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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ACP MASTER, LTD., AURELIUS CAPITAL MASTER, LTD., and AURELIUS OPPORTUNITIES FUND II, LLC, Plaintiffs-Below, Appellants, v. SPRINT CORPORATION, SPRINT COMMUNICATIONS, INC., STARBURST I, INC., and SOFTBANK CORP., Defendants-Below, Appellees.	No. 382, 2017 On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 8508-VCL PUBLIC VERSION FILED: NOVEMBER 27, 2017
ACP MASTER, LTD., AURELIUS CAPITAL MASTER, LTD., and AURELIUS OPPORTUNITIES FUND II, LLC, Petitioners-Below, Appellants, v. CLEARWIRE CORPORATION, Respondent-Below, Appellee.	No. 380, 2017 On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 9042-VCL

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NATURE OF PROCEEDINGS

Sprint Corp. ("Sprint") owned a majority stake in Clearwire Corp. ("Clearwire"), but wanted to own all of it. For years Sprint had been paying Clearwire for access to its wireless spectrum—the highway on which cellular traffic travels—to support the data demands of Sprint's retail customers. By the fall of 2012, as data demand skyrocketed, Sprint projected it would have to pay Clearwire billions just to keep pace. Sprint decided to freeze out minority stockholders and take full control of Clearwire before that happened.

The problem was that DISH Network Corp. ("DISH") wanted Clearwire, too. DISH, like Clearwire, had amassed a lot of spectrum. But DISH had not built a wireless network. It desired a partnership with Clearwire to leverage Clearwire's network infrastructure and expertise.

So, Sprint and DISH started bidding. Sprint proposed a merger with Clearwire at $2.97 per share. DISH countered with a tender offer at $3.30 per share. Sprint bumped the merger price to $3.40 per share, and DISH responded by increasing its tender offer to $4.40 per share. Sprint finally sealed the deal at $5.00 per share.

This is where it gets strange. In its appraisal decision below,[1] the Court of Chancery held that the fair value of Clearwire's stock on the merger date was only *$2.13* per share. That is a staggering discount to the $5.00 merger price. But, even more remarkably, it is less than half of what DISH—a third party bidding at arm's length—offered for a *minority stake* in Clearwire.

This holding is virtually unprecedented. Until now, to Plaintiffs' knowledge, only one Delaware court[2] had appraised a company's stock at more than a 20% discount—much less a *50%* discount—to what an arm's-length bidder offered to pay for it. The Court of Chancery's historic ruling was the product of two compounding legal errors.

First, the court simply disregarded DISH's $4.40 tender offer in its valuation of Clearwire; there is not a single mention of that crucial fact in the entire appraisal analysis. And this omission is especially puzzling because, *elsewhere* in its opinion, the court held that the very same DISH offer "render[ed] immaterial"

[1] These appeals arise from a plenary action (C.A. No. 8508-VCL in the Court of Chancery) and an appraisal action (C.A. No. 9042-VCL in the Court of Chancery). The Court of Chancery tried the two actions together and issued a single post-trial memorandum opinion resolving them. On October 5, 2017, this Court granted Appellants' motion to consolidate the appeals in the two actions.

[2] In a decision that "turn[ed] entirely on the fact that one expert's proffered opinion, for a host of reasons, was totally, completely unreliable," the Court of Chancery appraised a company's stock at $0.00. *In re Hanover Direct, Inc. S'holders Litig.*, 2010 WL 3959399, at *1 (Del. Ch. Sept. 24, 2010).

Sprint's "extensive, intentional, and manipulative" unfair dealing, warranting judgment for Sprint in the plenary action.[3] The Court of Chancery did not attempt to reconcile its appraisal of $2.13 per share with the $4.40 per share bid by a sophisticated third party, which in practice could acquire no more than a 33% stake. By failing to consider DISH's bid, the Court of Chancery violated the appraisal statute's directive to "take into account all relevant factors."[4]

Second, the court's choice of projections to appraise Clearwire rested on a legally insupportable finding about Clearwire's operative reality as of the merger date. In the court's view, had the merger been defeated, Sprint, as majority stockholder, would have imposed a "temporary solution" on Clearwire, under which Sprint "would have followed through on" earlier "threats" it had made[5]—namely, to tighten its grip on Clearwire, dilute other stockholders, keep Clearwire barely solvent, and then acquire Clearwire sometime later at a lower price. Remarkably, those were among the very threats that the Court of Chancery elsewhere found—and appropriately so—constituted unfair dealing. In short, the court appraised Clearwire on the assumption that its fiduciary, Sprint, would *continue* to breach its duties, and would do so without paying a penny of damages

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[3] Memorandum Opinion ("Op.," Ex. A) 50, 58, 72.

[4] 8 *Del. C.* § 262(h).

[5] Op. 81-82.

to minority stockholders. That despotic notion, a pillar of the court's appraisal ruling, flies in the face of Delaware law.

Those same errors infected the court's ruling in the breach case. Although the court found (correctly) that Sprint had engaged in unfair dealing to foist the merger on Clearwire's stockholders, it ultimately declined to award any damages for breach of duty because the court found the ultimate merger price ($5.00 per share) to be materially higher than what the court found to be Clearwire's fair value ($2.13 per share). Because the court's $2.13 valuation is legally erroneous, however, that logic falls away.

For these reasons, the Court should vacate the Court of Chancery's orders and remand both the appraisal action and the fiduciary-duty action.

SUMMARY OF ARGUMENT

I. The Court of Chancery erred as a matter of law by failing to "take into account all relevant factors" in appraising Clearwire at $2.13 per share.[6] Just before the appraisal date, a third party (DISH) had offered to buy just 33% of Clearwire for more than *twice* that amount. DISH's bid is, to say the very least, "relevant" to Clearwire's fair value. Yet the court did not even *mention* DISH's bid in its appraisal analysis, much less attempt to reconcile its appraisal award with DISH's much higher bid. That was legal error.

The court also legally erred in assuming that Clearwire's operative reality on the merger date was continued victimization by Sprint. Delaware courts must presume that fiduciaries will be faithful to their duties, or at least pay compensation for any breach. The Court of Chancery did neither. Instead, it grounded its appraisal on the assumption that, in the event the merger were disapproved, Sprint, though Clearwire's fiduciary, would depress the price of Clearwire's stock, consolidate its control over Clearwire, then squeeze out Clearwire's minority stockholders at some later date. That conduct would constitute a breach of Sprint's fiduciary duties. Indeed, the Court of Chancery

[6] 8 *Del. C.* § 262(h).

effectively acknowledged as much, finding that Sprint's prior threats to engage in precisely such conduct was unfair dealing.

II. The Court of Chancery's ruling in the plenary action was driven by its legal errors in the appraisal action. The court found that Sprint had engaged in unfair dealing that was "extensive, intentional, and manipulative,"[7] and explained that the merger would have failed entire-fairness review had it closed at $2.97 per share. The court declined to award damages, however, because it held that fair value was less than the ultimate merger price. Because the court's fair-value finding was legally erroneous, its rationale for awarding no damages falls away. Accordingly, if the Court remands the appraisal case, it likewise should remand the plenary case for the trial court to reconsider its ruling in light of its reconsidered finding of fair value.

[7] Op. 58.

STATEMENT OF FACTS

A. Clearwire Is Formed To Capitalize On The Wireless Revolution

Wireless spectrum—the electromagnetic waves that enable wireless devices to communicate—is the backbone of mobile telecommunications.[8] Spectrum demand has soared over the last decade due to the proliferation of data-intensive devices, like smartphones and tablets, and concomitant demand by mobile users to stream music, watch videos, and surf the Internet.[9] But the supply of spectrum is limited.[10] The federal government has allocated only a small amount of bandwidth for mobile use, and it sells licenses to those frequencies, well, infrequently.[11]

Clearwire set out to capitalize on the escalating demand for spectrum and assembled a large portfolio of spectrum in the 2.5 GHz frequency.[12] In 2008, Sprint and a group of investors—comprising Intel, Comcast, Bright House, Time Warner, and Google (together, the "Strategic Investors")—recapitalized

[8] A3680:1-20 (Merson).

[9] A3322 ¶ 70; *see* A3137 at 100:3-14 (Saw).

[10] A3691:5-9 (Bazelon).

[11] *Ibid.*; *see* A3320-21 ¶¶ 60, 62.

[12] Op. 2.

Clearwire.[13] Sprint contributed its 2.5 GHz spectrum licenses, and the Strategic Investors contributed cash.[14]

Following its recapitalization, Clearwire controlled the largest portfolio of wireless spectrum in the United States.[15] Sprint was Clearwire's majority stockholder, with 51% of Clearwire's equity; the Strategic Investors owned 22%.[16]

B. Sprint Becomes Clearwire's Largest Customer, And Projects Increasing Reliance On Clearwire

Sprint was not only Clearwire's controlling stockholder, but also its dominant customer.[17] Sprint and Clearwire were parties to a wholesale agreement whereby Sprint bought network capacity from Clearwire to satisfy the data demand that Sprint's own network could not handle. Under that agreement, Sprint paid Clearwire a usage fee based on the amount of data (or "tonnage") that Sprint placed on Clearwire's network.[18]

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[13] A3328-29 ¶¶ 95-96; A234, A237-39.

[14] Op. 2; *see* A3328-29 ¶¶ 95-96.

[15] Op. 3; *see* A3334 ¶ 112; A4046.

[16] Op. 2; A3330 ¶ 99.

[17] A1582.

[18] Op. 5.

Sprint was heavily reliant on Clearwire.[19] Sprint had little spectrum of its own—less than its competitors[20]—and it forecast "growing subscriber needs" that it would struggle to satisfy.[21] It projected that it would "begin to run out of . . . capacity on [its] own spectrum in 2013."[22] Sprint acknowledged, time and again, that it was "reliant on Clearwire for additional spectrum capacity."[23]

Sprint routinely capitalized on its role as Clearwire's dominant customer. In 2011, for example, Sprint publicly (and falsely) threatened to use a different spectrum wholesaler if Clearwire did not reduce its rates.[24] Clearwire's stock and bond prices plummeted in direct response to this threat.[25] Clearwire took the hint,

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[19] *E.g.*, A516-20; A687.

[20] A3686:9-12 (Bazelon); A4046.

[21] A607; A3532:4-21 (Cowan); A3516:16-24 (Schell).

[22] A2861; *accord* A734.

[23] A734; *accord* A495 ("This work has served to highlight the significant reliance we have upon Clearwire."); A522 ("Clearwire spectrum is the best (and maybe only) swath of available, useable and national spectrum."); A527 ("[N]et-net . . . we will be competitively challenged without Clearwire."); A2904 ("[W]e will still be competitively disadvantaged until we can turn up the 2.5GHz TDD LTE.").

[24] *E.g.*, A241; A257; A279; A1441; A3651:8-15 (Hesse).

[25] A3340 ¶ 144; A3521:1-3 (Schell); A3662:11-A3663:2, A3674:12-15 (Stanton).

and slashed the rates it was charging Sprint.[26] Clearwire's chairman lamented that "it is sad [Sprint] sunk to this."[27]

Sprint's increasing reliance on Clearwire was also reflected in Sprint's business plans. In 2012, Sprint management developed several sets of internal projections for its board.[28] The plans differed in their operational details, but every one of them assumed that Sprint would place more than 1.5 billion gigabytes of tonnage on Clearwire's spectrum from 2013 through 2017.[29] This was *three times* the Sprint tonnage that Clearwire was assuming in its own financial projections.[30] As it turns out, that information disparity had profound consequences—including in the appraisal ruling below.

C. Clearwire Develops Financial Projections Unaware Of Sprint's Plans

Sprint shared none of these internal plans with Clearwire. Accordingly, Clearwire was constrained to make its best guess about Sprint's demand for Clearwire's spectrum using publicly available data.[31] As Clearwire's then-Chief

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[26] A323-24; A3341-42 ¶ 149.

[27] A247.

[28] Op. 86-87; *see* A3343-44, A3349-50 ¶¶ 155, 173, 175.

[29] *See* A618; A1159-91 (Native); A1115.

[30] *See* A3119 (Native, Tab "Revenue," Line 58).

[31] Op. 57; A2145.

Technology Officer observed, the projections were "a very simplistic model based on [Clearwire's] own assumptions."[32]

Clearwire first created a "Multi-Customer Case."[33] The Multi-Customer Case assumed that Clearwire would attract at least one large wholesale customer in addition to Sprint.[34] Clearwire later created a "Single-Customer Case" when its efforts to attract non-Sprint customers had stalled. The Single-Customer Case assumed that Sprint would remain Clearwire's only significant wholesale customer.[35]

Both of these projections—the latter of which the Court of Chancery ultimately adopted for its appraisal—materially understated the amount of tonnage that Sprint was projecting to place on Clearwire's spectrum. In reviewing early drafts of Clearwire's proxy statement, Sprint compared Clearwire's Single-Customer Case and Multi-Customer Case projections to what Sprint itself was projecting to pay Clearwire.[36] Sprint observed what Clearwire never knew:

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[32] A3140 at 149:14-15 (Saw).

[33] A3351 ¶ 181.

[34] Op. 20.

[35] *Ibid*.

[36] A1488-89.

"*Sprint revenue [was] assumed by CLWR to be far less than Sprint assumed*."[37] Indeed, Sprint acknowledged that Clearwire's Multi-Customer Case was the only set of projections that anticipated "similar wholesale revenue" to what Sprint was projecting to pay Clearwire.[38]

D. DISH And Clearwire Begin Negotiating A Transaction

For more than a year, Clearwire had been in discussions with DISH about a potential transaction.[39] DISH had begun amassing its own portfolio of spectrum and wanted to enter the wireless space.[40] It perceived great value in Clearwire and its spectrum.

On August 7, 2012, DISH sent Clearwire's board a non-binding proposal to buy some of Clearwire's spectrum, to extend Clearwire debt financing, and to enter into a commercial agreement with Clearwire.[41] As DISH put it, "[t]he proposed DISH investment into Clearwire has been developed as a coordinated program of financial, strategic and commercial arrangements," which would "allow DISH and

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[37] A1488 (emphasis added).

[38] *Ibid*.

[39] *See* A244-45; A2505; A3340-41 ¶¶ 140, 147.

[40] Op. 11.

[41] A3348 ¶ 170; A1587-88; *see* A669.

Clearwire to work together to economically bring high capacity, high speed mobile and fixed broadband services to the majority of the United States population."[42]

DISH and Clearwire began negotiating the contours of a transaction. DISH noted, however, that it was reluctant to finalize anything until it received certain approvals from the federal government, which DISH expected by November 2012.[43]

E. SoftBank Also Eyes Clearwire's Spectrum, And Moves To Acquire Sprint In Order To Get It

DISH was not the only company interested in Clearwire. SoftBank Corp. ("SoftBank"), the largest telecommunications company in Japan, wanted to enter the United States wireless market, and Clearwire was its ticket. SoftBank had built a large and successful network in Japan using the same type of spectrum held by Clearwire (2.5 GHz), and regarded Clearwire's spectrum as "Key for Our Success in [the] US."[44] SoftBank's founder and CEO, Masayoshi Son, targeted an acquisition of Sprint as a way to gain control of Clearwire's vast spectrum holdings.[45]

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[42] A669; *see* A2505.

[43] A1588.

[44] Op. 6-7; *see* A1193; A1202.

[45] Op. 6-7.

In September 2012, SoftBank proposed to acquire 70% of Sprint for roughly $20 billion.[46] When the news broke, analysts recognized that Clearwire was an important part of Son's vision for Sprint.[47] Clearwire's stock price surged 70%, closing at $2.22 per share.[48]

SoftBank and Sprint soon reached out to Clearwire about a potential Sprint-Clearwire merger. Following a series of conversations with Clearwire's chairman (all before Clearwire formed a special committee), the companies provisionally agreed to a merger price of $2.97 per share.[49]

F. SoftBank And Sprint Buy Intel's Votes

To purchase Clearwire, Sprint needed the approval of a majority of Clearwire's minority stockholders. Intel, with 12.9% of Clearwire's stock not owned by Sprint, was Clearwire's largest minority stockholder.[50] SoftBank and Sprint knew that the road to a Clearwire deal traveled through Intel.

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[46] Op. 7; *see* A3355 ¶ 197.

[47] Op. 9.

[48] *Ibid*.

[49] Op. 13, 54. In a series of early meetings with Sprint and SoftBank, Clearwire's chairman intimated—though he lacked the authority to do so—that he could get a deal done at $2.97 per share. When Clearwire finally formed a special committee, its ability to negotiate was severely constrained by those early price discussions. *See* Op. 54.

[50] Op. 14.

So, SoftBank and Sprint set out to buy Intel's votes. In early November 2012, Son called Intel's CEO and brokered a quid pro quo.[51] They agreed to a deal whereby Intel would vote for the Sprint-Clearwire merger in exchange for a broader commercial arrangement with SoftBank.[52] Intel was thrilled: "This is a great opportunity for us to strike a strategic deal for smartphones with Softbank in exchange for facilitating an easier path for a complete acquisition of [Clearwire]."[53]

SoftBank and Intel dove into their "broader business arrangement," and Son reiterated his "commitment."[54] Intel spent millions on the project.[55] All the while, Intel recognized that it was doing Sprint a "gigantic favor" by supporting the merger at $2.97.[56] It initially considered "play[ing] hardball" on the merger price, but ultimately capitulated due to the "piss off factor with Softbank."[57] "[S]ell[ing]

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[51] Op. 14-15.

[52] Op. 14-15; *see* A1374.

[53] A1373.

[54] A1375; A3608:8-20 (Son).

[55] A3156 at 223:10 (Sodhani); *see* A1557.

[56] A1413.

[57] *Ibid.*; *see* A3153 at 169:14-19 (Sodhani).

our shares contingent on a broader business deal" had been Intel's "criteria from day one."[58]

Neither Clearwire nor its stockholders knew about SoftBank's side deal with Intel.[59] On the contrary, the Sprint-Clearwire proxy heralded Intel's support as evidence that "Sprint's $2.97 per share offer provides full value to Clearwire's stockholders."[60] This left stockholders with the woefully misguided impression that Intel had received no additional consideration for its votes.

G. Clearwire Executes A Merger Agreement At $2.97 Per Share

On November 13, 2012, Clearwire formed a special committee to negotiate the merger with Sprint. The committee regarded its role narrowly: "The intent here is to negotiate a deal with Sprint - there isn't going to be a process of soliciting other buyers; it's not a competitive deal . . . it['s] a price negotiation and we kind of even know where we are going to wind up on it."[61]

In the meantime, Clearwire continued discussions with DISH. On November 14, Clearwire sent DISH a non-binding term sheet for a commercial

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[58] A1416; *see* A1377.

[59] Op. 60.

[60] *Ibid*.

[61] A1379.

agreement and spectrum sale.[62] DISH responded on December 6 with a preliminary proposal offering to buy some of Clearwire's spectrum for $2.2 billion in net proceeds, and a commercial agreement involving, among other things, the companies' collaboration on "building, operating, maintaining and managing a wireless network."[63]

On December 17, Sprint and Clearwire executed their merger agreement at $2.97 per share.[64] At the same time, Sprint brokered Voting and Support Agreements ("VSAs"), and accompanying Right of First Offer Agreements ("ROFOs"), with Intel and the other Strategic Investors. Together, the VSAs and ROFOs obligated the Strategic Investors to (i) vote in favor of the Sprint-Clearwire merger; and (ii) sell their Clearwire stock to Sprint at the price specified in the merger agreement, even if the merger did not close.[65] Those agreements thus guaranteed that Sprint would own at least 67% of Clearwire even if the merger was voted down.[66]

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[62] Op. 16; *see* A2506.

[63] A2507; *see* Op. 18.

[64] Op. 22; A3374-75 ¶ 273.

[65] Op. 22.

[66] A2348. Sprint later executed VSAs and ROFOs with additional stockholders, which assured that Sprint would own nearly 79% of Clearwire even without a merger. *See infra* 35.

H. Sprint Extends Clearwire "Dilutive And Coercive" Financing

Along with the merger agreement, Sprint and Clearwire executed a note purchase agreement ("NPA").[67] The NPA authorized Clearwire to issue, and obligated Sprint to buy, up to $800 million in convertible debt, issued in ten monthly increments.[68] The merger agreement barred Clearwire from accepting alternative financing without Sprint's consent.[69]

The NPA notes carried a 1% coupon and could be converted to Clearwire equity at $1.50 per share.[70] Clearwire had requested a higher conversion rate—its stock was trading above $2.38 per share—but Sprint refused.[71] Clearwire's advisors complained that the conversion price was "so below market."[72] Its CFO bemoaned that "Sprint designed the [security] this way so that it is dilutive in the event that the deal does not close to incent common to vote for the deal."[73] And Clearwire's stockholders objected to the NPA as "dilutive and coercive."[74]

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[67] Op. 22; *see* A3374-75 ¶ 273; A1853-87.

[68] Op. 22; A3374-75 ¶ 273.

[69] A3374-75 ¶ 273.

[70] Op. 22.

[71] A1594-1595; A1386; A1393.

[72] A1419.

[73] Op. 63.

[74] Op. 22; *see* A1424; A1430.

Internally, Sprint acknowledged that its goal was to issue "highly dilutive[] financing to keep [Clearwire] limping along."[75]

I. SoftBank Plans A Dramatic Expansion Of Clearwire's Network

SoftBank was concurrently hatching big plans for Clearwire's spectrum. Son wanted a network that covered 100 million people, and he directed his engineers to expand Clearwire's network to meet that goal by the end of 2013.[76] This so-called "accelerated build" would represent a dramatic acceleration of Clearwire's existing network plans.[77]

But there was a problem with this plan: the accelerated build would mean that Clearwire could provide more tonnage and earn more revenue. In the words of one SoftBank executive, that would "encourage dissident shareholders to vote against the acquisition because it could make Clearwire look stronger as an independent company."[78] Clearwire would therefore have more "leverage" in its negotiations with Sprint.[79] Soon after SoftBank realized this, it put the accelerated

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[75] A1204.

[76] *See* Op. 61; A1016; A1391.

[77] Op. 18-19; *see* A3143-44 at 199:5-23 (Saw).

[78] A1458.

[79] A1381; *see* A3526:17-21 (Hersch); A3143-44 at 201:22-202:10 (Saw).

build on hold.[80] Clearwire's Chairman told SoftBank that Sprint and SoftBank were acting in "bad faith."[81]

J. DISH Commences A Tender Offer For Clearwire

On December 28, 2012, DISH launched a tender offer for Clearwire at $3.30 per share, topping Sprint's $2.97 bid by 11%.[82] DISH also offered to purchase some of Clearwire's spectrum, to enter into a ten-year business collaboration agreement, and to extend Clearwire financing on terms superior to the NPA's.[83]

DISH's tender offer was for up to 100% of Clearwire's outstanding common stock.[84] In reality, however, DISH was bidding only for a minority stake in a Sprint-controlled company. Sprint already owned 50.2% of Clearwire, and Sprint's VSA and ROFO agreements with the Strategic Investors assured that Sprint's stake would soon increase to roughly 67%.[85] Sprint had made clear that it was not willing to sell its Clearwire stock.[86] Accordingly, DISH could acquire no more than a 33% stake in Clearwire. DISH's tender offer was initially conditioned

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[80] Op. 61-62.

[81] Op. 61-62; A1529.

[82] Op. 23.

[83] *Ibid.*; A1444-46; A3378 ¶ 281.

[84] Op. 23.

[85] A2348.

[86] A1451.

upon its receipt of certain corporate governance protections, including the right to appoint three or four directors to Clearwire's 13-member board, and requiring that certain interested transactions be approved by an independent committee of directors.[87]

Clearwire, DISH, and their respective counsel engaged in numerous conversations throughout January and February 2013.[88] They exchanged a series of term sheets, and DISH refined its offer in response to comments from Clearwire and its advisors.[89] DISH reiterated its offer to finance Clearwire on terms superior to the NPA's, and asked that Clearwire not draw upon the NPA because such a draw would immediately transfer value to Sprint and make DISH's tender offer more expensive.[90]

On February 20, 2013, DISH held an earnings call with investors. DISH told investors that its "first preference" was a partnership with Clearwire, and characterized its $3.30 per-share tender offer as "a pretty good deal for Clearwire

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[87] Op. 23; *see* A1446-47.

[88] *See* A2508-09.

[89] *Ibid.*; *see* A1460-66.

[90] A1464-65 ("[W]e are acutely aware that if you begin to draw down on the Sprint exchangeable note commitment, this Proposal becomes more expensive for us …"); A2509 (noting the "significant cost associated" with the NPA).

shareholders, [] clearly a better deal than what Sprint has offered."[91] But DISH foreshadowed a "bidding war" with Sprint, and stated that "we have to wait and see how that plays out."[92]

After declining to draw on the NPA in January and February 2013, Clearwire accepted draws beginning in March.[93] DISH expressed disappointment, reminding Clearwire that every draw on the NPA "transfer[s] value to Sprint . . . to the detriment of [Clearwire's] public minority shareholders in the amount of nearly $100 million for each monthly draw."[94] But Clearwire and DISH continued to negotiate a transaction, and Clearwire responded to a series of due diligence requests from DISH regarding Clearwire's spectrum assets.[95]

K. Sprint And SoftBank Resort To Strong-Arm Tactics

Many Clearwire stockholders were displeased with the Sprint-Clearwire merger agreement.[96] The fact that DISH had offered more than Sprint for a minority stake in the company caused some to question the fairness of the $2.97

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[91] A1541-42.

[92] A1542; *see* A1546-47.

[93] Op. 24.

[94] *Ibid.*; *see* A1554.

[95] A2510.

[96] Op. 22-23.

merger price.[97] So Sprint and SoftBank set out to squelch stockholder dissidence. As the Court of Chancery later found, their wrongful tactics included:

Scuttled Opportunities. Before agreeing to the $2.97 share price, Clearwire had asked a number of companies, including Google and Qualcomm, whether they were interested in buying some of Clearwire's spectrum.[98] Clearwire reported to stockholders that no companies were interested except DISH.[99]

But Clearwire had bad information. Google *was* interested, and had even approached Sprint and SoftBank about a transaction involving Clearwire's spectrum. Sprint and SoftBank initially ignored that request, but Google persisted.[100] When Google intimated that it would approach Clearwire instead, Son intervened "to avoid them going directly to Clearwire."[101] Sprint and SoftBank disclosed none of this to Clearwire.[102]

Sprint and SoftBank also torpedoed Clearwire's opportunity with Qualcomm. Clearwire had been discussing a spectrum purchase with Qualcomm for some time, which would have helped to alleviate Clearwire's short-term

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[97] *E.g.*, A1469-70.

[98] Op. 20; *see* A1423.

[99] Op. 61; *see* A1609.

[100] Op. 60-61; *see* A1155; A1372; A1437-38; A1471-72.

[101] Op. 60-61.

[102] *Ibid*.

funding issues.[103] Son and Sprint did not want that, so they called Qualcomm and insisted (wrongly) that Sprint would have to approve any disposition of Clearwire spectrum.[104]

Forced Dilution. Sprint and SoftBank ensured that Clearwire had no choice but to draw upon the NPA. Clearwire had other options, but Sprint could veto Clearwire's decision to accept any financing other than the NPA.[105] And veto it did. DISH offered to finance Clearwire on terms superior to the NPA, and Sprint said no.[106] Clearwire stockholders offered more attractive financing, and Sprint again said no.[107]

As a consequence, Clearwire accepted $240 million of financing under the NPA, obligating it to issue 160 million shares to Sprint at $1.50 per share (less than half of what the stock was trading for).[108]

Misleading Proxy. Sprint and SoftBank caused Clearwire to issue a materially misleading proxy. In the portion of the proxy that Sprint prepared,

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[103] Op. 51-52.

[104] *Ibid.*; *see* A1369.

[105] Op. 24-25.

[106] A1455-56.

[107] Op. 24-25; *see* A3383-85 ¶¶ 305, 309, 311.

[108] A3387 ¶ 322.

Sprint claimed that Intel's support confirmed the merger's fairness.[109] In reality, of course, Intel's support had been bought and paid for by SoftBank (as Sprint well knew).[110]

Further, the proxy recounted Clearwire's failed efforts to sell spectrum, and reported that "all reasonably available potential buyers" had declined any interest, save for DISH.[111] Sprint and SoftBank knew that was untrue. They had concealed Google's overtures from Clearwire, thereby assuring that Clearwire could not disclose those overtures to stockholders.[112]

Retributive Threats. For good measure, Sprint and SoftBank threatened Clearwire stockholders with dire fates if they voted down the merger. Sprint repeatedly told stockholders that, in the event of a "no" vote, it would strengthen its control of the Clearwire board, further increase its equity position through tender offers, and ultimately squeeze out minority stockholders.[113] It also threatened to finance Clearwire in a manner that, like the NPA, resulted in "substantial dilution."[114] Sprint and SoftBank amplified those threats in "talking

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[109] Op. 60; *see* A1615.

[110] *See* Op. 60.

[111] Op. 61.

[112] *Ibid*.

[113] Op. 31-32, 62; *see* A2153; A2164-65; A2169; A2279-80.

[114] Op. 62.

points" created for discussions with Clearwire investors.[115] Son chimed in as well, cautioning stockholders that "any subsequent deal" with Clearwire would be structured so that it could close without approval from minority stockholders.[116]

L. Sprint Considers Life Without Clearwire, And Increases Its Bid To $3.40 Per Share

With some stockholders refusing to buckle, Sprint was forced to think hard about the consequences of a no-vote. Sprint's spectrum shortage loomed large. Sprint's network was quickly becoming congested, and its only source of additional capacity was Clearwire.[117] Accordingly, Sprint and SoftBank wished to "rapidly deploy" Clearwire's spectrum.[118]

But such rapid deployment would come at a cost. In April and May 2013, Sprint management outlined this predicament to its board. "Without a Clearwire acquisition," it explained, "Sprint will have to pay for both (1) capacity on the Clearwire network (current agreement is $5-$6 per [gigabyte]) plus (2) what could be significant fees to secure access to deploy 2.5 GHz spectrum on the Sprint

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[115] A2282-83; A2289-90.

[116] Op. 62; *see* A2172.

[117] *See* A2667; A2272 ("Since we don't have another source of LTE capacity right now … we should assume all the non-Sprint capacity comes from CLWR.").

[118] Op. 28; *see* A2056; A2176.

network."[119] It cautioned that Sprint ultimately would "transfer value to other shareholders" because, as plans for the accelerated build had confirmed, Clearwire would "become more valuable as Sprint traffic and payments increase."[120]

Confronted with the options of (i) transferring value to minority stockholders or (ii) keeping that value for itself, Sprint opted for Door Number 2. On May 20, 2013, Sprint increased the merger price to $3.40 per share, besting DISH by a dime and telling Clearwire that it was its "best and final offer."[121]

M. DISH Tops Again

On May 28, 2013, DISH's board met. It recognized, as it had before, that DISH was bidding for only a minority stake in Clearwire: Sprint, through its voting agreements with the Strategic Investors and the NPA, would own a commanding stake in the company no matter what.[122] But DISH resolved to bid more anyway. After discussing the benefits to DISH of the tender offer, the board authorized DISH to "launch and consummate" a tender offer for Clearwire at up to $5.00 per share.[123]

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[119] A2176; *see* A2056.

[120] A2056; A2176; *see* A2348-50; A2388-90.

[121] Op. 30.

[122] A2276-77.

[123] *Ibid*.

The next day, DISH formally tendered for Clearwire's stock at $4.40 per share.[124] DISH again proposed to finance Clearwire on terms superior to the NPA's.[125] In its securities filing, DISH stated that it "remain[ed] committed to a commercialization of Clearwire's significant portfolio of wireless spectrum assets," and that "[t]he Clearwire spectrum portfolio has always been a key component to implementing our wireless plans of delivering a superior product and service offering to customers."[126]

DISH's tender offer continued to request certain governance rights.[127] However, the offer was not conditioned on "the absence or failure" of a legal challenge by Sprint to those governance rights, meaning that DISH would bear the cost, and risk, associated with any litigation of their enforceability.[128]

On June 5, 2013, Clearwire's board and special committee recommended that stockholders accept DISH's $4.40 offer.[129] Soon thereafter, DISH announced

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[124] Op. 32; *see* A2285.

[125] A2285-86.

[126] A2633.

[127] Op. 32; *see* A3392 ¶¶ 345, 346.

[128] Op. 32; *see* A2634.

[129] Op. 34; *see* A3394 ¶¶ 351, 352.

that it would "focus [its] efforts and resources on completing the Clearwire tender offer."[130]

N. Sprint Sues DISH And Reexamines Its Alternatives

Sprint promptly sued DISH and Clearwire in the Court of Chancery, alleging that DISH's requested governance rights rendered the DISH bid unlawful.[131] At a preliminary hearing, DISH's counsel confirmed that DISH would tender with *or without* those governance rights:

> Court: [W]hat was told to me is the tender offer is not conditioned on the availability or enforceability of those [governance] rights . . . . I consider it judicially binding . . . . But if there is some lack of clarity, then I want you to tell me now. Because we're not going to play 'gotcha' like that.
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> DISH Counsel: There is no lack of clarity here.[132]

In the face of DISH's competing bid, Sprint was constrained to evaluate what the world might look like if it failed to acquire Clearwire. To do so, Sprint developed a model that answered *precisely* the question that Delaware law asks in

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[130] Op. 39; *see* A2995.

[131] Op. 39.

[132] A3012-13; *see* A3400-01 ¶ 376.

appraisal cases: What would the operative reality for Clearwire have been had the merger failed?[133] Here were the basic elements of Sprint's model:

First, Sprint would rapidly deploy Clearwire's spectrum.[134] SoftBank desired a world-class network,[135] and alternative spectrum sources were not available.[136] So even if the merger failed, and Clearwire remained independent, Sprint would continue to ramp up its reliance on the Clearwire network at a rapid pace.

Second, Sprint would seek to reduce the rates it would pay Clearwire to use its spectrum. Sprint settled on a rate schedule that it had previously negotiated at arm's length with another spectrum wholesaler.[137] The rates were markedly below the rates in Sprint's and Clearwire's existing wholesale agreement, but Sprint thought the rates nevertheless were reasonable from Clearwire's perspective given the amount of tonnage that Sprint would be placing on Clearwire's spectrum.[138] In fact, Sprint paid outside financial analysts to evaluate the commercial

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[133] A1524 ("We'll need to frame a current view of what we believe CLWR stand-alone would look like if there is a 'no vote.'").

[134] A2056; A3548:11-18 (Schwartz).

[135] A3618:7-A3619:12 (Son); A1270 ("I aspire to be number one.").

[136] Op. 36; *see* A3625:13-A3628:11 (Son).

[137] A3559:9-14 (Schwartz); A3537:23-A3538:3 (Cowan).

[138] A3558:18-A3560:15 (Schwartz); A2823; A2869.

reasonableness, from Clearwire's perspective, of the new rate schedule. Everything checked out.[139]

Third, Sprint made a number of operational assumptions regarding whether Clearwire's spectrum would be deployed on Clearwire's network, Sprint's network, or some combination of the two. Sprint settled on the combination approach.[140]

Fourth, Sprint considered which company would bear the capital and operating expenditures associated with the deployment of Clearwire's spectrum. After extensive discussion,[141] Sprint concluded that Clearwire would bear those costs, but that Sprint would help to finance those costs in the initial years through prepayments to Clearwire.[142]

Fifth, in an abundance of caution, Sprint vetted the economic feasibility of pursuing its preferred network strategy.[143] Its analysis showed that it would pay Clearwire $20.9 billion in wholesale usage payments from 2013 to 2018. Was that

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[139] A2901; A2892-2900; A3559:24-A3562:11 (Schwartz) ("[W]e believed these rates would be reasonable from Clearwire's perspective.").

[140] A2823.

[141] *See* A2678-81; A2682-87; A2775-81.

[142] A2823, A2836 (accrued payments line shows Sprint prepayment to Clearwire which are subsequently repaid); A3556:6-22 (Schwartz); A3715:5-A3721:3 (Taylor).

[143] A2801, A2836.

feasible? Sprint concluded that the strategy was not only feasible, but profitable.[144] Sprint would generate positive cash and OIBDA throughout the projection period, would satisfy all its debt covenants, and would generate substantially positive cash flows in the out years (including the terminal year).[145] And that was before accounting for the fact that Sprint would recoup much of what it paid to Clearwire through its 79% stake in the company.[146]

The product of Sprint's efforts was a comprehensive set of projections for both Sprint and Clearwire in the event of a failed merger (*i.e.*, the "Full Build Projections"). The Full Build Projections were incorporated into Sprint's revised business plan in the event of a failed merger, which Sprint dubbed the "SoftBank Plan Without Clearwire," and Sprint's supporting analyses were shared with its and SoftBank's financial advisors.[147]

O. Sprint And SoftBank Rely On The Full Build Projections In Deciding Whether To Bump The Bid For Clearwire

SoftBank was initially skeptical that it needed to top DISH's $4.40 bid. As Son had told investors, SoftBank could accomplish its network strategy so long as

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[144] A2836.

[145] *Ibid.*; *see* A3587:3-24 (Schwartz); A3636:4-A3639:6 (Fisher); A3726:3-A3727:5 (Taylor).

[146] *See* A2836; A3703:6-13 (Jarrell).

[147] *See* A2703, A2745; A2884, A2887.

Sprint had a controlling stake in Clearwire.[148] To persuade SoftBank that increasing the merger price would actually *save* SoftBank money (when compared with continuing to use Clearwire without a full acquisition), Sprint management created an aptly titled "Clearwire Alternatives" presentation,[149] which outlined four options for SoftBank:

Alternative 1 was to increase the merger price and acquire the remaining 33% of Clearwire. Sprint calculated the incremental cost of topping DISH at various prices.[150]

Alternative 2 was to pursue, without acquiring 100% of Clearwire, the Full Build Projections outlined above—the network strategy that Sprint and SoftBank had been planning for months, and the *raison d'être* of SoftBank's investment in Sprint: a rapid deployment of Clearwire's spectrum to create a network that could compete with AT&T's and Verizon's.[151]

Alternative 3, the "Limited Build," likewise contemplated Sprint's not acquiring 100% of Clearwire, but assumed that Sprint and SoftBank would jettison

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[148] A2048-49; *see* A3602:10-21 (Son) ("Once we have 51 percent, we can utilize. At least we can get access to the spectrum.").

[149] Op. 35; *see* A2874-80.

[150] Op. 35.

[151] Op. 6-7, 35; A3613:4-7 (Son); A3567:14-17 (Schwartz); A3644:18-A3645:8 (Bye).

their network plans and instead use only modest amounts of Clearwire's spectrum under the companies' existing wholesale agreement.[152] This would be a stopgap measure at best.[153] Because Sprint lacked the spectrum depth to support projected data demand, Sprint customers in major markets would experience a "high risk" of "congestion" and "degrade[d]" service by the end of 2015.[154]

Alternative 4 scoured for potential alternative spectrum sources, all of which were hopeless.[155] Son rejected them as "stupid" and "useless."[156]

P. Informed Of The Full Build Alternative, The Sprint Board Approved A Bump To $5.00 And Boxed Out DISH

On June 17, Sprint's board met. At that meeting, Sprint's head of corporate development, Michael Schwartz, apprised the board of only two alternatives: pay more for Clearwire, or implement Alternative 2, the Full Build Projections.[157] Although an acquisition was Sprint's preference, the "fall back position" was a new commercial agreement providing Sprint with access to Clearwire's

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[152] Op. 36.

[153] *E.g.*, Op. 37; *see* A2902.

[154] *See* A2878.

[155] Op. 36.

[156] *Ibid.*; *see* A3625:13-A3628:11 (Son).

[157] A2946; *see* A3543:4-14 (Schwartz).

spectrum.[158] Schwartz provided a high-level description of the Full Build Projections to educate the board about how much it would cost Sprint to implement its network strategy in the event Sprint failed to acquire Clearwire.[159]

After hearing from Sprint management regarding the negative consequences to Sprint of a no-vote, including the costs associated with the Full Build,[160] the board authorized an increase in the merger price to $5.00 per share.[161]

SoftBank promptly approved the price bump.[162] Then SoftBank called certain Clearwire stockholders and persuaded them to sign VSAs and ROFOs similar in terms to those previously executed by the Strategic Investors.[163] Those agreements assured that Sprint would own nearly 79% of Clearwire even without a merger.[164]

In its amended merger agreement, Sprint required Clearwire to "terminate all discussions" with DISH, and forbade Clearwire from recommending any non-

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[158] A2946; A3572:9-21 (Schwartz).

[159] A3581:13-A3582:14 (Schwartz).

[160] *Ibid*.

[161] Op. 38; *see* A3398 ¶ 366.

[162] Op. 39; A3592:23-A3593:2 (Son).

[163] Op. 39; *see* A3399, A3401 ¶¶ 370, 377.

[164] *See* A3404-05 ¶ 393.

Sprint proposal that contained a request for governance rights.[165] Sprint further demanded that Clearwire allow Sprint "promptly" to replace its designees on the Clearwire board in the event of a no-vote.[166]

On July 8, 2013, Clearwire's stockholders approved the merger.[167] The merger closed on July 9.[168] The next day, SoftBank closed on its multibillion-dollar investment in Sprint.[169]

Q. The Proceedings Below

1. Plaintiffs owned more than 25 million shares of Clearwire stock on the date of the merger. They voted against the merger, forwent the merger consideration (more than $125 million), and filed a statutory appraisal proceeding. They also filed a plenary action alleging that Sprint, aided and abetted by SoftBank, breached its fiduciary duties to Clearwire's minority stockholders. The two actions were tried together.[170]

At trial, Plaintiffs argued that the Sprint-Clearwire merger failed entire-fairness review. They pointed to Sprint's and SoftBank's sharp practice leading up

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[165] Op. 39; *see* A3044; A3099-3100; A3401 ¶ 380.

[166] A3099.

[167] Op. 40.

[168] *Ibid*.

[169] *Ibid*.

[170] Op. 1.

to the merger—including their threats to stockholders and the dilutive NPA—and claimed that the $5.00 merger price was below fair value. Plaintiffs explained that DISH's $4.40-per-share offer for a minority stake in Clearwire set a valuation floor.[171] They argued that the best evidence of Clearwire's fair value on the merger date was Sprint's Full Build Projections, a DCF of which yielded a valuation of Clearwire of $11.27 per share without accounting for Clearwire's unused spectrum.[172] Plaintiffs also offered the testimony of a spectrum valuation expert, whose analysis of Clearwire's unused spectrum, when added to the DCF, yielded a fair value for Clearwire of $16.08 per share.[173]

2. In the plenary action, the court found that Sprint and SoftBank engaged in "multiple instances of unfair dealing."[174] Their "heavy-handed tactics"[175] included, among other things:

- Coercing minority stockholders through the dilutive NPA;[176]

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[171] A3708:19-A3709:9 (Jarrell) ("[W]e have evidence that the minority value of the company is as high as $4.40 from DISH's bid. . . . [T]hat's greater than $2.13. And fair value isn't supposed to be a minority value.").

[172] Both Plaintiffs and Defendants agreed that Clearwire's unused spectrum (*i.e.*, spectrum that was not deployed and generating cash flows) must be accounted for separately and added to the DCF. A3656:10-18 (Cornell); A3697:1-A3698:7 (Jarrell).

[173] A3906-09.

[174] Op. 50, 59.

[175] Op. 64.

- Making "retributive threats" to stockholders, including threatening to further dilute Clearwire with NPA-esque financing and squeeze out minority stockholders in a future transaction by bypassing a majority-of-the-minority vote;[177]
- Postponing the accelerated build until after the merger, to avoid enriching Clearwire's minority stockholders in the meantime;[178]
- Buying Intel's votes, then lying about it;[179] and
- Sabotaging Clearwire's commercial opportunities.[180]

The court found that Defendants' wrongdoing was "sufficiently extensive, intentional, and manipulative" that if the merger had closed at the original $2.97 per share—even though that price was markedly *higher* than what the court believed to be fair value (see below)—then the court would have ruled in favor of Plaintiffs and awarded damages in the plenary action.[181]

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[176] Op. 62-63.

[177] Op. 62.

[178] Op. 61-62.

[179] Op. 59-60.

[180] Op. 51-52, 60.

[181] Op. 58. The court noted that, based on its (incorrect) fair value finding of $2.13 per share, its damages award likely would have been in the neighborhood of $3.15 per share, plus damages to redress the NPA. Op. 65.

The court found, however, that DISH's intervention "freshened the atmosphere"[182] and cleansed Defendants' antecedent wrongdoing. Because DISH had waged a bidding war against Sprint, and because that bidding war resulted in a merger price ($5.00 per share) that eclipsed the court's determination of fair value ($2.13 per share), the court held that the merger was fair enough.[183] In other words, the court's ruling in the plenary action was all but dictated by its valuation finding in the appraisal action.

3. In the appraisal action, the court credited many of Plaintiffs' arguments. The court agreed that "Clearwire's value largely depended on how much demand Sprint had for Clearwire's spectrum."[184] It agreed that Sprint's Long-Term Projections were probative of how much demand Sprint had for Clearwire's spectrum, "and hence how much Sprint was willing to pay" for the company.[185] It agreed that Sprint did not have viable alternative sources of

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[182] Op. 72.

[183] *E.g.*, Op. 64 ("[O]nce the price reached $5.00 per share, it was sufficiently generous that the fair price aspect of the entire fairness inquiry predominates over any lingering coercion.").

[184] Op. 57.

[185] *Ibid.*

spectrum, and that Sprint's limiting its use of Clearwire's spectrum offered only a "temporary" solution.[186]

But in determining Clearwire's "operative reality" on the valuation date, the Court of Chancery drew a surprising conclusion from these facts. Precisely *because* Clearwire was so important to Sprint, the court held, Sprint would never have allowed Clearwire to become profitable. Instead, the Court of Chancery found, if the merger had been voted down, Sprint would simply have "followed through" on the very "threats" the court had decried in its analysis of the breach case: Sprint would have taken control of Clearwire's board, "dribble[d] out financing" to keep Clearwire "barely solvent," "gradually increase[d] [its] ownership stake," and "acquire[d] Clearwire in the future" at a depressed price.[187]

Having concluded that Clearwire's operative reality was a continued plundering by its majority stockholder, the Court of Chancery adopted Clearwire's Single-Customer Case projections as the basis for its DCF analysis. It did so notwithstanding its prior acknowledgment that Clearwire's value depended largely on the amount of Clearwire spectrum that *Sprint* was projecting to use, and despite

[186] Op. 36-37, 81; *accord* Op. 6-7, 28, 29, 33, 86.

[187] Op. 81-84.

the fact that the Single-Customer Case (by Sprint's own admission) underestimated Sprint's demand by a wide margin.[188]

Not surprisingly, a DCF of the Single-Customer Case projections was a pittance. It yielded a valuation of only $0.79 per share before accounting for Clearwire's unused spectrum. The Court of Chancery accepted Defendants' argument that Clearwire's unused spectrum was worth no more than a DISH offer for it that Clearwire had *rejected*—roughly $2 billion—and added that amount to the DCF to appraise Clearwire at $2.13 per share.[189]

Tellingly, the court never attempted to reconcile its $2.13 per share valuation with DISH's contemporaneous offer of $4.40 per share for a mere one-third stake in Clearwire. In fact, it disregarded DISH's bid altogether in appraising the company. (The number "$4.40" appears only once in the court's 95-page opinion, and it is in the Background section.)

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[188] *Supra* 11-12; *see* A1488.

[189] Op. 95.

ARGUMENT

I. THE COURT OF CHANCERY ERRED AS A MATTER OF LAW IN APPRAISING CLEARWIRE

A. Question Presented

Whether the Court of Chancery erred as a matter of law by appraising Clearwire (i) without regard for the amount that a third party had bid for a minority stake in Clearwire; and (ii) on the assumption that its controlling stockholder would continue to breach its fiduciary duties. Preserved at A3488-90; A3838-43; A3988-92; A4021-23.

B. Standard And Scope Of Review

"An appraisal proceeding is a limited legislative remedy intended to provide shareholders dissenting from a merger on grounds of inadequacy of the offering price with a judicial determination of the intrinsic worth (fair value) of their shareholdings."[190] "In determining such fair value, the Court shall take into account all relevant factors."[191] "The basic concept of value under the appraisal statute is that the stockholder is entitled to be paid for that which has been taken

[190] Op. 73 (quoting *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1186 (Del. 1988)).

[191] 8 *Del. C.* § 262(h).

from him, *viz.*, his proportionate interest in a going concern."[192] "When applying this standard, the corporation 'must be valued as a going concern *based upon the operative reality of the company* as of the time of the merger,' taking into account its particular market position in light of future prospects."[193]

The Court reviews questions of law in the appraisal context *de novo*.[194] "This Court reviews appraisal valuations pursuant to the abuse of discretion standard, so long as the Court of Chancery has committed no legal error."[195]

C. Argument

1. The Court Of Chancery Erred As A Matter Of Law By Appraising Clearwire Without Considering DISH's Bid

Sprint was able to acquire Clearwire only because it won a bidding war with DISH. DISH's final bid of $4.40 per share is compelling evidence that the court's fair-value determination is wrong. In fact, DISH's bid establishes a *lower bound* on Clearwire's value. DISH was bidding for a minority stake in a Sprint-controlled entity, and it was doing so in an environment hostile to bidders not named Sprint.

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[192] Op. 74 (quoting *Tri-Continental Corp. v. Battye*, 74 A.2d 71, 72 (Del. 1950)).

[193] *Ibid.* (quoting *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 525 (Del. 1999)) (emphasis added).

[194] *Rapid-American Corp. v. Harris*, 603 A.2d 796, 804 (Del. 1992).

[195] *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 35 (Del. 2005).

Anomalously, the Court of Chancery held that Clearwire's fair value was $2.13 per share—less than half of DISH's offer. It did not even *consider* DISH's bid in its appraisal ruling, much less reconcile its appraisal award with DISH's bid. That was legal error.

a. The Court Of Chancery Must Take Into Account All Relevant Factors, Which Often Include Third-Party Bids

Although the appraisal statute gives the Court of Chancery great leeway in valuation,[196] it makes one thing clear: "In determining . . . . fair value, the Court shall take into account all relevant factors."[197] This Court has often emphasized that considering all relevant factors is mandatory: "[A]ll factors and elements which reasonably might enter into the fixing of value . . . are not only pertinent to an inquiry as to the value of the dissenting stockholders' interest, but *must be considered* by the agency fixing the value."[198]

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[196] *See Del. Open MRI Radiology Assocs., P.A. v. Kessler*, 898 A.2d 290, 310 (Del. Ch. 2006) (Strine, V.C.) ("Fair value is, by now, a jurisprudential concept that draws more from judicial writings than from the appraisal statute itself.").

[197] 8 *Del. C.* § 262(h).

[198] *Weinberger v. UOP, Inc.*, 457 A.2d 701, 713 (Del. 1983) (quoting *Tri-Continental*, 74 A.2d at 72) (emphasis added in *Weinberger*); *see also*, *e.g.*, *Glassman v. Unocal Expl. Corp.*, 777 A.2d 242, 248 (Del. 2001) ("The determination of fair value must be based on *all* relevant factors." (emphasis in original)).

One frequently relevant factor is the price a third party has bid for the corporation. This Court's "jurisprudence recognizes that in many circumstances a property interest is best valued by the amount a buyer will pay for it."[199] Although fair value in an appraisal "is a jurisprudential, rather than purely economic, construct," the economic definition—the price at which property would change hands between a willing buyer and a willing seller—"remains central to our statutory concept of fair value."[200] Consequently, in many cases where the buyer is an arm's-length third party, courts have equated fair value with the final bid.[201]

b. DISH's Bid For Clearwire Is Plainly "Relevant" To The Fair Value Of Clearwire

DISH's bid for Clearwire is a prime example of a factor "relevant" to the fair value of Clearwire. It shows the price that a sophisticated third party was willing to pay, and in extremely suboptimal circumstances. Indeed: Sprint offered

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[199] *Applebaum v. Avaya, Inc.*, 812 A.2d 880, 889-90 (Del. 2002); *cf.* Barry M. Wertheimer, *The Shareholders' Appraisal Remedy and How Courts Determine Fair Value*, 47 Duke L.J. 613, 654 (1998) ("An appraisal proceeding is a valuation proceeding intended to determine what something is worth. The common sense answer to the question 'what is an asset worth?,' is 'whatever someone is willing to pay for it.'").

[200] *DFC Global Corp. v. Muirfield Value Partners, L.P.*, --- A.3d ---, 2017 WL 3261190, at *16 (Del. Aug. 1, 2017).

[201] *See id.* at *13 n.84 (collecting cases).

$2.97; DISH then "started a bidding war,"[202] offering $3.30; Sprint countered with $3.40; DISH came back with $4.40.[203] The bidding war ended only when Sprint increased its bid to $5.00, sued DISH, and forbade Clearwire from further negotiating with DISH.[204]

However, the DISH-Sprint contest differed from a paradigmatic auction in ways that *depressed* the bids. For one thing, DISH (unlike Sprint) was bidding for only a minority stake. To be sure, both of DISH's bids technically were tender offers for all of Clearwire's stock.[205] But, at the time of the bids, it was clear that Sprint would end up owning at least 67% of Clearwire,[206] and Sprint made clear that it would sell no stock to DISH.[207] Furthermore, because Sprint refused to sell its majority stake, Clearwire and its advisors made no effort to shop Clearwire to other potential buyers. (And no buyers other than DISH made offers for Clearwire in light of Sprint's stranglehold over the company.)

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[202] Op. 58.

[203] *Supra* 17, 20, 27.

[204] Op. 38-40.

[205] Op. 23, 32.

[206] A2348.

[207] *E.g.*, A1451.

As a result, DISH's bid sets a *lower bound* for the fair value of Clearwire.[208] That is because a competitive and fair auction—with "a robust market check, against the back drop of a rich information base and a welcoming environment for potential buyers"[209]—encourages bids for a corporation's full value. The DISH-Sprint contest fell well short of this paradigm, not least because Sprint had a dominant stake in the company and refused to sell. Thus, the price resulting from an auction, unburdened by Sprint's position, would have been at least as high as DISH's $4.40 bid.

c. The Court Of Chancery Erred By Failing To Consider DISH's Bid For Clearwire

i. The Court of Chancery did not consider, in its appraisal analysis, DISH's $4.40 per-share bid, much less reconcile it with its fair value determination. By contrast, when the court *did* refer to DISH elsewhere in its opinion, it was only in ways that were *harmful* to Plaintiffs' case. Most notably, the court relied on the DISH bid as a kind of "harmless error" factor in its

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[208] DISH's bid, of course, included no synergies because Sprint would have remained in control of Clearwire.

[209] *DFC Global*, 2017 WL 3261190, at *15; *see also*, *e.g.*, *Union Ill. 1995 Inv. Ltd. P'ship v. Union Fin. Grp., Ltd.*, 847 A.2d 340, 358 (Del. Ch. 2004) (Strine, V.C.) (relying on deal price resulting from "a competitive and fair auction, which followed a more-than-adequate sales process and involved the broad dissemination of confidential information to a large number of prospective buyers").

fiduciary-duty analysis.[210] According to the court, the DISH bid "cleansed" the effects of what it acknowledged to be a series of coercive actions by Sprint and SoftBank. But when it came to the court's *appraisal* analysis, DISH's $4.40 bid exits stage left.[211] By ignoring DISH's bid in its appraisal holding, the Court of Chancery erred as a matter of law.[212]

ii. Defendants may argue (as they did below) that the Court of Chancery was well advised in disregarding the DISH bid. According to Defendants, DISH's bid is not evidence of Clearwire's value because it (i) included a request for governance rights, and (ii) was secretly motivated by a desire to drive Clearwire into bankruptcy. Both arguments are meritless.

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[210] Op. 49-72.

[211] Op. 73-95.

[212] The court refused to consider the $5.00 merger price as evidence of Clearwire's fair value because this was a squeeze-out merger. *See* Op. 75. It is true (and Plaintiffs argued below) that the merger price is often unreliable valuation evidence in a controlling transaction. But that is because the merger price is generally too *low*. *E.g.*, *DFC Global*, 2017 WL 3261190, at *13 n.84 (noting that controlling-stockholder transactions "d[o] not involve a process whereby buyers not tied to the company's major stockholders would [feel] welcome to bid and succeed"). The court also observed that the $5.00 merger price might have included synergies associated with the Sprint-Clearwire merger. *See* Op. 75-76. However, in the court below, Defendants did not even advocate for a particular quantum of synergies, much less provide cogent evidence of that quantum.

First, that DISH sought certain governance rights is beside the point. That is because fair value in an appraisal includes "the value of control" spread "over all shares equally."[213] Thus, even if DISH *were* bidding for some degree of control of Clearwire, the value of that control must be accounted for in the appraisal.

In any event, DISH's $4.40 offer was *not* conditioned upon the enforcement of governance rights.[214] DISH bore the risk that it would never receive the governance rights it sought: It made a "judicially binding concession" that the governance rights could be "set aside" without compensation to DISH if the Court held those rights to be invalid.[215]

Second, Defendants' speculation that DISH wanted to drive Clearwire into bankruptcy is likewise no basis to ignore DISH's bid in appraising Clearwire. Even assuming a bidder's subjective intent is relevant,[216] the notion that DISH was prepared to spend billions of dollars on Clearwire equity only to drive the company

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[213] *Agranoff v. Miller*, 791 A.2d 880, 887 (Del. Ch. 2001) (Strine, V.C.); *accord, e.g.*, *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1145 (Del. 1989) ("[T]o fail to accord to a minority shareholder the full proportionate value of his shares imposes a penalty for lack of control, and unfairly enriches the majority shareholders who may reap a windfall from the appraisal process by cashing out a dissenting shareholder.").

[214] A3012-13.

[215] A3400-01 ¶ 376.

[216] *See DFC Global*, 2017 WL 3261190, at *21 n.145 ("[I]t is in tension with the statute itself to argue that the subjective view of post-merger value of the acquirer can be used to value the respondent company in an appraisal.").

into bankruptcy lacks even the slightest support in the record. The Court of Chancery referred offhandedly to this urban legend in the Background section of its opinion,[217] but cited no record evidence. And the best evidence of DISH's motivations—records of discussions among its directors concerning its bid for Clearwire—says nothing about a Clearwire bankruptcy.[218] To the contrary, those records show that DISH was authorized to pay up to $5.00 per share for Clearwire.[219]

Similarly, DISH's conduct and statements to investors refute the notion that DISH was playing for a Clearwire bankruptcy.[220] For example, DISH repeatedly affirmed the seriousness of its tender offer, and told investors that it desired a long-term commercial agreement with Clearwire.[221]

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[217] Op. 25-26.

[218] A2275-77.

[219] A2276.

[220] Nor did Clearwire or its special committee regard DISH's bid with skepticism. They affirmatively recommended DISH's $4.40 tender offer to minority shareholders over Sprint's then-offer. *See* Op. 34.

[221] *Supra* 12-13, 21-22; *see* A1446.

2. The Court Of Chancery Erred As A Matter Of Law By Appraising Clearwire On The Assumption That Sprint Would Continue To Breach Its Fiduciary Duties Had The Merger Been Defeated

The Court of Chancery committed a second, compounding legal error. When the court ruled on Plaintiffs' *fiduciary-duty* claim, it held that Sprint's conduct—including its efforts at depressing Clearwire's value and its threats to dilute other stockholders while consolidating its own control—constituted unfair dealing. When it ruled on Plaintiffs' *appraisal* claim, however, it valued Clearwire on the assumption that *Sprint would continue that same unfair conduct had the merger been voted down*. The court found that, were the merger unsuccessful, Sprint and SoftBank would "follow[] through on the[ir] threats" to "dribble out" dilutive financing, gradually aggrandize their control, and ultimately "acquire Clearwire … on more favorable terms."[222] Precisely because this conduct would persist—thus depressing the value of Clearwire—the court concluded that Clearwire's Single-Customer Case projections were the appropriate basis for a DCF.

This head-scratching holding was legally erroneous. When courts make predictions in appraisal proceedings, as they often do, they must presume that fiduciaries (like Sprint) will be faithful to their duties. Even if courts may

[222] Op. 81-82.

anticipate that fiduciaries will breach their duties, appraisal must account for the redress stockholders would receive.[223] Controlling stockholders can do many things with the companies they control, but breaching their fiduciary duties with impunity is not among them.

a. The Court Of Chancery Must Presume In An Appraisal Proceeding That Fiduciaries Will Be Faithful To Their Fiduciary Duties

How fiduciaries (such as controlling stockholders[224]) will act in the future is often a central question in appraisal proceedings. The Court of Chancery must determine the "operative reality of the company"[225] in a counterfactual world in which "the merger [had] not occurred."[226] Such a determination necessarily entails predictions about the behavior of fiduciaries.

In making these predictions, the Court of Chancery should apply the same presumption that it applies to the past and present: that fiduciaries are "faithful to their fiduciary duties."[227] In a related context, for instance, the Court of Chancery

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[223] *See infra* 53.

[224] *See Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1113-14 (Del. 1994) (holding that controlling stockholders owe fiduciary duties).

[225] *M.G. Bancorporation*, 737 A.2d at 525 (quotation marks omitted).

[226] *Ibid.* (quotation marks omitted).

[227] *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004).

rejected a financial analysis because it rested on an assumption that "would violate statutory restrictions."[228]

Even were the Court of Chancery to assume that fiduciaries would breach their duties, valuation in appraisal must account for any value owed to stockholders as a result. An appraisal petitioner is entitled to "the amount he would have received as a stockholder *in one way or another* as long as the company continued in business."[229] Among the ways for a stockholder to receive value for its shares is by suing for breach of fiduciary duty.[230] So, for example, an appraisal proceeding must include the value of a claim that a controlling stockholder "breached its fiduciary duty . . . by causing [the corporation] to . . . reduc[e] [the corporation's] public float and making it less expensive for [the controller] to acquire all of [the corporation's] stock."[231] As explained below, that is precisely the value to which Plaintiffs here are entitled—but did not receive. The Court of Chancery's legally erroneous appraisal gave Defendants a freebie.

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[228] *Quadrant Structured Prods. Co. v. Vertin*, 2015 WL 6157759, at *18 (Del. Ch. Oct. 20, 2015), *aff'd*, 151 A.3d 447 (Del. 2016).

[229] *Tri-Continental*, 74 A.2d at 76 (emphasis added).

[230] *E.g.*, *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 1994 WL 198726, at *3 (Del. Ch. May 16, 1994).

[231] *In re Cox Radio, Inc. S'holders Litig.*, 2010 WL 1806616, at *14 (Del. Ch. May 6, 2010), *aff'd*, 9 A.3d 475 (Del. 2010).

b. The Lower Court's Appraisal Rests On A Finding That Sprint Would Depress Clearwire's Stock Price, Then Acquire Clearwire On The Cheap

In the long run, Sprint and SoftBank needed Clearwire and its spectrum. The Court of Chancery so found.[232] The court further acknowledged that "Clearwire's value largely depended on how much demand Sprint had for Clearwire's spectrum."[233] It granted that Sprint's internal projections, which forecast massive (and growing) usage of Clearwire's spectrum, "revealed how Sprint valued Clearwire and hence how much Sprint was willing to pay."[234]

All of this could lead one to conclude that Clearwire was immensely valuable. But the Court of Chancery found that Clearwire's equity was nearly valueless. Why? Because, the court determined, Sprint and SoftBank would never have allowed Clearwire's minority stockholders to realize that value. Instead, they would have dominated and enfeebled Clearwire, then bought it on the cheap while it was down.

i. Things were good in wireless. Smartphones and tablets, which could stream music and videos, were replacing flip phones, which could not. As a result,

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[232] *See* Op. 6-7, 28, 29, 33, 36, 37, 81, 86.

[233] Op. 57.

[234] *Ibid*.

customers were consuming more and more data.[235] Total data usage doubled from 2010 to 2011, and doubled again the following year.[236] It would keep growing at 66% a year through 2017, the industry predicted.[237] Sprint management repeatedly told its board that Sprint faced "an environment of *rapidly growing data demand*."[238]

But, for Sprint, all of this posed a challenge. It could not satisfy its data-hungry customers without more spectrum. Sprint, with far less spectrum than its competitors, faced an "[i]mpending spectrum shortage"[239] and "[l]imited spectrum to meet growing subscriber needs."[240] "Capacity limitations may hamper our business longer term," Sprint's directors observed.[241] Buying more spectrum was not an option.[242]

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[235] *See* A3322 ¶ 70.

[236] A3263.

[237] A1492.

[238] A1075 (emphasis in original); *see also*, *e.g.*, A440.

[239] A1077.

[240] A607.

[241] A1396.

[242] Op. 36; *accord* A916.

Sprint's only hope was Clearwire. Clearwire had more spectrum than anyone else.[243] Sprint's board recognized that "[w]ithout a Clearwire acquisition, Sprint will have to pay . . . what could be significant fees" to use Clearwire's spectrum.[244] Its executives put it more starkly: "[N]et-net . . . we will be competitively challenged without Clearwire."[245]

Hence, Sprint consistently projected that it would send a massive amount of tonnage over Clearwire's spectrum. Its "Long Term Projections" and "Build Projections"[246] each projected sending more than 1.5 billion gigabytes from 2013 through 2017.[247] Sprint's "Full Build Projections" projected still more data usage.[248] Clearwire's Single-Customer Case (which the Court of Chancery adopted) was meager by comparison.[249]

ii. The Court of Chancery was constrained to accept all of this. It agreed with Plaintiffs that Sprint "lack[ed] [] access to . . . sources of spectrum" other than

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[243] Op. 3.

[244] Op. 28.

[245] A527; *accord* A496; A522.

[246] *See* Op. 86-87.

[247] *See* A618; A1159-91(Native); A1115.

[248] A2950-94 (Native).

[249] A3114-32 (Native).

Clearwire.[250] And it agreed that Sprint's spectrum crisis was sufficiently dire that it could limit its usage of Clearwire's spectrum only "temporar[ily]."[251] It follows that, in the long run, Sprint would have no choice but to increase its use of Clearwire's spectrum significantly.[252]

Nevertheless, the Court of Chancery brushed aside Clearwire's (and Sprint's) long-term prospects, and held that Sprint—if it could not coerce minority stockholders into the subject merger—needed only a "temporary solution" for its spectrum woes.[253] During this "interim" period,[254] Sprint would have continued to breach its fiduciary duties so that it could buy Clearwire "in the near future on more favorable terms."[255] According to the court, Sprint's plan would proceed in two steps.

First, the Court of Chancery found that Sprint would dial back its use of Clearwire's spectrum.[256] This suffocation strategy would, of course, hurt Clearwire financially. But it would also harm Sprint, at least in the short term:

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[250] Op. 81, 36.

[251] Op. 80-81; *see* Op. 28, 33-34, 36.

[252] *See supra* 9-10, 19-20, 26-27, 29-32.

[253] Op. 81.

[254] Op. 86.

[255] Op. 81.

[256] Op. 81-83, 85-86.

Sprint customers in nearly every major market would face a "high risk" of "congestion" and "degrade[d]" service by the end of 2015.[257] That is why, the court found, the Clobber-Clearwire strategy could be only "temporary."[258]

Nevertheless, the court determined that Sprint's short-term sacrifice would enable it to tighten its grip on Clearwire. Specifically, "Sprint and Softbank would have laid the groundwork for a future acquisition by solidifying their control over the Clearwire Board and gradually increasing their ownership interest in Clearwire through rights offerings and dilutive financings."[259] These actions amounted to—as the Court of Chancery acknowledged—"keep[ing] Clearwire barely solvent while preparing to acquire Clearwire in the future."[260]

Second, Sprint would then swoop back in.[261] It would acquire Clearwire "on more favorable terms,"[262] thanks to the value-depressing tactics in step one. Moreover, unlike in 2013, Sprint would not need to put the merger to a vote of Clearwire's minority stockholders.[263] Sprint could "structure the acquisition as a

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[257] A2878.

[258] Op. 81.

[259] Op. 86; *see also* Op. 81.

[260] Op. 83.

[261] Op. 81-83, 85-86.

[262] Op. 81.

[263] Op. 81-82.

tender offer followed by a short-form merger."[264] Thus, Sprint would face fewer checks on its ability to acquire Clearwire for less than its fair value.

The Court of Chancery's prediction that Sprint would execute this two-step plan drove its appraisal of Clearwire. The court was bound to appraise Clearwire based on Clearwire's operative reality,[265] which, it held, was defined by Sprint's two-step plan.[266] Thus, it adopted the financial projections that it believed to "reflect[] Clearwire's operative reality": the Single-Customer Case,[267] which dramatically understated Sprint's tonnage needs and assumed that Clearwire would scarcely remain solvent. This choice all but dictated the court's appraisal, because roughly 90% of the difference between the parties' respective DCF valuations stemmed from the different financial projections they used.[268]

c. The Lower Court's Appraisal Rests On The Assumption That Sprint Would Breach Its Fiduciary Duties

Had Sprint executed its two-step plan, it would have breached its fiduciary duties. Consequently, the Court of Chancery erred as a matter of law in appraising

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[264] Op. 82.

[265] *Supra* 42-43.

[266] Op. 78-89.

[267] Op. 78; *accord* Op. 84 ("The key assumptions of the Single Customer Case matched Clearwire's operative reality.").

[268] Op. 77.

Clearwire based on the assumption that this two-step plan would have been implemented.[269]

Perhaps the strongest proof that Sprint's two-step plan would have breached its fiduciary duties is the Court of Chancery's own holding. The court, in ruling on Plaintiffs' *fiduciary-duty* claim, found that Sprint had engaged in unfair dealing.[270] Among those bad acts were Sprint's "retributive threats" to stockholders about what it would do if the merger were defeated.[271] These threats included "tak[ing] full control of the Clearwire Board, financ[ing] Clearwire in a manner that would result in substantial dilution to Clearwire's existing stockholders, and engag[ing] in

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[269] In addition to being legally erroneous, the Clobber-Clearwire strategy endorsed by the Court of Chancery is belied by the trial record and common sense. When Sprint's board met to approve the $5.00 bump, Sprint's management discussed *only* the Full Build Projections; they made no mention of a plan to degrade Sprint's network to uncompetitive levels as part of some Machiavellian long-game. *See* A3573:21-A3575:6 (Schwartz). That is because a critical pillar of SoftBank's $21 billion investment in Sprint was access to Clearwire's spectrum, which Son wanted to rapidly deploy (as he repeatedly affirmed at trial). *See* Op. 6-7; A3602:10-21, A3613:8-13 (Son). The Court of Chancery never reconciled those facts with the temporary dystopia it envisioned for Clearwire. Nor did the court acknowledge—not once in its opinion—that Sprint would own roughly ***79%*** of Clearwire in the absence of a merger, making the Clobber-Clearwire strategy all the more farfetched: Why would Sprint pursue an unlawful and value-destructive scheme, compromising its competitive position and defying SoftBank's wishes, all to avoid making service payments that, in significant part, would be moving from one Sprint pocket to the other?

[270] Op. 63.

[271] Op. 62.

a squeeze-out merger without a stockholder vote."[272] Similarly unfair, the court held, was postponing the accelerated build to avoid enriching Clearwire "because it could make Clearwire look stronger as an independent company."[273]

But the Court of Chancery then based its *appraisal* analysis on the assumption that this very same conduct would persist. According to the court, Sprint would "have followed through on" its earlier "threats"[274] to "take control of the Clearwire Board,"[275] increase its stake through "dilutive financings,"[276] and "acquire Clearwire without the approval of Clearwire's minority stockholders."[277] Meanwhile, Sprint would "temporar[ily]"[278] reduce its usage of Clearwire's spectrum to drive down its value (allowing Sprint to buy the company more cheaply). This plan would have been, in essence, "a calculated effort to depress the market price of a stock until the minority stockholders are eliminated by merger or some other form of acquisition."[279]

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[272] *Ibid.* (quotation marks omitted).

[273] *Ibid.*

[274] Op. 82.

[275] Op. 81.

[276] Op. 86.

[277] Op. 81-82.

[278] Op. 81.

[279] *See* Op. 51 (quotation marks and alterations omitted).

Executing this plan would have breached Sprint's fiduciary duties, not least because the opportunistic acquisition contemplated in step two would flunk the entire fairness test.[280] The *process* would have been unfair; the Court of Chancery already found this very same conduct to "constitute[] unfair dealing."[281] And the *price* that Sprint paid to acquire Clearwire in step two would have been unfair, too. That was the whole point of step one. The Court of Chancery found, as Sprint contemporaneously acknowledged, that Sprint was compelled to increase its use of Clearwire eventually.[282] A fair price would account for that increase.[283] But

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[280] *See* Op. 43-49 (summarizing legal standard). Sprint could not invoke the business judgment rule under *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014), because the contemplated merger would have had no majority-of-the-minority vote. Moreover, Sprint could not argue that it lacked control, as it did in the Court of Chancery. *See* Op. 42. It would have "solidif[ied its] control over the Clearwire Board and gradually increas[ed its] ownership interest." Op. 86.

[281] *Ibid.*; *see also*, *e.g.*, *Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1105-06 (Del. 1985); *Sealy Mattress Co. of N.J. v. Sealy, Inc.*, 532 A.2d 1324, 1335-36 (Del. Ch. 1987).

[282] *Supra* 56-57; *see* A2056 ("Clearwire may become more valuable as Sprint traffic and payments increase").

[283] Indeed, failure to account for that increase was a standalone legal error. The Court of Chancery's valuation of Clearwire using a "temporary" construct, while disregarding significant future cash flows—because the court believed those cash flows would postdate a hypothetical squeeze-out transaction—is incompatible with the appraisal statute. Plaintiffs are entitled to be compensated for their "proportionate interest in [Clearwire as] as going concern," Op. 74, which includes *all* future elements of value—including the significant tonnage (and corresponding cash flows) that Sprint would eventually need to transfer to Clearwire. Neither the "temporary" construct the court charted for Clearwire, nor the Single-Customer

Sprint, the Court of Chancery found, would instead sabotage Clearwire in the near term so that Sprint could acquire Clearwire "on more favorable terms"[284]—for less than its fair value.[285]

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The Court of Chancery must, in an appraisal proceeding, assume that fiduciaries will comply with their duties, or at least account for the value owed to stockholders due to a breach. The court here did neither. Its appraisal of Clearwire therefore is legally erroneous.

3. In Light Of These Two Compounding Legal Errors, The Appraisal Ruling Should Be Vacated And Remanded With Specific Instructions For What To Do (And Not Do) On Remand

Two legal errors, in short, undermined the Court of Chancery's appraisal analysis.

First, DISH's bid not only must be considered (making the Court of Chancery's failure to consider it legal error) but also, when properly considered, refutes the Court of Chancery's appraisal. DISH's $4.40 per-share bid simply

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Case projections the court endorsed as a financial proxy for that construct, include those elements of future value.

[284] Op. 81.

[285] The decision below sets forth a perverse roadmap for controllers: (1) Try to freeze out minority stockholders at a low price; (2) If that fails, engage in bad acts to drive down the target's value, allowing for a cheaper acquisition at a later date; (3) Collect spoils.

cannot be squared with the court's $2.13 per-share valuation. Indeed, DISH's bid is irreconcilable with *any* valuation predicated solely on Clearwire's Single-Customer Case, which yields valuations well below $4.40 per share. It powerfully shows that Clearwire was worth at least $4.40 per share, and likely quite a bit more.

Second, the Court of Chancery's erroneous assumption that Sprint would continue breaching its duties, and thus avoid making large wholesale payments to Clearwire, profoundly influenced its choice of projections. The court accepted Clearwire's Single-Customer Case, which left Clearwire barely solvent—even while acknowledging that Clearwire's value depended on Sprint's projected demand for Clearwire's spectrum; that the Single-Customer Case took no account of Sprint's projected demand (about which Clearwire was in the dark); and that Sprint projected to use far more of Clearwire's spectrum than was assumed in the Single-Customer Case. And the court did so because it believed that Sprint was free to stanch its payments to Clearwire and otherwise depress its value just long enough to execute its wrongful two-step plan.

For the same reason, the court rejected out of hand Sprint's long-term plans, including the Full Build Projections, because implementing them would have been more expensive than Sprint's preferred two-step strategy. The court thereby sidestepped critical questions: How would Sprint have maintained a competitive

network in the medium- and long-term if plundering Clearwire were not an option? How would Sprint have implemented its and SoftBank's network strategy, which was predicated on the wide-scale deployment of Clearwire's spectrum, without paying Clearwire substantially more than was assumed in the Single-Customer Case? In short, what was the fair value of Clearwire assuming Sprint *complied* with its fiduciary duties?

Accordingly, this Court should vacate the Court of Chancery's appraisal holding and remand with instructions to:

- Consider DISH's $4.40 bid as probative evidence of the lower bound of Clearwire's fair value;
- Reject the Single-Customer Case projections as the *sole* basis to value Clearwire; and
- Re-appraise Clearwire on the assumption that Sprint would comply with its fiduciary duties (which should require revisiting the court's rejection of the Full Build Projections—a rejection predicated in part on the erroneous assumption that Sprint need *not* comply with its fiduciary duties).[286]

[286] Admittedly, the Court of Chancery had other reasons for questioning the Full Build Projections. For example, it wondered why "Clearwire would cut its prices" as those projections assumed. Op. 79. (The answer, of course, is because Clearwire would have been immensely profitable even at those reduced rates. *See* Op. 80.) Regardless, it is impossible to know the extent to which the court's legally erroneous assumption about Clearwire's operative reality influenced its rejection of the Full Build Projections.

II. BECAUSE THE COURT OF CHANCERY'S RULING IN THE PLENARY ACTION WAS PREDICATED ON ITS ERRONEOUS VALUATION FINDING, THE PLENARY ACTION LIKEWISE SHOULD BE REMANDED

A. Question Presented

Whether the Court of Chancery's refusal to award damages for Sprint's and SoftBank's "extensive, intentional, and manipulative"[287] unfair dealing was legally erroneous, predicated as it was on the court's erroneous determination of fair value. Preserved at A3846-95 (arguing that the merger price was not entirely fair).

B. Standard And Scope Of Review

This Court reviews questions of law *de novo*.[288]

C. Argument

The Court of Chancery correctly found that Sprint and SoftBank committed all manner of bad acts in the months leading up to the merger. In light of those bad acts, the court held that the merger would have flunked entire-fairness review had it closed at $2.97 per share.[289] The court declined to award damages, however, because the court believed that the ultimate $5.00 merger price was well in excess of fair value ($2.13 per share, the court found).

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[287] Op. 58.

[288] *Reid v. Spazio*, 970 A.2d 176, 180 (Del. 2009).

[289] Op. 58, 63.

As explained above, *supra* 42-65, the Court of Chancery's appraisal (and the basis for its $2.13 valuation) is legally erroneous. By extension, then, the court's finding of no-breach was predicated on an erroneous foundation. The Court of Chancery's decision in the plenary case was inexorably linked to its appraisal ruling. Accordingly, should the Court remand the appraisal case, it likewise should remand the plenary case for the Court of Chancery to reevaluate in light of its redetermination of fair value. The Court of Chancery may conclude, based on that redetermination, that the $5.00 merger price was not a fair price. Even if it concludes that $5.00 was a fair price, it might nonetheless award Plaintiffs a "fairer price," as it contemplated with respect to Sprint's $2.97-per-share bid,[290] due to its redetermination of fair value.[291]

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[290] Op. 50.

[291] Indeed, even if the Court of Chancery were to find Clearwire's fair value to be no more than the $4.40 floor set by DISH, it would be an untenable result for Plaintiffs to receive less than the merger consideration ($5.00) if the court on remand finds that Sprint breached its fiduciary duties. Such a result would afford Sprint a windfall for its bad acts.

CONCLUSION

For the foregoing reasons, the Court should vacate the Court of Chancery's orders in both the appraisal action and the plenary action, and remand both actions.

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