shares. The aggregate purchase price for the shares and the warrants was approximately $9.8 billion.

In connection with NTT DoCoMo's investment, we and AT&T agreed to use our reasonable efforts to enter into separation agreements for our spinoff on or prior to January 1, 2002. In addition, we, AT&T and NTT DoCoMo entered into an Investor Agreement in which we agreed, among other things, to certain commitments with respect to the launch of service based on W-CDMA technology. On July 9, 2001, AT&T completed our spinoff and we became an independent, publicly traded company. The outstanding shares of AT&T Wireless Group tracking stock were exchanged for shares of our common stock, resulting in NTT DoCoMo owning approximately 16% of our outstanding common stock.

In March 2002, we first had conversations with representatives of SBC and BellSouth with respect to the possibility of exploring a business transaction between Cingular and us. On April 2, 2002, we entered into confidentiality agreements with SBC and with BellSouth in connection with the possibility of exploring such a transaction. However, these conversations did not proceed beyond the preliminary and conceptual stages and were discontinued shortly after the confidentiality agreements were signed and without exchange of any confidential information. Thereafter, in the spring of 2002, we had discussions, and entered into a confidentiality agreement, with another third party about the possibility of a business combination. Over the course of the spring and again in the fall of 2002, we continued to have exploratory discussions with this third party with respect to a possible business combination, but these discussions did not result in any agreement.

In the late fall of 2002, we also commenced discussions with NTT DoCoMo with respect to an amendment to the Investor Agreement to amend our technology commitments under that agreement. We and NTT DoCoMo entered into an amendment dated as of December 26, 2002, providing for revisions to our technology commitments to extend the date and specify the markets for the launch of W-CDMA service. The amendment also provided for, among other things, an additional NTT DoCoMo representative on our board and consultation rights under which NTT DoCoMo would receive advance notice of, and the right to consult on, specified types of proposals that might be made by a third party to acquire us.

From the end of 2002 until the fall of 2003, our board periodically reviewed the state of the wireless industry and the issue of whether a business combination would be in our best interest and the best interests of our shareholders. In the fall of 2003, we commenced exploratory discussions with two third parties with respect to the possibility of a business combination. One of these two parties was the party with whom we had previously entered into a confidentiality agreement and engaged in discussions during the spring and fall of 2002. We entered into a confidentiality agreement with the other third party on December 15, 2003. During this same time period, we also began to have contacts with additional third

parties interested in the possibility of a business combination transaction with us. At a regularly scheduled board meeting on December 18, 2003, our management again reviewed the state of the wireless industry with our board, and described the discussions and contacts between our management and these third parties.

By early January 2004, it had become clear that a number of companies were interested in the possibility of an acquisition of or business combination with us. In January 2004, we engaged Merrill Lynch to act as our financial advisor in connection with a possible strategic transaction. From early to mid-January 2004, we signed confidentiality agreements, and commenced or accelerated discussions and exchanges of information, with three parties. One of these three parties was Cingular. We also executed extensions of the existing confidentiality agreements with SBC and BellSouth. In addition, we continued discussions with the third party with which we had signed a confidentiality agreement in December 2003. Because NTT DoCoMo was one of the parties expressing a possible interest in a transaction, we also commenced discussions with NTT DoCoMo with respect to a waiver of NTT DoCoMo's consultation rights in the event we were to decide to pursue seriously a transaction (the triggering event for activating the consultation rights).

As a result of these discussions, and in anticipation of a regularly scheduled meeting of our board on January 20, the third party that had signed a confidentiality agreement in December 2003 provided us with an outline, on January 14, setting forth the terms of a possible cash and stock merger. The outline contemplated that the consideration would consist mostly of stock, and the aggregate value would be more than $11.00 per share of our common stock based on the then market price of the third party's stock. On January 17, SBC and BellSouth submitted a letter and draft merger agreement to us proposing a cash merger between us and Cingular valued at $11.25 per share of our common stock.

At its meeting on January 20, our board again conducted an extensive review of our business plans, potential values, and the risks involved in seeking to achieve those values. Our management and our advisors reviewed with our board the range of companies that might be interested in a transaction with us, the types of transactions that might be pursued, and the values that might be achievable. Our legal advisors also reviewed with our board the legal standards applicable to the board's decision-making process. The NTT DoCoMo representatives on our board recused themselves from the discussions relating to the possibility of pursuing proposals or strategic alternatives.

Following these presentations and reviews, as well as further discussion and deliberation, our board concluded that it would be in our best interest and the best interests of our shareholders to explore strategic alternatives. On January 22, we made a public announcement to this effect.

In order to implement the review of strategic alternatives, our board directed our management and our advisors to commence a formal process to solicit proposals for an acquisition of all the shares of our common stock. Our board further directed Merrill Lynch to invite NTT DoCoMo to submit a proposal and participate in the process if, but only if, NTT DoCoMo agreed to a limited waiver of its consultation rights so that we would not be required to share with NTT DoCoMo the identity of other parties who submitted proposals or the terms of such other parties' proposals. On January 27, we and NTT DoCoMo signed a waiver letter under which NTT DoCoMo granted this limited waiver. Later that same day, Merrill Lynch, on our behalf, sent letters to the four parties who had executed confidentiality agreements in December 2003 or January 2004, formally soliciting the submission of acquisition proposals by 5:00 p.m., Eastern time, on February 13. We and Merrill Lynch also informally contacted other parties to assess their interest in participating in the proposal process, but none of these other parties decided to participate in the formal process.

On January 28, our legal advisors sent a proposed draft merger agreement to the legal advisors for each of the four parties that had received a formal letter from Merrill Lynch. In the case of Cingular, the draft reflected the changes from the draft previously submitted by Cingular with its initial bid. Also during that week, and for the following two weeks, all four parties conducted substantial business and legal due diligence on us, and we began due diligence activities with respect to those parties that might propose to include stock as part of the merger consideration. Commencing during the week of February 2, and

continuing through the following week, our legal advisors engaged in discussions and meetings with legal advisors for each of the four parties with respect to the proposed merger agreement and related schedules to the proposed agreement.

On January 30 and February 9, our board held meetings to discuss the process and ongoing developments with our management and our advisors. At each of these meetings, our management and our advisors reported on their discussions and negotiations with the four interested parties. Our board also continued to review valuation analyses and asked for additional valuation materials, which we and our advisors provided at subsequent meetings. The NTT DoCoMo representatives on our board recused themselves from these discussions. The board directed our management and our advisors to continue to make as much progress as they could, with the goal of receiving fully developed proposals by February 13. At the February 9 meeting, our board also heard a preliminary report on our January financial results, and directed that this information be provided to each of the four parties in the proposal process, which we did over the next two days. In addition, on February 11, the compensation committee of our board approved certain amendments to our Senior Officer Severance Plan. See "— Interests of Certain Persons in the Merger — Senior Officer Severance Plan."

On February 13, NTT DoCoMo and one other party each informed us that it had determined not to submit an acquisition proposal. This other party expressed a continuing interest in a business combination with us in the event we did not enter into an agreement as a result of the proposal process. Later that day, we invited the NTT DoCoMo representatives on our board to rejoin future board meetings and discussions with respect to the proposal process. On the evening of February 13, the other two parties, one of which was Cingular, submitted proposal letters and revised drafts of the merger agreement. Each of the two parties proposed an all-cash merger for all our shares. Cingular proposed a price of $12.50 per share of our common stock, which was lower than the price proposed by the other party.

Our board reviewed the two proposals at a meeting starting on the morning of February 14. At this meeting, our management and our advisors reviewed with the board the financial and legal aspects of the two proposals, including open issues and risks relating to each proposal. Following further discussion, the board determined that it was not satisfied with the financial or other terms of either proposal, and directed management and the advisors to seek improvements in both price and terms from each party. With respect to non-financial terms, the board directed the advisors to seek as high a level of closing certainty as possible in each proposal. The board then recessed, but thereafter received periodic telephonic updates. The board agreed to reconvene in person on the morning of February 16, subject to reconvening earlier if events warranted. Following the board meeting, Merrill Lynch, on our behalf, requested that each of the two parties submit a revised proposal by 11:00 a.m. on February 15. Later on February 14, our legal advisors held meetings with the legal advisors for each of the two parties to review contract issues and requested revisions.

On February 15, Cingular and the other party each submitted a revised proposal letter and a revised draft of the merger agreement. Cingular's letter contained a revised all-cash merger proposal at $14.00 per share of our common stock, subject to an expiration deadline of 9:00 p.m. that evening. The other party's letter contained a revised all-cash merger proposal at a price higher than its original price but lower than Cingular's new proposal, subject to an expiration deadline of 8:00 p.m. the following evening. Cingular's revised merger agreement also contained a number of revisions responsive to requests made by our legal advisors. Throughout the day and night of February 15, we had a number of discussions with representatives of each of the two parties in an effort to improve further the level of closing certainty reflected in each merger agreement and to finalize the other terms of the agreements. We also requested that Cingular extend its expiration deadline to accommodate a reconvening of our board on the morning of February 16, which Cingular agreed to do on the evening of February 15.

On the morning of February 16, shortly prior to the reconvened meeting of our board, the other party contacted us with a revised proposal of $14.00 per share of our common stock. Cingular did not revise the economic terms of its proposal prior to our board meeting, but did deliver a revised draft of the merger agreement on the morning of February 16 reflecting further progress in response to the discussions with

our legal advisors. Through much of the day on February 16, while our board meeting continued, our legal advisors and the legal advisors for each of the two parties continued discussions towards finalizing the draft merger agreements.

At its meeting on February 16, our board discussed the two revised proposals with our management and our advisors, including the terms of the merger agreement proposed by each party and the conditions and risks associated with each party's proposal. The board reviewed again our stand-alone business plans, the potential values that we might achieve on a stand-alone basis, and the risks involved in seeking to achieve those values. The board also reviewed and considered, with our advisors, the various factors described under "—Recommendation of the AT&T Wireless Board of Directors; AT&T Wireless' Reasons for the Merger," including regulatory approval risks, shareholder approval risks, and other risks in connection with the proposals. Our legal advisors reviewed again with the board the legal standards applicable to the board's decision-making process. Following these reviews and further discussion, the board determined to contact each of the two parties in an effort to ensure that each party had made its best and final offer.

Shortly after 3:00 p.m. on February 16, at the direction of the board, one of our outside directors contacted the chief executive officers of SBC and BellSouth, and the chief executive officer of the other party, asking each party to submit its best and final price by 4:00 p.m. that afternoon. Around 4:00 p.m., each party submitted a letter reconfirming its $14.00 per share price. Cingular also offered to pay interest at a rate of 4% per annum commencing on December 16, 2004 if the transaction had not closed before then.

Our board then commenced further deliberations with respect to the two proposals. Given that the two proposals were both at $14.00 per share, these deliberations focused on timing risks and closing certainty related to each. As deliberations progressed, and after receiving advice from our legal advisors, the board's judgment was that, subject to resolution of remaining issues, the other party's proposal appeared slightly superior to Cingular's in terms of timing and risk. Accordingly, the board directed management and our advisors to continue to try to resolve the remaining issues with the other party and to finalize the merger agreement.

While discussions with the other party were continuing, one of Cingular's advisors contacted one of our advisors to inquire whether our board would be willing to consider an offer of $15.00 per share were Cingular to make such a proposal. The Cingular advisor stated that both the SBC and BellSouth boards would have to be convened to approve such a proposal before it could be made. Our board instructed our advisor to respond that the board would be willing to consider such an offer were Cingular to make it.

In subsequent conversations, Cingular's advisor requested assurance that if Cingular were to deliver a $15.00 per share proposal by 3:00 a.m. on February 17, we would be willing to sign the merger agreement with Cingular immediately. In considering this request, our board believed that it was unlikely that the other party would be willing to bid at least $15.00 per share based on the other party's bidding history and the discussions with the other party to date. Based on these considerations, and not wanting to jeopardize a potential $15.00 per share offer from Cingular, our board instructed our advisor to provide the requested assurance. Cingular's advisor also made clear that were a $15.00 per share proposal to be made, it would be without the added 4% interest provision that had earlier been offered in connection with the $14.00 per share proposal.

Following these conversations, our board passed resolutions authorizing acceptance of the $15.00 per share proposal if it were made, and approving the merger agreement as previously negotiated with Cingular and presented to the board. In connection with the board's consideration of these resolutions, Merrill Lynch delivered orally its fairness opinion, later confirmed in writing, as described under "— Opinion of AT&T Wireless' Financial Advisor." At approximately 2:00 a.m. on February 17, representatives of Cingular, SBC and BellSouth arrived at the offices of our legal advisors with the merger agreement fully executed on behalf of all parties other than us. John D. Zeglis, our chairman and chief executive officer, then executed the merger agreement on our behalf. We and Cingular announced the execution of the merger agreement at approximately 5:00 a.m. on February 17.

Interests of Certain Persons in the Merger (p. 21)

In considering the recommendation of our board of directors with respect to the merger agreement, you should be aware that our executive officers and directors have interests in the merger and have arrangements that are different from, or in addition to, those of our shareholders generally. Our board of directors was aware of these interests and considered them, among other matters, in reaching its decisions to approve the merger agreement and to recommend that our shareholders vote in favor of the merger agreement.

Equity Compensation Awards (p. 21)

The merger agreement provides that immediately prior to the merger, each of our stock options, including those held by our executive officers and directors, will vest and be converted into the right to receive the excess, if any, of $15.00 over the exercise price of the stock option for each share of our common stock subject to the option less applicable withholding tax and without interest. In addition, the merger agreement provides that immediately prior to the merger, each of our restricted stock units or deferred stock units (including any performance share award that has not yet been converted into shares), including those held by our executive officers and directors, will vest and be converted into the right to receive $15.00 for each share of our common stock covered by the award, subject to any deferral election in effect immediately prior to the merger made by the holder under our deferred compensation plans, less any withholding tax and without interest. Based on the equity compensation award holdings anticipated as of December 30, 2004, assuming target performance under the performance share award program and assuming that no stock options are exercised after the date of this proxy statement and before December 30, 2004, upon completion of the merger, Messrs. John D. Zeglis, Chairman, President and Chief Executive Officer, Andre Dahan, President, Mobile Multimedia Services, Michael Keith, President, AT&T Wireless Mobility Operations, Joseph McCabe, Jr., Executive Vice President and Chief Financial Officer, and Lewis Chakrin, Executive Vice President, Corporate Strategy and Business Development, and our remaining executive officers as a group and our directors as a group, would receive cash payments in amounts equal to $4,408,594, $2,362,031, $2,362,031, $1,296,422 and $1,296,422, and $8,628,150 and $279,999, with respect to their unvested stock options, and $9,880,170, $3,248,435, $3,248,435, $2,124,255 and $2,124,255, and $11,918,035 and $398,370, with respect to their unvested restricted stock and performance share awards. We describe under "Director Compensation" the effect of the merger on equity compensation award holdings of our directors.