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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 E-FILED: December 26, 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

APPELLEE SOFTBANK'S
ANSWERING BRIEF ON APPEAL

DATED: December 11, 2017

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NATURE OF THE PROCEEDINGS

This consolidated appeal stems from a coordinated appraisal and fiduciary proceeding arising from the merger of Clearwire Corporation ("Clearwire") and Sprint Corporation ("Sprint"). Both proceedings were initiated by ACP Master, Ltd., Aurelius Capital Master, Ltd. and Aurelius Opportunities Fund II, LLC ("Aurelius") and concerned only the individual stakes in Clearwire stock that they acquired during the pendency of the merger.

On April 26, 2013, Aurelius filed a complaint against Sprint, members of the Clearwire Board, and Clearwire in the Delaware Court of Chancery asserting breaches of fiduciary duty by Sprint and the individual Clearwire Board members. (A3310 ¶ 3[1]) In July 2013, the merger closed. After the merger, Aurelius sought appraisal for its shares. On December 20, 2013, Aurelius amended its complaint to add SoftBank Corporation and Starburst I, Inc. (collectively "SoftBank") as defendants solely in the fiduciary action. (A3311 ¶ 6) The only claim Aurelius alleged against SoftBank was a claim for aiding and abetting a breach of fiduciary duty. (A3311 ¶ 6)

On October 14, 2015, Aurelius voluntarily dismissed with prejudice all of its claims against individual members of the Clearwire Board. (A3311 ¶ 7)

[1] Citations to the Appendix to Appellants' Opening Brief will be in the form of "(A____)."

In October and November 2016, Vice Chancellor Laster of the Court of Chancery held a ten day trial on both actions. Vice Chancellor Laster heard live testimony from eleven fact witnesses and seven experts. Over 2,500 exhibits were received into evidence. The parties also agreed on a 547-paragraph Stipulated Pre-Trial Order, with an extensive list of agreed-upon facts.

After a lengthy trial, Vice Chancellor Laster received four rounds of post-trial briefing, totaling more than 766 pages, and heard post-trial argument. The Court issued a 95-page opinion in which it concluded that the final $5.00 merger price was "far beyond" what stockholders could have expected by themselves and "substantially more in value than what they had before." (Op. at 52, 55, 72[2]) The Court of Chancery found that the "Clearwire-Sprint Merger satisfied the test of entire fairness [and that] Sprint did not breach its fiduciary duties to Clearwire or its minority stockholders." (Op. at 73) Since "[a] claim for aiding and abetting requires an underlying breach of fiduciary duty," the Court of Chancery held that "SoftBank therefore cannot be liable for aiding and abetting." (Op. at 72-73) With respect to Aurelius's appraisal claim, the Court of Chancery concluded that the fair

[2] Citations to the Memorandum Opinion issued by the trial court (the "Opinion"), attached as Exhibit A to Appellants' Opening Brief in Nos. 380, 2017 and 382, 2017 ("ACP Br."), will be in the form "(Op. at __)."

value of Clearwire's stock under Section 262 was $2.13 per share. This appeal followed.

SUMMARY OF ARGUMENT

SoftBank is a separate defendant only in the fiduciary duty action against whom Aurelius alleged a separate claim, aiding and abetting, that has its own independent legal and evidentiary requirements. The decision below fully resolved the claim against SoftBank, and Aurelius had a full and fair opportunity before this Court to brief any alleged error with respect to its claim against SoftBank. Yet, none of the arguments raised by Aurelius in its Opening Brief address the aiding and abetting claim or the legal requirements of that claim. Thus, Aurelius has waived its right to challenge the Court of Chancery's ruling on the aiding and abetting claim, and this Court should affirm the judgment of the Court below.

Separately, and out of an abundance of caution, SoftBank responds to Aurelius's Summary of Argument section as follows:

1. Denied. SoftBank was not a party in the appraisal proceeding and has no liability with respect thereto. Further, Aurelius's arguments misstate the record in the appraisal proceeding and misstate the Court of Chancery's decision. The Court of Chancery considered the DISH offer in its factual findings, and it did not abuse its discretion by any claimed failure to specifically "reconcile its appraisal award with DISH's much higher [$4.40] bid." (ACP Br. at 5) Appellate review is not a trip wire such that an appellant can claim that each piece of evidence must be "reconciled" with the final outcome. Nor did the Court of Chancery abuse its

discretion by considering the full range of options that Sprint might have pursued in the absence of a merger, along with other evidence, when it was deciding what set of projections best reflected Clearwire's operative reality. SoftBank otherwise refers this Court to Sprint's Answering Brief.

2. Denied. The Court of Chancery's ruling in the plenary action was driven by careful consideration of the complete record and not any single factor, including, but not limited to, its determination of the fair value of Clearwire's stock in connection with the appraisal. In light of the complete record and based on the unitary consideration of both price and process, the Court of Chancery concluded that the challenged merger transaction was entirely fair in light of all the conduct by Sprint, Clearwire, the Clearwire directors, the Clearwire stockholders, Softbank, and DISH that had come before. The Court of Chancery's approach reflects neither legal error nor an abuse of discretion in light of the careful and comprehensive factual findings of the Court with respect to an exceptionally complex fact pattern below. SoftBank otherwise refers this Court to Sprint's Answering Brief. In any event, the Court of Chancery ruled in favor of SoftBank on Aurelius's aiding and abetting claim and Aurelius has not appealed that ruling as either legally or factually erroneous. Aurelius has therefore waived any appeal of the judgment in favor of SoftBank on that claim.

COUNTERSTATEMENT OF FACTS

SoftBank refers this Court to Sprint's Counterstatement of Facts in its Answering Brief. The following limited statement of facts in this Counterstatement is taken from the 95-page post-trial Opinion and the record in this case.

SoftBank is a large Japanese corporation, which runs one of the largest telecommunications companies in Japan. (Op. at 1) In 2012, SoftBank evaluated entry into the U.S. wireless telephone market. (Op. at 6) In an effort to create a strong third wireless player that could compete with Verizon and AT&T, SoftBank began parallel negotiations with Sprint and T-Mobile. (Op. at 6-7)

When talks stalled with T-Mobile, SoftBank pivoted and decided to acquire Sprint first. (Op. at 7) Because SoftBank had experience using 2.5 GHz spectrum in Japan, SoftBank wanted Sprint to explore acquiring the portion of Clearwire that it did not already own as well. (Op. at 6-7) SoftBank anticipated that Sprint would pay $2.00 per share to acquire Clearwire, which reflected a sizeable premium over the $1.30 price of Clearwire's stock at the time. (Op. at 7; A3353 ¶ 189)

On October 15, 2012, Sprint and SoftBank announced a series of definitive agreements under which SoftBank would acquire a 70% stake in Sprint for approximately $20 billion (the "Sprint-SoftBank Agreement"). (A3355 ¶ 197) The Sprint-SoftBank Agreement did not require Sprint to acquire or merge with

Clearwire. (A3355 ¶ 197) The Sprint-SoftBank Agreement included a fairly standard restriction, memorialized in Section 5.2(b)(v), such that Sprint could not "acquire any equity interest in" any third party that exceeded $100 million without obtaining SoftBank's consent while the merger was pending. (A3356 ¶ 199) Because of this clause, SoftBank's consent was contractually required to complete a merger between Sprint and Clearwire. SoftBank had no other equity holdings or corporate governance rights at Sprint, which operated through a fully independent board of directors and independent management.

In November 2012, Clearwire's Chairman, acting at the direction of Clearwire's board of directors, encouraged SoftBank and Sprint to acquire Clearwire. (Op. at 12-13) Negotiations followed. On December 17, 2012, Sprint and Clearwire entered into a merger agreement at $2.97 per share. (Op. at 22; A3374 ¶ 273) Clearwire's Special Committee and its fully independent board approved the merger and recommended that Clearwire's stockholders vote in favor of it. (Op. at 21) The merger agreement included a non-waivable majority of the minority clause. (Op. at 22) Certain large, independent stockholders in Clearwire agreed to vote in favor of the merger, and separately required that Sprint agree to buy them out at the $2.97 per share price (or any increased merger price) if the

transaction did not close. (Op. at 22) As required by Section 5.2 of the Sprint-SoftBank Agreement, SoftBank consented to the merger. (A3371-72 ¶ 263)

Starting on December 28, 2012, DISH made a series of public moves that were designed to prevent the consummation of the merger between Sprint and Clearwire and took additional actions that were designed to prevent the consummation of the merger between SoftBank and Sprint. "DISH's intervention at $3.30 per share changed the negotiating landscape." (Op. at 23) For the next six months, the Clearwire Special Committee and an organized group of minority stockholders of Clearwire used DISH's activities to seek increases in the price of Sprint's proposed merger with Clearwire. (Op. at 23-32) Throughout this period, DISH's bids for Clearwire stock were conditioned on receipt of additional rights, such as corporate governance rights, corporate vetoes, commercial agreements, or sales of prime spectrum assets. (Op. at 23-32)

Because of the combined effect of the DISH proposals, the active intervention of the Clearwire Special Committee, and the leverage provided to minority stockholders by a non-waivable majority of the minority clause, Sprint decided to increase its offer to $3.40 per share in May 2013. (Op. at 23-30) SoftBank consented. (Op. at 30)

On May 29, 2013, DISH made a new bid for Clearwire stock, with certain conditions. (Op. at 32) Clearwire, led by its Special Committee, changed its recommendation on the Clearwire-Sprint merger in favor of DISH's proposal. (Op. at 34) Sprint sued to address the improper corporate governance conditions that were part of DISH's bid. (Op. at 39) While that lawsuit was pending, negotiations between Sprint, the Clearwire Special Committee, SoftBank, and a large group of minority stockholders (known as the "Gang of Four") resulted in a new merger agreement with a price of $5.00 per share on June 19, 2013. (Op. at 39-40)

In July 2013, approximately 82% of Clearwire's *unaffiliated* shares voted in favor of the merger. (Op. at 40) On July 9, the Clearwire-Sprint merger closed. (Op. at 40) On July 10, the Sprint-SoftBank merger closed. (Op. at 40)

ARGUMENT

I. Aurelius Waived its Right to Appeal the Court of Chancery Ruling on the Aiding and Abetting Claim Against SoftBank.

A. Question Presented.

Whether Aurelius's failure to brief the Court of Chancery's only ruling specific to SoftBank – its aiding and abetting claim – results in waiver and automatic affirmance of that claim.

B. Scope Of Review.

This Court will defer to findings of fact "unless they are clearly erroneous or not arrived at through a logical process." *Kahn v. Lynch Commc'n Sys., Inc.*, 669 A.2d 79, 84 (Del. 1995). This Court has plenary review regarding the scope of the issues placed before it by a party's appeal. *See, e.g., Ploof v. State*, 75 A.3d 811, 822-23 (Del. 2013), *as corrected* (Aug. 15, 2013) (considering "only the issues [appellant] has properly presented to us under Supreme Court Rule 14").

C. Merits Of Argument.

There is no dispute that SoftBank is a separate defendant that was the subject of a separate claim in the fiduciary duty action. That aiding and abetting claim had independent legal and evidentiary requirements. The Court of Chancery's opinion and order completely resolved the claim against SoftBank. Aurelius's brief makes no substantive argument that the Court of Chancery's findings with respect to

SoftBank were in error. It makes no effort to show that SoftBank acted with scienter. Aurelius has thus waived any appeal of these issues.

Aurelius's brief makes two claims about the appraisal judgment. Neither of these arguments have merit, but, more importantly for this brief, neither of these arguments addresses the aiding and abetting claim against SoftBank.

In the last two pages of its brief, Aurelius argues that the alleged errors associated with the determination of fair value in the appraisal proceeding are so linked to the judgment in the fiduciary duty action that this Court should reverse and remand that judgment as well. In those two pages, Aurelius never refers to the aiding and abetting claim against SoftBank or to the legal requirement that Aurelius demonstrate that SoftBank acted with the requisite scienter. Aurelius has thus waived any appeal of the judgment in favor of SoftBank.

1. Aurelius Has Waived its Right to Appeal the Aiding and Abetting Ruling as a Procedural Matter.

In order to preserve a matter for appeal, the merits of the argument must be raised in the appellant's opening brief. "The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal." Del. Supreme Court Rule 14(b)(vi)(A)(3). "If an appellant fails to comply with these requirements on a particular issue, the

appellant has abandoned that issue on appeal." *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1264 (Del. 2012).

Aurelius makes a two-page request at the end of its opening brief that this Court remand the plenary case because "[t]he Court of Chancery's decision in the plenary case was inexorably linked to its appraisal ruling." (ACP Br. at 67) That limited request is not adequate to preserve any argument regarding SoftBank. Aurelius's counsel, who are experienced appellate advocates, made a conscious decision to focus their appeal on the appraisal claim and hoped in three paragraphs to preserve an argument that Aurelius can still proceed on the breach of fiduciary duty claim against Sprint. The only mention of the aiding and abetting claim against SoftBank in 68 pages of Aurelius's briefing is a passing reference as part of the procedural history of this case. (ACP Br. at 36) On this basis alone, Aurelius waived its right to challenge the Court of Chancery's ruling in favor of SoftBank.

2. This Court Should Affirm the Court of Chancery's Ruling on the Aiding and Abetting Claim Because Knowing Participation Reflects a Separate Legal Element, Which Was Not Addressed on Appeal.

To prevail on the aiding and abetting claim against SoftBank, Aurelius was required to prove: "'(1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, … (3) knowing participation in that breach by the defendants,' and (4) damages proximately caused by the breach." *Malpiede v. Townson*, 780

A.2d 1075, 1096 (Del. 2001) (alteration in original) (citation omitted). On this claim, Aurelius bore the heavy burden to prove scienter. *See Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1038-39 (Del. Ch. 2006) ("[T]he test for stating an aiding and abetting claim is a stringent one, turning on proof of scienter ….").

The aiding and abetting claim against SoftBank is legally and intellectually distinct from Aurelius's claim that Sprint's merger with Clearwire was not entirely fair. Thus, even if there were a basis to require the Court of Chancery to reevaluate evidence of the price paid in the merger (and there is not), that would not revive the aiding and abetting claim against SoftBank. At trial and on appeal, Aurelius was obligated to demonstrate that SoftBank acted with scienter, *i.e.*, that Softbank knew that the price (and process) associated with the Clearwire merger was not entirely fair. Aurelius's burden regarding the separate claim against SoftBank is particularly high in the present case because Aurelius argued below that it could establish a breach under the entire fairness standard, "independent of [Sprint's] beliefs" and regardless of whether Sprint "'honest[ly] belie[ved] that the transaction was entirely fair.'" (A3819 (quoting *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 44 (Del. Ch. 2013)))

Thus, whether or not Aurelius's arguments justify a remand of the plenary action against Sprint (and they do not), they do not justify a remand of the separate claim against SoftBank. Aurelius's brief does not address its separate obligation to prove scienter. Thus, Aurelius has waived any right to challenge the Court of Chancery's ruling on the aiding and abetting claim, and the judgment of the Court below should be affirmed.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the judgment of the Court of Chancery.

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